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IN THE
SUPREME COURT OF CALIFORNIA

In re Dezi C.,
A Person Coming Under the Juvenile Court Law.

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent*,*

v.

A.A.,

Defendant and Appellant.

From a Published Decision by the Court of Appeal
Second Appellate District, Division Two, Case No. B317935
Los Angeles Superior Court Case No. 19CCJP08030A-B
On Appeal from the Superior Court of Los Angeles County
Honorable Robin R. Kesler, Judge Presiding

ANSWER BRIEF ON THE MERITS

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Issue Presented

In juvenile dependency matters, where parents repeatedly deny – including by written attestation – having any American Indian heritage, what standard of prejudice should apply when the child welfare agency neglects to question extended family members and others who may have an interest in the child whether the child is or may be an Indian child as required by heightened state law requirements of the Indian Child Welfare Act (ICWA)?

Introduction

Appellant, A.A. (mother), seeks reversal of *In re Dezi C.* (2022) 79 Cal.App.5th 769 (*Dezi C.*). The children in that case were removed from their parents' custody in 2019, and parental rights were terminated in 2022. When the case began, mother and the children's father (father) filed forms denying under penalty of perjury having Indian ancestry. They never objected to the juvenile court's finding that ICWA did not apply. After parental rights were terminated and adoption was ordered as the children's permanent plan, mother raised ICWA inquiry error on appeal, contending reversal was necessary because her and father's extended family members were not asked whether the children are or may be Indian children, as required by state law. Mother did not claim that the forms she and father filed denying Indian ancestry were incorrect or that any extended family member possessed any information about Indian ancestry.

Division Two of the Second District Court of Appeal affirmed the order terminating parental rights, finding that although the failure to inquire of extended family members was

error, mother had failed to demonstrate a miscarriage of justice, i.e., prejudice, as required by the California Constitution. In reaching its decision, Division Two noted appellate courts currently applied three different rules to assess harmlessness in ICWA inquiry appeals: the "automatic reversal rule," the "presumptive affirmance rule," and the "readily obtainable information rule."

The "automatic reversal rule" requires reversal and/or remand in every case where ICWA inquiry was not made of an extended family member, even when the parents denied Indian ancestry in the juvenile court under the penalty of perjury. This rule requires no showing of prejudice by the appealing parent. The "presumptive affirmance rule" takes the opposite approach and holds that defective initial ICWA inquiry is harmless unless the parent makes a proffer on appeal as to why further inquiry would lead to a different ICWA finding. The "readily obtainable information rule" holds that defective initial inquiry is harmless unless "the record indicates there was readily obtainable information likely to bear meaningfully upon whether the child is an Indian child" and "the probability of obtaining meaningful information is reasonable."

The *Dezi C.* court rejected these rules and proposed a fourth: the "reason to believe rule," which holds that defective initial inquiry is harmless "unless the record contains information suggesting a reason to believe the child may be an Indian child within the meaning of ICWA, such that the absence of further inquiry was prejudicial to the ICWA finding." For this

purpose, the "record" includes both the record of proceedings in the juvenile court and any proffer the parent makes on appeal.

Mother petitions this Court to reject the "reason to believe rule" and adopt either the "automatic reversal rule" or the "readily obtainable information rule." However, as *Dezi C.* explained, the "automatic reversal rule" should be rejected because, by not requiring a parent to demonstrate prejudice on appeal, it elevates ICWA above the constitutional mandate that reversal is prohibited absent a miscarriage of justice. As *Dezi C.* also explained, the "automatic reversal rule" encourages parents to "game the system" by not raising ICWA inquiry issues in the juvenile court based on the knowledge that they can raise those issues for the first time on appeal and be guaranteed reversal and/or remand, which may lead to an endless succession of appeals and remands because the broad language of the statute allows a parent to identify any person having "an interest in the child" as someone who must be questioned for initial inquiry purposes. Therefore, this Court should reject the "automatic reversal rule."

The same is true of the "readily obtainable information rule," which has been widely criticized as vague, confusing, flexible, malleable, imprecise, open to misapplication, subject to different interpretations, and a de-facto automatic reversal rule.

This Court should instead affirm the "reason to believe rule" because it (1) weaves together the test for harmless error compelled by the California Constitution with the cascading duties of inquiry that the statute imposes upon child welfare

agencies; (2) best reconciles the competing policies at issue when an ICWA objection is asserted at the final phases of a dependency proceeding; and (3) sidesteps the problem of an undeveloped record (due to a parent's failure to raise the issue below) and allows a parent to make a proffer on appeal. The "reason to believe rule" also tracks the language of the statute, providing for precise application, and it fills the holes left open by the other rules.

Accordingly, *Dezi C.* should be affirmed.

Combined Statement Of The Case And Facts

Respondent, the Los Angeles County Department of Children and Family Services (Department) adopts the "Facts and Procedural Background" in *Dezi C., supra,* 79 Cal.App.5th at pages 775 and 776:

"I. *Facts*

"Mother and [father] have two children – Dezi C. (born May 2016) and Joshua C. (born Apr. 2018).

"On November 6, 2019, mother and father got into a verbal fight. After father threatened to kill mother, mother struck father with a broomstick while father was holding then-toddler Joshua in his arms. This was not the first such incident between the parents.

"Both mother and father also have long-standing issues with substance abuse. Mother has been using methamphetamine for more than seven years; father also uses.

"II. *Procedural Background*

"A. *Petition, adjudication and termination of parental rights*

"On December 17, 2019, [the Department] filed a petition asking the juvenile court to exert dependency jurisdiction over Dezi and Joshua on the basis of (1) mother's and father's history of domestic violence (rendering jurisdiction appropriate under subds. (a) and (b)(1) of [Welf. & Int. Code,[1]] § 300), and (2) mother's and father's drug abuse (rendering jurisdiction appropriate under subd. (b)(1) of § 300).[2]

"On February 19, 2020, the juvenile court held a combined jurisdictional and dispositional hearing. The court sustained the domestic violence and substance abuse allegations under section 300, subdivision (b)(1), struck the domestic violence allegation under section 300, subdivision (a), removed the children from the parents' custody, and ordered the Department to provide both parents with family reunification services in accordance with a 'case plan' developed for each parent.

"At a six-month review hearing on August 26, 2020, the juvenile court concluded that mother and father were not in compliance with their case plans, terminated reunification services, and set the matter for a permanency planning hearing under section 366.26.

"On January 18, 2022, the juvenile court held the permanency planning hearing. After concluding that the children were adoptable and likely to be adopted by their

[1] Further statutory references are to the Welfare and Institutions Code unless otherwise designated.

[2] The petition also alleged that father had failed to protect the children by allowing mother to remain in the family home, but that allegation was dismissed.

paternal grandparents, the court terminated mother's and father's parental rights.

"B. *ICWA-related facts*

"In December 2019, mother and father told a Department social worker that they had no American Indian heritage. The next day, mother and father filled out ICWA-020 forms, and checked the box indicating that they had no American Indian heritage "as far as [they knew]." At the hearing on whether to initially detain the children, mother and father told the juvenile court that they had no American Indian heritage.

"While investigating the allegations in this case, the Department's social workers spoke to father's parents (the paternal grandparents), mother's parents (the maternal grandparents), father's siblings, mother's siblings, and one of father's cousins. The social workers did not ask any of these individuals whether mother, father, or the children had any American Indian heritage.

"The juvenile court found '[no] reason to know that this is an Indian child, as defined under ICWA.'

"C. *Appeal*

"Mother filed this timely appeal from the termination of her parental rights."

Actions in the Court of Appeal

In her Appellant's Opening Brief (AOB), mother contended the order terminating parental rights must be reversed because the Department failed to comply with its duty under the California ICWA provisions to initially inquire of "extended family members" regarding Dezi's and Joshua's possible

American Indian heritage. (AOB 20-42.) Mother argued that the failure to comply with California's initial inquiry requirements should result in (1) automatic reversal; or (2) reversal when the record demonstrates there was readily obtainable information that was likely to bear meaningfully upon whether the child is an Indian child. (AOB 36.)

In its Respondent's Brief (RB), the Department did not dispute that it failed to make ICWA inquiries of the children's extended family members but argued (1) reversal was not warranted because mother had not made a showing of prejudice, and (2) mother should have made an offer of proof sufficient to invoke the ICWA. (RB 10-35.)

The Court of Appeal noted the duty of initial inquiry mandated by California's version of the ICWA "obligates the Department to question 'extended family members' about a child's possible American Indian heritage" and that the Department had spoken to several extended family members but did not question them whether the children are or may be Indian children. (*Dezi C., supra,* 79 Cal.App.5th at pp. 776-777.) After observing that there were three rules currently governing such appeals (the "automatic reversal," "presumptive affirmance," and "readily obtainable information" rules), the Court adopted a fourth rule (the "reason to believe rule") and held that the failure to conduct a proper initial ICWA inquiry "is harmless unless the record contains information suggesting a reason to believe that the child may be an 'Indian child' within the meaning of ICWA, such that the absence of further inquiry was prejudicial to the

juvenile court's ICWA finding." (*Id.* at pp. 777-779.) The Court explained that the "record" in such appeals "includes both the record of proceedings in the juvenile court and any proffer the appealing parent makes on appeal." (*Id.* at p. 779.)

Actions in the Supreme Court

On July 19, 2022, mother filed a Petition for Review asking this Court to resolve the split of authority concerning the standard of prejudice in reviewing initial inquiry error under the California ICWA statutes. (Petition for Review, pp. 21-37.) Mother also argued that requiring appellate counsel to make a proffer on appeal conflicted with this Court's opinion in *In re Zeth S.* (2003) 31 Cal.4th 396. (Petition for Review, pp. 35-36.)

The Department filed an Answer to mother's Petition for Review on August 4, 2022, asserting that review was necessary to secure uniformity of decision and settle an important question of law, but the issue of requiring appellate counsel to make a proffer on appeal did not merit review. (Answer to Petition for Review, pp. 8-14.)

On September 21, 2022, this Court granted review.

Argument

Mother contends this Court should reject *Dezi C.*'s "reason to believe rule" and adopt either the "automatic reversal rule" or the "readily obtainable information rule." (Opening Brief on the Merits [OBM] 41-52.) But this Court should affirm *Dezi C.*'s "reason to believe rule" and reject the other rules for several reasons, including those described in the *Dezi C.* opinion.

///

I. *Dezi C.* Should Be Affirmed To Resolve The Split Of Authority Among California's Courts Of Appeal.

A. Standard Of Review.

A juvenile court's ICWA findings are reviewed for substantial evidence. (*In re S.H.* (2022) 82 Cal.App.5th 166, 175; *In re Josiah T.* (2021) 71 Cal.App.5th 388, 401; *In re J.S.* (2021) 62 Cal.App.5th 678, 688 ["We review a court's ICWA findings for substantial evidence. [Citations.] We must uphold the court's orders and findings if any substantial evidence, contradicted or uncontradicted, supports them, and we resolve all conflicts in favor of affirmance"], internal quotation marks omitted; but see *In re Ezequiel G.* (2022) 81 Cal.App.5th 984, 1004 (review denied, Nov. 22, 2022, S276223) [applying a hybrid substantial evidence/abuse of discretion standard of review].)

B. Prejudice And Harmless Error.

Neither error nor prejudice is presumed on appeal, and it is an appellant's burden to affirmatively demonstrate both. (Cal. Const., art. VI, § 13; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140; *In re Phillip F.* (2000) 78 Cal.App.4th 250, 260.) Reviewing courts "typically apply a harmless-error analysis when a statutory mandate is disobeyed, except in a narrow category of circumstances when we deem the error reversible per se. This practice derives from article VI, section 13 of the California Constitution, which provides: 'No judgment shall be set aside, or new trial granted, in any cause . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.'" (*In*

re Jesusa V. (2004) 32 Cal.4th 588, 624; accord *In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1122.) An error is harmless when the party alleging the error is not prejudiced by the decision. (*In re James F.* (2008) 42 Cal.4th 901, 915.) A party is prejudiced by statutory error if it was reasonably probable that, absent the error, a result more favorable to that party would have been reached. (*In re Jesusa V., supra*, 32 Cal.4th at pp. 625-626, citing *People v. Watson* (1956) 42 Cal.2d 818, 836.) "[A]ny failure to comply with a higher state standard, above and beyond what the [federal version of] ICWA itself requires, must be held harmless unless the appellant can show a reasonable probability that he or she would have enjoyed a more favorable result in the absence of the error." (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1162.)

C. Applicable Law.

"Congress enacted ICWA in 1978 in response to 'rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.' [Citation.] ICWA declared that 'it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . .' (25 U.S.C. § 1902.)" (*In re Isaiah W.* (2016) 1 Cal.5th 1, 7-8.)

ICWA provides Indian tribes a right to intervene in any state court proceeding contemplating foster care placement of, or termination of parental rights to, an Indian child. (25 U.S.C. §§ 1911(c), 1912, 1915; *In re Isaiah W., supra,* 1 Cal.5th at p. 8.) To effectuate that right to intervene, ICWA requires that for any state court involuntary proceeding "where the court knows or has reason to know that an Indian child is involved," "the party seeking the foster care placement of, or termination of parental rights to, an Indian child" must notify the child's parents or Indian custodian and the Indian child's tribe of the pending state court proceeding and the right to intervene. (25 U.S.C. § 1912(a).)

"In 2006, [the California] Legislature enacted provisions that affirm ICWA's purposes." (*In re Isaiah W., supra,* 1 Cal.5th at p. 9.) "In any given case, ICWA applies or not depending on whether the child who is the subject of the custody proceeding is an Indian child." (*In re Abbigail A.* (2016) 1 Cal.5th 83, 90.) Both federal and state ICWA law define an "Indian child" as a child who is either a member of an Indian tribe or 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); § 224.1, subds. (a)-(b); see also *In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1520 ["if the child is not a tribe member, and the mother and the biological father are not tribe members, the child simply is not an Indian child"].)

"Under federal law, the juvenile court 'must ask each participant' in a dependency [proceeding] 'at the commencement

of the proceeding' 'whether the participant knows or has reason to know that the child is an Indian child.' (25 C.F.R. § 23.107(a) (2021)[.])" (*In re A.C.* (2021) 65 Cal.App.5th 1060, 1068.) "It must also 'instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.' (25 C.F.R. § 23.107(a) (2021).)" (*Ibid.*)

Under state law, the juvenile court and the Department have "an affirmative and continuing duty to inquire" whether a child subject to a section 300 petition is or may be an Indian child. (§ 224.2, subd. (a); *In re D.S.* (2020) 46 Cal.App.5th 1041, 1052.) "This continuing duty can be divided into three phases: the initial duty to inquire, the duty of further inquiry, and the duty to provide formal ICWA notice." (*In re Dominic F.* (2020) 55 Cal.App.5th 558, 566.)

"The state law duty to make an ICWA inquiry 'begins with the initial contact, including, but not limited to, asking the party reporting child abuse or neglect whether the party has any information that the child may be an Indian child.' (§ 224.2, subd. (a).) If a child is removed from parental custody, 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 and where the child, the parents, or Indian custodian is domiciled.' (§ 224.2, subd. (b).) Further, at

the first appearance in court of each party, 'the court shall ask each participant present in the hearing whether the participant knows or has reason to know that the child is an Indian child' and 'shall instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.' (§ 224.2, subd. (c).)" (*In re Ezequiel G., supra,* 81 Cal.App.5th at pp. 998-999.)

"If the initial inquiry provides 'reason to believe' that an Indian child is involved in a proceeding – that is, if the court or social worker 'has 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' – then the court or social worker 'shall make further inquiry' regarding the child's possible Indian status as soon as practicable. (§ 224.2, subd. (e).) Further inquiry 'includes, but is not limited to, all of the following: [¶] (A) Interviewing the parents, Indian custodian, and extended family members . . . . [¶] (B) Contacting the Bureau of Indian Affairs and the State Department of Social Services . . . [and] [¶] (C) Contacting the tribe or tribes and any other person that may reasonably be expected to have information regarding the child's membership, citizenship status, or eligibility.' (*Ibid.*)" (*In re Ezequiel G., supra,* 81 Cal.App.5th at p. 999.)

"If there is 'reason to know' a child is an Indian child, the agency shall provide notice to the relevant tribes and agencies in accordance with section 224.3, subdivision (a)(5). (§ 224.2, subd. (f).) There is 'reason to know' a child is an Indian child if any one of six statutory criteria is met – i.e., if the court is advised that

the child 'is an Indian child,' the child's or parent's residence is on a reservation, the child is or has been a ward of a tribal court, or either parent or the child possess an identification card indicating membership or citizenship in an Indian tribe. (§ 224.2, subd. (d).)" (*In re Ezequiel G., supra,* 81 Cal.App.5th at p. 999.)

"If the juvenile court finds that 'proper and adequate further inquiry and due diligence as required in this section have been conducted and there is no reason to know whether the child is an Indian child,' the court may make a finding that ICWA does not apply to the proceedings, 'subject to reversal based on sufficiency of the evidence.' (§ 224.2, subd. (i)(2).)" (*In re Ezequiel G., supra,* 81 Cal.App.5th at p. 999.)

"If ICWA is not complied with, the dependency proceedings, including an adoption following termination of parental rights, [are] vulnerable to collateral attack if the dependent child is, in fact, an Indian child." (*In re G.H.* (2022) 84 Cal.App.5th 15, 29, internal quotation marks omitted.) "That attack may be launched from several quarters under state law: 'Any Indian child, the Indian child's tribe, or the parent or Indian custodian from whose custody the child has been removed, may petition the court to invalidate an action in an Indian child custody proceeding for foster care or guardianship placement or termination of parental rights if the action violated Section 1911, 1912, or 1913 of [ICWA].' (§ 224, subd. (e).)" (*Ibid.*)

A parent's statement that he or she "may have Indian ancestry" or other similar statements are "insufficient to support a reason to believe" a child is an Indian child "as defined in

ICWA." (*In re Austin J.* (2020) 47 Cal.App.5th 870, 888.) "At most, they suggest a mere possibility of Indian ancestry. Indian ancestry, heritage, or blood quantum, however, is not the test; being an Indian child requires that the child be either a member of a tribe or a biological child of a member. [Citations.] Being a member of a tribe depends 'on the child's political affiliation with a federally recognized Indian Tribe,' not the child's ancestry. [Citations.]" (*Id.* at pp. 888-889.) "Indian ancestry, without more, does not provide a reason to believe that a child is a member of a tribe or is the biological child of a member." (*Id.* at p. 889.)

"Tribal membership criteria are set forth in tribal constitutions, articles of incorporation, or ordinances, and vary from tribe to tribe. [Citations.] Significantly, 'Tribal citizenship (aka Tribal membership) is voluntary and typically requires *an affirmative act* by the enrollee or her parent.' [Citation.] Specifically, 'Tribal laws generally include provisions requiring the parent or legal guardian of a minor *to apply* for Tribal citizenship on behalf of the child. [Citation.] Tribes also often require *an affirmative act* by the individual seeking to become a Tribal citizen, such as the filing of an application. [Citation.] As ICWA is limited to children who are either enrolled in a Tribe or are eligible for enrollment and have a parent who is an enrolled member, *that status inherently demonstrates an ongoing Tribal affiliation*.' (*Ibid.*, italics added; see also [Bureau of Indian Affairs (BIA)] Guidelines, *supra*, at p. 10 ['Most Tribes require that individuals apply for citizenship and demonstrate how they

meet that Tribe's membership criteria.'].)" (*In re Ezequiel G., supra,* 81 Cal.App.5th at pp. 1009-1010.) "Because tribal membership typically requires an affirmative act by the enrollee or her parent, a child's parents will, in many cases, be a reliable source for determining whether the child or parent may be a tribal member." (*Id.* at p. 1010.)

1. *Recent ICWA Jurisprudence.*

The Legislature enacted changes to the Welfare and Institutions Code, effective January 1, 2019, that expanded the duty of initial ICWA inquiry to include inquiry of a child's extended family members and others who may have an interest in the child. (*In re S.H., supra,* 82 Cal.App.5th at p. 174.) "[T]hese amendments to the Welfare and Institutions Code have generated confusion and divergent views in the appellate courts." (*In re A.C.* (2022) 86 Cal.App.5th 130, 138 (dis. opn. of Baker, J.).) "The ICWA investigatory process under state law is now expansive and potentially onerous." (*In re S.H., supra,* 82 Cal.App.5th at p. 174.)

One Court of Appeal opined that "complying with the literal language of the statute," as amended, is "absurd at best and impossible at worst." (*In re Ezequiel G., supra,* 81 Cal.App.5th at p. 1006.) That Court explained: "[T]he scope of the inquiry required by state law is not well defined. As noted above, section 224.2, subdivision (b) requires the county welfare department to 'inquire whether [a dependent child] is an Indian child,' and it says that 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).) An 'extended family member' is (unless otherwise defined by an Indian child's tribe) an adult who is 'the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.' (25 U.S.C. § 1903(2); § 224.1, subd. (c) [adopting federal definition].)" (*Id.* at p. 1005.)

"Because the persons identified in section 224.2, subdivision (b) are connected by the word 'and,' not 'or,' and because 'extended family member' is broadly defined, the statute facially requires that, *in every case*, initial inquiry be made of *at least* all of the following: (1) the child, (2) the parents, (3) the legal guardian (presuming there is one, although the statute doesn't say that explicitly), (4) the Indian custodian (again presuming there is one, although again the statute doesn't say that), (5) all grandparents, (6) all aunts and uncles, (7) all adult siblings, (8) all siblings-in-law, (9) all nieces and nephews, (10) all first cousins, (11) all second cousins, (12) the reporting party, and (13) all others who have an interest in the child." (*In re Ezequiel G., supra,* 81 Cal.App.5th at p. 1005.) "The statute then requires that if the initial inquiry gives rise to reason to believe a child is an Indian child, a *further* inquiry shall be made that 'includes, but is not limited to' interviewing the parents, Indian custodian, and extended family members (§ 224.2, subd. (e)(2)(A)) – that is, all the same individuals the statute says should be interviewed as part of the initial inquiry." (*Id.* at p. 1006.)

The *Dezi C.* court described California's ICWA inquiry statutes as "an open-ended universe of stones" that impose "cascading duties" on child welfare agencies and require them to leave no stone unturned. (*Dezi C., supra,* 79 Cal.App.5th at pp. 785, 779.)

Another opinion noted "the pertinent ICWA-related law in California is anything but straightforward," has "no endpoint," is "impossible to satisfy in practice," has a "Byzantine scheme of inquiry, further inquiry, reason to know, and reason to believe that is challenging to even summarize," and is "a real problem." (*In re H.V.* (2022) 75 Cal.App.5th 433, 441 (dis. opn. of Baker, J.), footnotes omitted.)

Another opinion noted "[t]he problem is not going to go away soon" and that "it is hard to understate the havoc, expense, and uncertainty caused by" California's ICWA-related law. (*In re A.C.* (2022) 75 Cal.App.5th 1009, 1019-1020 (dis. opn. of Crandall, J.).)

Still another opinion described section 224.2, subdivision (b), as "practically if not theoretically impossible to satisfy," and argued that the categories people listed in the statute should be read as "*examples* of the categories of people a social services agency or court should inquire of[.]" (*In re A.C. supra,* 86 Cal.App.5th at p. 142 (dis. opn. of Baker, J.).)

A new opinion adds to the confusion, questioning all previous interpretations of the California ICWA inquiry requirements, stating those interpretations are "inconsistent with the plain language of the text," and contending the duty to

inquire of extended family members applies only to the limited circumstance where a child is detained pursuant to section 306. (*In re Adrian L.* (2022) 86 Cal.App.5th 342, 353-374 (conc. opn. of Kelley J.).)

The expansive statutory revisions have changed the way appellate courts treat ICWA inquiry error in cases where parents deny having Indian ancestry in the juvenile court but the child welfare agencies do not inquire of extended family members and others. (*In re Ezequiel G., supra,* 81 Cal.App.5th at p. 999 ["Until recently, Courts of Appeal routinely rejected claims of ICWA error where there was no evidence in the juvenile court record that a child was an Indian child and a parent did not affirmatively assert Indian ancestry on appeal."].) This has resulted in a flood of appeals alleging ICWA inquiry error. (See *Dezi C., supra,* 79 Cal.App.5th at p. 774 ["This juvenile dependency case presents what is unfortunately becoming a common scenario. . . . Nearly 30 months into the proceedings and on appeal from the termination of her parental rights [mother] is for the first time objecting that the agency did not discharge its statutory duty to 'inquire' of 'extended family members' whether her children might be 'Indian child[ren]'"]; *In re Ezequiel G., supra,* 81 Cal.App.5th at p. 995 ["This juvenile dependency appeal is one of many in an increasingly common posture. There is no evidence in the juvenile court record – which began in 2017 and concluded with the termination of parental rights in 2021 – that the three children at issue in this case are Indian children within the meaning of the [ICWA]"]; see also *In re A.C., supra,* 75

Cal.App.5th at p. 1018 (dis. opn. of Crandall, J.) ["the appellate dockets seem to be burgeoning with such cases"].)

The flood of appeals has resulted in a split of authority. (See *In re J.K.* (2022) 83 Cal.App.5th 498, 512-514 (dis. opn. of Yegan, J.) ["The continuing appellate controversy which is now dominating the advance sheets concerns the [ICWA] and the appropriate standard of appellate review."].)

2. *Split Of Authority.*

Prior to the *Dezi C.* decision, California's appellate courts had "developed three different rules – at various points along a continuum – for assessing harmlessness" within the context of initial ICWA inquiry. (*Dezi C., supra,* 79 Cal.App.5th at pp. 774, 777-778, citing *In re A.C., supra,* 75 Cal.App.5th at p. 1011 ["recent appellate jurisprudence has adopted a continuum of tests for prejudice stemming from error in following California statutes implementing ICWA"].)

At one end of the continuum is the "automatic reversal rule," which mandates reversal and/or remand in any case where initial inquiry was inadequate. (*Dezi C., supra,* 79 Cal.App.5th at p. 777, citing *In re J.C.* (2022) 77 Cal.App.5th 70, 80-82 [order terminating parental rights remanded for inquiry of extended family members after both parents denied Indian ancestry and did not object to ICWA finding]; *In re Antonio R.* (2022) 76 Cal.App.5th 421, 432-437 [same]; *In re H.V., supra,* 75 Cal.App.5th at p. 438 [remanded for inquiry of extended family members after the mother denied Indian ancestry and did not object to ICWA finding]; *In re Y.W.* (2021) 70 Cal.App.5th 542, 556 [order terminating parental rights remanded for further

inquiry after no ICWA objection]; *In re N.G.* (2018) 27 Cal.App.5th 474, 484-485 [order terminating parental rights reversed and remanded for inquiry of extended family members despite no ICWA objection]; *In re K.R.* (2018) 20 Cal.App.5th 701, 708-709 [order terminating parental rights reversed and remanded despite no ICWA objection].) "Under this test, reversal is required no matter how 'slim' the odds are that further inquiry on remand might lead to a different ICWA finding by the juvenile court." (*Dezi C., supra,* 79 Cal.App.5th at p. 777, citing *In re Antonio R., supra,* 76 Cal.App.5th at p. 435 [inquiry error not harmless despite "slim odds the information in the possession of the extended maternal relatives would show" the child is an Indian child].)

At the other end of the continuum is the "presumptive affirmance rule," which treats initial inquiry error as harmless unless the parent makes a proffer on appeal as to why further inquiry would lead to a different ICWA finding. (*Dezi C., supra,* 79 Cal.App.5th at pp. 777-778, citing *In re A.C., supra,* 65 Cal.App.5th at pp. 1065, 1071; *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430-1431.)

The third approach, the "readily obtainable information rule," holds that defective initial inquiry is harmless unless "the record indicates that there was readily obtainable information that was likely to bear meaningfully upon whether the child is an Indian child" and that "the probability of obtaining meaningful information is reasonable." (*Dezi C., supra,* 79 Cal.App.5th at p. 778, citing *In re Benjamin M.* (2021) 70 Cal.App.5th 735, 744; *In*

re A.C., supra, 75 Cal.App.5th at p. 1015; *In re S.S.* (2022) 75 Cal.App.5th 575, 581-583; *In re Darian R.* (2022) 75 Cal.App.5th 502, 509-510.)

Dezi C. proposed and applied a fourth approach, the "reason to believe rule," which holds that the "failure to conduct a proper initial inquiry into a dependent child's American Indian heritage is harmless unless the record contains information suggesting a reason to believe that the child may be an 'Indian child' within the meaning of ICWA, such that the absence of further inquiry was prejudicial to the juvenile court's ICWA finding." (*Dezi C., supra,* 79 Cal.App.5th at p. 779.) "For this purpose, the 'record' includes both the record of proceedings in the juvenile court and any proffer the appealing parent makes on appeal." (*Ibid*.)

D. *Dezi C.*'s "Reason To Believe Rule" Should Be Affirmed Because It Is Consistent With Our Constitution, Balances All Of The Interests In Dependency Proceedings, And Focuses On What Is In The Record.

Mother urges this Court to reject *Dezi C.*'s "reason to believe rule." (OBM 48.) But the "reason to believe rule" should be affirmed because it (1) "weaves together the test for harmless error compelled by our State's Constitution" with the "cascading duties of inquiry" that the statute imposes upon child welfare agencies; (2) "best reconciles the competing policies at issue when an ICWA objection is asserted . . . at the final phases of the dependency proceedings;" and (3) "largely sidesteps the 'how can we know what we don't know' and burden of proof conundrums that animate the automatic reversal [rule]" by "focusing on what

is in the record rather than what is not in the record." (*Dezi C., supra,* 79 Cal.App.5th at pp. 779-782.)

1. *Dezi C. Weaves Together The California Constitution's Test For Harmless Error With The "Cascading Duties Of Inquiry" Imposed On Child Welfare Agencies.*

The *Dezi C.* court correctly reasoned that because California's test for harmless error is an outcome-focused test, the proper analysis is whether it is reasonably probable that insufficient initial inquiry affected the outcome of the ICWA finding:

> Our Constitution specifies that a judgment may not be 'set aside' unless it 'has resulted in a miscarriage of justice' (Cal. Const., art. VI, § 13), and our Supreme Court has defined a 'miscarriage of justice' as existing only when 'it is reasonably probable that *a result* more favorable to the appealing party would have been reached in the absence of the error' [citation]. Thus, our state's test for harmlessness is an *outcome*-focused test.

(Dezi C., supra, 79 Cal.App.5th at p. 779.)

With an outcome-focused test in mind, the court observed that the first duty of a child welfare agency under ICWA is the "initial duty" of inquiry pursuant to subdivisions (a), (b), and (c) of section 224.2, which require inquiry of the child's parents, extended family members, and "others." (*Dezi C., supra,* 79 Cal.App.5th at p. 780.) The court then observed that the second duty, the duty to "make further inquiry," is triggered if there is "reason to believe that an Indian child is involved" in the proceedings because the record contains "information . . . suggesting the child is Indian." (*Ibid.*, citing § 224.2, subd. (e); *In*

re D.S., supra, 46 Cal.App.5th at p. 1049.) Applying a step-by-step analysis, the court explained:

> Because the governing test for harmlessness is outcome focused, adapting that test to the situation in this case means courts should focus on whether it is reasonably probable that an agency's error in not conducting a proper initial inquiry affected the correctness (that is, the outcome) of the juvenile court's ICWA finding. As noted above, ICWA already provides a standard for assessing whether further inquiry is necessary after an initial inquiry – namely if the initial inquiry provides a reason to believe that the child is an Indian child because the record contains 'information . . . suggesting the child is Indian.' [Citation.] This standard reserves further inquiry for those cases in which such inquiry may affect the juvenile court's ultimate ICWA determination. Because the question before us in assessing harmlessness is *also* whether further inquiry would affect the juvenile court's ICWA finding, the 'reason to believe' standard is the logical standard to apply.

(*Dezi C., supra,* 79 Cal.App.5th at p. 781, italics in original.)

Although mother claims the *Dezi C.* court's conclusion regarding the outcome-focused test for harmlessness compelled by our Constitution frustrates the purpose of ICWA (OBM 47), its conclusion is supported by this Court's analysis in *People v. Breverman* (1998) 19 Cal.4th 142. In that case, this Court noted that "by the appellate review standards set forth in article VI, section 13 of the California Constitution," reversal is warranted only if an error was "strong enough to affect the *outcome*[.]" (*Id.* at p. 177, italics added.) The Court also noted that a "conviction of the charged offense may be reversed in consequence of this form of error only if, 'after an examination of the entire cause,

including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable *outcome* had the error not occurred [citation].'" (*Id*. at p. 178, italics added.) Justice Mosk emphasized the point:

> We sometimes inquire . . . whether, under the standard in question, the error had an unfavorable effect on the outcome. [Citations.] At other times, we inquire . . . whether, under the standard in question, a more favorable outcome would have resulted in the absence of the error. [Citations.] [¶] Whether we use one or the other of the two verbal formulas is a matter of rhetorical style and makes no substantial difference – so long as we focus on the fact that prejudice is an unfavorable effect on the outcome. . . . Reversal is required if the error caused prejudice, that is, an unfavorable effect on the outcome.

(*Id*. at p. 185 (dis. opn. of Mosk, J.).)

Thus, *Dezi C.*'s determination that our state's test for harmlessness is outcome-focused was accurate. (*Dezi C., supra,* 79 Cal.App.5th at p. 781.) It follows that *Dezi C.* was also accurate in determining that, under this framework, the pertinent question is whether the error in initial inquiry affected the outcome of the ICWA finding. (*Ibid.*) Because ICWA provides the standard for when further inquiry is necessary after initial inquiry (i.e., if initial inquiry provides "reason to believe" the child is an Indian child), the "reason to believe" harmless error standard is the logical standard to apply because it focuses on what the outcome would have been had initial inquiry been properly performed. (*Ibid.*; see also *In re K.H.* (2022) 84 Cal.App.5th 566, 615 [the reason to believe "rule focuses on information relevant to the next stage in the ICWA compliance

process – a need for further inquiry *if*, based on the record, there is reason to believe the child is an Indian child"].)

The importance of adhering to the outcome-focused test compelled by our Constitution was emphasized in a dissent where the majority had consistently applied the "automatic reversal rule:"

> Strict and inflexible ICWA enforcement at the Court of Appeal level strikes at the heart of two basic aspects of the California Constitution: First, the oath of judicial office, which directs justices to 'support and defend' the California Constitution, not a statute. Second, reversal of a superior court judgment only where an error is prejudicial, i.e., where it is reasonably probable that a different result will obtain upon reversal. . . .
>
> The Court of Appeal is tasked to affirm a judgment unless there has been a miscarriage of justice, in which case we reverse. [¶] The oath of judicial office does not say that appellate courts have a duty to support and defend a statute. This is a glaring omission in the oath and the only inference that can be drawn is that the judicial oath of office is not directed to a statute. Of course, we strive to uphold the letter and spirit of a statute. And, we do so in almost every case. But, the Constitution takes precedence over a statute. This is not a novel statement. Any negligent violation of statute in almost any context does not inexorably result in reversal. Such a violation, an error, must be prejudicial within the meaning of the California Constitution to warrant reversal of a judgment.
>
> The Court of Appeal should not continue to slavishly adhere to the ICWA rules at the expense of the California Constitution. There is no ICWA exception to the California Constitution. As indicated, we strive to follow any statute, including the ICWA

> statute. And, at least in Division Six of the Second Appellate District, we have always and strictly applied ICWA and reversed upon a showing of 'ICWA error.' That time, for me, is now over. Rather than championing the rights of an Indian tribe, we should be championing the rights of a dependent child.
>
> The prior Court of Appeal opinions, and the majority opinion here, does not solve this administration of justice problem. The new opinion authored by Justice Hoffstadt, *In re Dezi C.*[*, supra,*] 79 Cal.App.5th 769, review granted September 21, 2022, S275578, does solve the problem. This scholarly opinion is consistent with the oath of office, follows the Constitutional mandate of when and when not to reverse a judgment, and is a pragmatic solution for the ICWA issue at the Court of Appeal level. It dictates that we affirm in this case.

(*In re J.K., supra,* 83 Cal.App.5th at pp. 512-514 (dis. opn. of Yegan, J.).)

In cases like *Dezi C.*, where the parent or parents deny Indian ancestry in the juvenile court only to raise ICWA error on appeal, the "reason to believe rule" allows the appealing parent to make a proffer in order to demonstrate that the outcome of the ICWA finding was affected. This approach is consistent with the article VI, section 13's requirement that an appellant demonstrate a miscarriage of justice before a judgment or order can be reversed. Accordingly, *Dezi C.* effectively weaves together the California Constitution's test for harmless error with the "cascading duties of inquiry" imposed on child welfare agencies.

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2. *Dezi C. Best Reconciles The Competing Policies At Issue When An ICWA Objection Is Asserted At The Final Phases Of The Dependency Proceedings.*

Dependent children have an "interest in avoiding delay and the instability that comes from having the final determination of his or her permanent placement remain 'up in the air.'" (*Dezi C., supra,* 79 Cal.App.5th at p. 781.) As this Court stated: "There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current home, under the care of his parents or foster parents, especially when such uncertainty is prolonged. [Citation.] We emphatically agree that dependent children have a critical interest in avoiding unnecessary delays to their long-term placement. [Citation.] And we have repeatedly underscored the need to avoid delay in this context." (*In re Christopher L.* (2022) 12 Cal.5th 1063, 1081, internal quotation marks omitted.)

Alongside the policy favoring prompt resolution of dependency proceedings is the policy "at the heart" of ICWA's inquiry requirements: "'effectuating the rights of Indian tribes' by ensuring that the juvenile court determines whether a child may be an actual or potential member of an Indian tribe and by thereafter giving the pertinent tribe(s) the opportunity to make the final determination of tribal status. [Citations.]" (*Dezi C., supra,* 79 Cal.App.5th at p. 781.) Also in the policy "mix is the judicial branch's interest in ensuring that the agency 'gets the message' that it is critical to conduct a proper initial inquiry [citation], as well as the branch's interest in discouraging game playing by parents who hold back any objection to the adequacy

of the agency's inquiry until an appeal of the termination of their parental rights in the hopes of delaying the finality of that termination [citations]." (*Ibid*.)

The "reason to believe rule" reconciles these sometimes-competing policies by honoring them all. As the *Dezi C*. court indicated, "By limiting a remand for further inquiry to those cases in which the record gives the reviewing court a reason to believe that the remand may undermine the juvenile court's ICWA finding, the 'reason to believe' rule effectuates the rights of the tribes in those instances in which those rights are most likely at risk, which are precisely the cases in which the tribe's potential rights do justify placing the children in a further period of limbo." (*Dezi C., supra,* 79 Cal.App.5th at pp. 781-782.) "The 'reason to believe' rule also removes the incentive to use ICWA as a thirteenth-hour delay tactic and, by allowing parents to cite their proffers on appeal as well as the juvenile court record, still sends a 'message' to agencies that ICWA's mandates are not to be ignored because remand will be ordered in any case where there is reason to believe the failure to inquire mattered." (*Id*. at p. 782.)

Thus, the *Dezi C*. approach effectively balances all of the competing interests among dependent children, Indian tribes, child welfare agencies, and juvenile courts. If an appellant can demonstrate a reason to believe a child is or may be an Indian child, remand would be appropriate to protect the Indian tribes' interests. (*In re G.A*. (2022) 81 Cal.App.5th 355, 363, review granted Oct. 12, 2022, S276056 ["We agree with our colleagues

that . . . the 'reason to believe' rule effectuates the rights of the tribes in those instances in which those rights are most likely at risk, which are precisely the cases in which the tribe's potential rights do justify placing the children in a further period of limbo."].) By contrast, if an appellant cannot demonstrate a reason to believe the child is or may be an Indian child, remand would not be appropriate and the child's interest in avoiding delay is protected. (*In re Josiah Z.* (2005) 36 Cal.4th 664, 674 ["the priority in dependency proceedings is to identify and carry out the services and placement that best serve the child's interests as swiftly as possible . . ."]; *In re Jesusa V., supra,* 32 Cal.4th at p. 625 [strong interest in expeditious resolution of dependency proceedings "would be thwarted if the proceeding had to be redone without any showing the new proceeding would have a different outcome"].)

The *Dezi C.* approach is of particular utility with respect to the thirteenth-hour delay tactic mentioned in the opinion, which has been a problematic characteristic of almost every recent ICWA appeal. (*Dezi C., supra*, 79 Cal.App.5th at p. 782.) Parents are routinely remaining silent after an ICWA finding – in some cases, for several years – then raising ICWA error for the first time on appeal, often from an order terminating parental rights. (See, e.g., *In re Y.M.* (2022) 82 Cal.App.5th 901, 906-907 [parents denied Indian ancestry and did not object to the ICWA finding]; *In re Ezequiel G., supra,* 81 Cal.App.5th 1012-1013 [same]; *In re Q.M.* (2022) 79 Cal.App.5th 1068, 1077 [no ICWA objection]; *Dezi C., supra,* 79 Cal.App.5th at p. 776 [parents

denied Indian ancestry and did not object to ICWA finding]; *In re J.C., supra,* 77 Cal.App.5th at pp. 75-76 [same]; *In re A.R.* (2022) 77 Cal.App.5th 197, 204 [parent may raise ICWA error for the first time on appeal]; *In re Antonio R., supra,* 76 Cal.App.5th at pp. 426-428 [parents denied Indian ancestry and did not object to the ICWA finding]; *In re H.V., supra,* 75 Cal.App.5th at p. 436 [the mother denied that either parent had Indian ancestry and did not object to ICWA finding]; *In re A.C., supra,* 75 Cal.App.5th at p. 1021 (dis. opn. of Crandall, J.) [the father "remained silent" on the ICWA in the juvenile court]; *In re Y.W., supra,* 70 Cal.App.5th at p. 550 [no ICWA objection below]; *In re A.C., supra,* 65 Cal.App.5th at p. 1071 ["we are allowing the father to raise the issue for the first time on appeal"].)

When a parent fails to object to an ICWA finding below and instead raises the issue for the first time on appeal, it inevitably delays permanence for the child, which is contrary to the child's best interests. (*In re Ezequiel G., supra,* 81 Cal.App.5th at p. 1001 ["There is no real dispute that delays in finalizing adoptions or other permanent placements for children who cannot safely be returned to their parents do not serve the best interests of the children whom the dependency system is intended to protect."]; *In re A.C., supra,* 75 Cal.App.5th at p. 1022 (dis. opn. of Crandall, J.) ["it is untenable gamesmanship to allow a parent to stand idly by and then raise a 'winning' ICWA issue on appeal"]; *In re Rebecca R., supra,* 143 Cal.App.4th at p. 1431 ["The ICWA is not a 'get out of jail free' card dealt to parents of non-Indian children, allowing them to avoid a termination order by withholding secret

knowledge, keeping an extra ace up their sleeves. Parents cannot spring the matter for the first time on appeal without at least showing their hands. Parents unable to reunify with their children have already caused the children serious harm; the rules do not permit them to cause additional unwarranted delay and hardship, without any showing whatsoever that the interests protected by the ICWA are implicated in any way."].)

Moreover, allowing a parent to remain silent below and raise an ICWA issue on appeal is contrary to the purpose of ICWA, which is to involve a potentially interested Indian tribe at the earliest possible point in the proceedings. (*In re Ezequiel G., supra,* 81 Cal.App.5th at p. 1002 ["early identification of Indian children is critical to ICWA's proper implementation"].)

Accordingly, because the "reason to believe rule" protects the rights of children and Indian tribes, while discouraging last-minute gamesmanship, *Dezi C.* best reconciles the competing policies at issue when an ICWA objection is asserted at the final phases of the dependency proceedings.

3. *Dezi C. Sidesteps The "How Can We Know What We Don't Know" And Burden Of Proof Conundrums That Animate The "Automatic Reversal Rule" By Focusing On What Is In The Record Rather Than What Is Not In The Record.*

Dezi C. observed that the current split of authority was due to appellate courts "grappling with how to assess how the *absence* of information (that is, answers to the questions about American Indian heritage that the agency never asked) might affect the juvenile court's ICWA finding" and that "the current

disagreement over which rule to apply largely reduces down to a disagreement over where to assign the burden of proof." (*Dezi C., supra,* 79 Cal.App.5th at p. 778.) The court also observed that the "automatic reversal rule" "put[s] the burden of proof on the agency to show that its failure to ask questions would be harmless, a burden the agency will never be able to carry because, by definition, it is impossible to know the answers to unasked questions. [Citation.]" (*Ibid*.)

Dezi C. sidesteps the problem of grappling with an absence of information by permitting an appealing parent to make it possible to know the answers to unasked questions. (*Dezi C., supra,* 79 Cal.App.5th at p. 779 ["the 'record' includes both the record of proceedings in the juvenile court and any proffer the appealing parent makes on appeal"].) By requiring a parent to make a proffer on appeal providing "reason to believe" a child is or may be an Indian child, the "reason to believe rule" eliminates the incentive for a parent to remain silent below while ensuring that relevant information will be considered if proffered. This approach is authorized by section 909 of the Code of Civil Procedure and has been implemented by several appellate courts. (See *In re Kenneth D.* (2022) 82 Cal.App.5th 1027, 1034, review granted Nov. 30, 2022, S276649; *In re E.L.* (2022) 82 Cal.App.5th 597, 608, review granted Nov. 30, 2022, S276508; *Dezi C., supra,* 79 Cal.App.5th at p. 779; *In re Allison B.* (2022) 79 Cal.App.5th 214, 218-220; *In re A.C., supra,* 65 Cal.App.5th at pp. 1071-1073; *In re A.B.* (2008) 164 Cal.App.4th 832, 841-844.)

Notably, in an analogous split in authority case, the Supreme Court of the United States applied reasoning that mirrors *Dezi C.*'s and held that an appellant must make an affirmative showing of prejudice when the appellant has circumvented the doctrines of forfeiture and waiver. (*Weaver v. Massachusetts* (2017) 582 U.S. ___ [137 S.Ct. 1899]) (*Weaver*).)[3] In *Weaver*, the defendant failed to object when the trial court erroneously excluded the public from jury selection, which the defendant did not raise in the direct appeal. (*Id.* at pp. ___ [137 S.Ct. at pp. 1905-1907].) Instead, five years later, the defendant raised the courtroom closure issue in an ineffective assistance of counsel claim. (*Id.* at p. ___ [137 S.Ct. at p. 1906].) The Massachusetts Supreme Judicial Court rejected the ineffective assistance of counsel claim, holding the defendant failed to show prejudice warranting a new trial. (*Id.* at p. ___ [137 S.Ct. at p. 1907].) The Supreme Court of the United States granted certiorari to resolve a disagreement among appellate courts about whether a defendant must demonstrate prejudice on appeal when he did not preserve the claim below. (*Ibid.*) Using the same reasoning that *Dezi C.* does, the Court explained that when a defendant raises a courtroom closure error on appeal via an ineffective assistance of counsel claim that was not raised below, the defendant circumvents the doctrines of waiver and forfeiture and, as a result, must bear the burden of demonstrating prejudice

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[3] This Court sought guidance from *Weaver* regarding whether automatic reversal was required where a juvenile court failed to appoint counsel for an incarcerated parent. (*In re Christopher L., supra,* 12 Cal.5th at p. 1077.)

on appeal. (*Id*. at p. __ [137 S.Ct.at pp. 1911-1912].) The Court noted that when a defendant objects to a courtroom closure, the trial court can either open the courtroom or state its reasons for keeping it closed. (*Id*. at p. __ [137 S.Ct.at p. 1912].) By contrast, when a defendant does not object, "the trial court is deprived of the chance to cure the violation either by opening the courtroom or by explaining the reasons for closure" and the appeal will result in "added time delays" and lack of finality in judgments. (*Ibid*.) Thus, the Court held, a defendant "must show prejudice" on appeal in order to obtain a new trial when the issue was not raised below. (*Id*. at p. __ [137 S.Ct. at p. 1913].)

Likewise, when parents fail to object to an ICWA error in the juvenile court and subsequently raise ICWA error on appeal, they deprive the juvenile court of an opportunity to cure the error and the result will be added time delays and lack of finality in judgments. (*In re Ezequiel G., supra,* 81 Cal.App.5th at pp. 1012-1013 ["Had the parents' counsel objected to the ICWA inquiry based on these reports, the juvenile court could have decided whether to order a further inquiry . . . . Significantly, moreover, it could have done so without delaying permanency for these children."].) The lack of finality of judgments in the dependency context is of paramount concern given that "four months . . . 'can be a lifetime to a young child.'" (*Id*. at p. 1001, quoting *In re Marilyn H*. (1993) 5 Cal.4th 295, 310.) Thus, the *Weaver* analysis – from the highest court in the land – supports *Dezi C.*'s "reason to believe rule," which protects against unnecessary delay, lack of

finality in judgments, last-minute gamesmanship, and the incentive to evade the forfeiture and waiver doctrines.

Accordingly, the "reason to believe rule" is a sensible manner by which to sidestep the "'how can we know what we don't know' and burden of proof conundrums that animate the automatic reversal [rule]" by "focusing on what is in the record rather than what is not in the record." (*Dezi C., supra,* 79 Cal.App.5th at pp. 779-782.)

For this reason, and because *Dezi C.* "weaves together the test for harmless error" with the "cascading duties of inquiry" and "best reconciles the competing policies at issue" when an ICWA objection is asserted at the final phases of dependency proceedings, *Dezi C.* should be affirmed.

E. The Two Rules Mother Proposes Should Be Rejected.

Mother proposes that this Court adopt the "automatic reversal rule" or the "readily obtainable information rule." (OBM 41-52.) This Court should decline.

1. *Problems With The "Automatic Reversal Rule."*

Dezi C. rejected the "automatic reversal rule" for two primary reasons – faulty rationales and undesirable consequences.

a. Faulty Rationales.

The "automatic reversal rule" is based on the faulty rationales that (1) a tribe always has the right to collaterally attack an order terminating parental rights and the only way to stave off such collateral attacks is to remand to conduct a proper inquiry prior to the entry of judgment; (2) reversal is the only

means of ensuring an agency's violation of its statutory ICWA duties will not be rewarded; and (3) a parent's denial of Indian ancestry can never be trusted. (*Dezi C., supra,* 79 Cal.App.5th at pp. 782-785.)

These rationales do not justify the "automatic reversal rule." As to the first rationale, although it is true that a tribe maintains a right to collaterally attack an order terminating parental rights, that right "is akin to a criminal defendant's right to collaterally attack his final judgment of conviction, and courts have never viewed the possibility of such collateral attacks as warranting a rule of automatic reversal for all errors raised during the direct appeal of a criminal conviction." (*Dezi C., supra,* 79 Cal.App.5th at p. 783.)

As to the second rationale – that reversal is the only way to ensure that failure to inquire will not be rewarded – the "reason to believe rule" explicitly states that agencies will *not* be rewarded for violating ICWA duties when the record reveals that remand *will* undermine the finding of ICWA's inapplicability. (*Dezi C., supra,* 79 Cal.App.5th at p. 783.) Moreover, this Court has cautioned against using automatic reversal as an incentive to promote compliance with statutory requirements. (See *In re James F., supra,* 42 Cal.4th at p. 918 ["the price that would be paid for this added incentive, in the form of needless reversals of dependency judgments, is unacceptably high in light of the strong public interest in prompt resolution of these cases so that the children may receive loving and secure home environments as soon as reasonably possible"].)

Regarding the third rationale – that a parent's representation of Indian ancestry can never be trusted – *Dezi C.* appropriately declined to "adopt a rule that obligates us to view with a jaundiced eye whatever parents report about their heritage, at least in the usual case where the parents were not adopted and thus can be presumed to be knowledgeable," and instead endorsed "the traditional approach to evaluating harmlessness, which looks to what is in the record (or proffered by the parent on appeal) rather than speculating about what might have been placed in the record." (*Id*. at p. 784.) This traditional approach is preferable to the position that parents can never be trusted when denying Indian ancestry, especially considering that such a position would open the door to the opposite approach: a parent can also never be trusted when *asserting* Indian ancestry. Thus, *Dezi C.* was correct that the "automatic reversal rule" is based on faulty rationales. (*Id*. at pp. 782-785.)

b. Undesirable Consequences.

The second reason *Dezi C.* rejected the "automatic reversal rule" is because it leads to three undesirable consequences: unnecessary delay, successive appeals, and elevation of statutory provisions over the California Constitution. (*Dezi C., supra,* 79 Cal.App.5th at pp. 784-785.) Each of these justifies disapproval of the "automatic reversal rule."

(1) Unnecessary Delay.

The "automatic reversal rule" confers on parents a perverse incentive *not* to object to perceived deficiencies in ICWA inquiry

in order to "guarantee [on appeal] a remand that forestalls the finality of the final judgment in the dependency case and, indeed, may even derail arranged adoption of the dependent children." (*Dezi C., supra,* 79 Cal.App.5th at p. 784.) This gives rise to the "'very evil the Legislature intended to correct' – namely, 'lengthy and unnecessary delay in providing permanency for children.'" (*Id.* at p. 784, quoting *In re Marilyn H., supra,* 5 Cal.4th at p. 310.) "In just the last 12 months, this 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. At best, these reversals significantly delay entry of final judgments releasing children for adoption; at worst, they may result in potential adoptive parents deciding not to adopt." (*In re Ezequiel G., supra,* 81 Cal.App.5th at p. 1001.)

By requiring a parent to make a proffer on appeal providing "reason to believe" a child is or may be an Indian child, the *Dezi C.* approach eliminates the perverse incentive created by the "automatic reversal rule," while still ensuring that relevant information will be considered.

The need to avoid lengthy and unnecessary delay in dependency proceedings was a consideration in this Court's decision in *In re Christopher L., supra,* 12 Cal.5th 1063. The issue in that case was whether it was structural error[4] for a

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[4] The term "structural error" refers to errors requiring automatic reversal. (*In re James F., supra,* 42 Cal.4th at p. 913 ["structural error requir[es] automatic reversal"].)

juvenile court to erroneously hold the jurisdiction and disposition hearings without an incarcerated parent's presence and without appointing the parent counsel. (*Id.* at p. 1069.) This Court held the error was not structural, did not require automatic reversal, and was amenable to a harmless error analysis. (*Id.* at pp. 1069, 1083-1084.) In reaching the holding, the Court emphasized the detriment to a child caused by prolonged delays in permanence:

> [I]n the dependency context, automatic reversal for errors that do not invariably lead to fundamental unfairness would exact a particularly steep cost. 'There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home," under the care of his parents or foster parents, especially when such uncertainty is prolonged.' [Citation.] 'We emphatically agree that dependent children have a critical interest in avoiding unnecessary delays to their long-term placement.' [Citations.] And we have repeatedly underscored the need to avoid delay in this context. [Citations.] Accordingly, we decline to adopt a rule of automatic reversal in cases involving the errors that occurred here.

(*In re Christopher L., supra,* 12 Cal.5th at pp. 1081-1082.) Thus, *Dezi C.*'s assessment that one of the undesirable consequences of the "automatic reversal rule" is the "'lengthy and unnecessary delay in providing permanency for children'" is both correct and consistent with this Court's recognition of a child's need for prompt resolution of dependency proceedings. (*Dezi C., supra,* 79 Cal.App.5th at p. 784.) It also respects the "bedrock timelines" governing dependency proceedings that avoid "prolonged

temporary placements" and ensure the prompt "permanence and stability to which [children] are legally entitled." (*In re A.C., supra,* 75 Cal.App.5th at p. 1018 (dis. opn. of Crandall, J.).)

(2) Likelihood Of Successive Appeals.

The second undesirable consequence of the "automatic reversal rule" is that "the rule – in conjunction with the breadth of the duty of initial inquiry under section 224.2 – may yield a seemingly endless feedback loop of remand, appeal, and remand." (*Dezi C., supra,* 79 Cal.App.5th at p. 784; see also *In re Ezequiel G., supra,* 81 Cal.App.5th at p. 1007 [the "automatic reversal rule" "creates a likelihood of successive appeals, all raising purported ICWA errors based on the same record."].) The *Dezi C.* court noted that, "[b]ecause the automatic reversal rule mandates remand if any stone is left unturned, and because section 224.2 creates an open-ended universe of stones, the rule ostensibly empowers the party to obtain a remand to question extended family members, then a second remand to question the family babysitter, and then a third remand to question longtime neighbors, and so on and so on." (*Id*. at p. 785.)

The endless feedback loop of remand, appeal, and remand is a problem not addressed by appellate courts applying the "automatic reversal rule." Instead, as the *Ezequiel G.* court stated, they "dodge this troubling issue by limiting their analyses of the adequacy of an ICWA inquiry to those relatives identified by the parent on appeal. [Citation.] Our dissenting colleague does the same, suggesting that all we need consider in this case is whether [the Department] should have inquired of the three

extended family members mother identifies on appeal – not of the seven others whose names and contact information appear in the record but whom mother inexplicably does not address. ([Dis. opn., *post*, at p. 1020 ['The issue before us isn't whether the statute would, in a hypothetical case, require a child protective agency to track down and interview an overwhelming number of relatives. That issue should be addressed in the future when, if ever, it's raised on appeal.'].)" (*In re Ezequiel G., supra,* 81 Cal.App.5th at p. 1007.)

Limiting review to the family members identified by a parent in a particular appeal and waiting to address other "hypothetical" situations "in the future" – "if ever" – does not provide a workable rule or useful guidance regarding the issue of successive appeals. *Dezi C.*'s "reason to believe rule," on the other hand, does provide a workable rule and useful guidance regarding successive appeals. And notably, it would apply to any person named in the statute – an extended family member, the party reporting abuse or neglect, or an "other" person who is interested in the child. (§ 224.2, subd. (b).) In contrast, courts applying the "automatic reversal rule" are unclear if the rule applies to the failure to inquire of "other" persons, the reporting party, and so on. (§ 224.2, subd. (b).) Therefore, the "reason to believe rule" ameliorates the potential for successive appeals in a way that the "automatic reversal rule" does not.

Intertwined with the issue of successive appeals is the tendency for the "automatic reversal rule" to result in ambiguous remand instructions. "Although the reversals in these cases are

based on an agency's failure to make an ICWA inquiry of particular named individuals, the remand instructions typically are not limited to these individuals, but instead send cases back to juvenile courts with instructions to ensure ICWA compliance, without specifying exactly what that entails. [Citations.]" (*In re Ezequiel G., supra,* 81 Cal.App.5th at pp. 1007-1008.) This topic was addressed in a case where the majority applied the "automatic reversal rule" due to the agency's failure to inquire of extended family members, despite the mother having already denied Indian ancestry:

> The majority . . . does the best it can, with the statutes we have, to articulate what it believes the Department must do to satisfy its ICWA obligations on remand. But the majority's instructions only highlight the unpredictability the Department still faces. According to the majority, the Department must ask ICWA questions of 'at least' the maternal great grandmother, the maternal great grandfather, and [the mother] (yet again, apparently). Then, if there is 'reason to believe' (in the statutory parlance: information including, but not limited to, 'information that indicates, but does not establish, the existence of one or more of the grounds for reason to know enumerated in paragraphs (1) to (6), inclusive, of subdivision (d)') that [the child] is an Indian child, the Department must make 'further inquiry' that the majority does not detail. . . . [¶] These instructions leave much to be desired.

(*In re H.V., supra,* 75 Cal.App.5th at pp. 441-442 (dis. opn. of Baker, J.).)

A later dissent from the same Justice underscored "just how awry things have gone:"

> There are already many published Court of Appeal opinions – particularly when taken to their logical conclusion regardless of any analytically arbitrary limits in their dispositional language – that require social workers to ask ICWA-related questions of every family member of a child they can find: parents, grandparents, brothers, sisters, first cousins, second cousins, aunts, uncles, etcetera. That can be a challenge in its own right. But the upshot of today's opinion is that this universe has gotten even bigger: juvenile courts and social services agencies must now also contact and interview non-related 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 at p. 141 (dis. opn. of Baker, J.).)

In view of the above, it is clear the "automatic reversal rule" has the undesirable consequence of a potential "seemingly endless feedback loop of remand, appeal, and remand," results in ambiguous remand instructions, and fails to provide guidance for future appeals.

(3) Elevation Of Statutory Provisions Over The California Constitution.

The third undesirable consequence of the "automatic reversal rule" is that, because it compels reversal without a showing of prejudice, the rule elevates ICWA's statutory provisions above "the *constitutional* mandate that reversal is only required when there would be a miscarriage of justice." (*Dezi C.,*

supra, 79 Cal.App.5th at pp. 784-785.) As stated by one appellate court: "[W]e reject the application of a reversible per se standard for section 224.2, subdivision (b), inquiry error because it is inherently inconsistent with the requirement in California Constitution, article VI, section 13 that a miscarriage of justice be shown for reversal. Alternatively stated, a reversible per se standard for state law error, such as that adopted by [*In re Y.W., supra,* 70 Cal.App.5th 542], conflicts with, and disregards, the constitutional requirement that an appellate court 'examin[e] . . . the entire cause, including the evidence,' and then reverse the judgment only if the purported error 'resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.)" (*In re Y.M., supra,* 82 Cal.App.5th at p. 912; see also *In re Ezequiel G., supra,* 81 Cal.App.5th at pp. 1003, 1014 [adopting *Dezi C.*'s "reason to believe rule," noting "ICWA inquiry error should require reversal only if prejudicial," and rejecting the "automatic reversal rule" because it is "not compelled by the statute, harms the interests of dependent children, and is not in the best interests of Indian communities"].) "[T]he Constitution takes precedence over a statute. This is not a novel statement. Any negligent violation of statute in almost any context does not inexorably result in reversal. Such a violation, an error, must be prejudicial within the meaning of the California Constitution to warrant reversal of a judgment." (*In re J.K., supra,* 83 Cal.App.5th at pp. 512-514 (dis. opn. of Yegan, J.).)

Accordingly, *Dezi C.* was accurate that the "automatic reversal rule" improperly elevates ICWA's statutory provisions

above the constitutional mandate that reversal is only required when a miscarriage of justice is demonstrated. (*Dezi C., supra,* 79 Cal.App.5th at pp. 784-785.) It was also accurate that the "automatic reversal rule" results in unnecessary delay and the likelihood of successive appeals. Thus, the "automatic reversal rule" should be rejected for the reasons set forth in *Dezi C*.

c. Additional Reasons For Rejecting The "Automatic Reversal Rule."

(1) The Legislature Did Not Require Automatic ICWA Appeals.

Another reason for rejecting the "automatic reversal rule" when a parent raises ICWA error for the first time on appeal is that the parent was under no obligation to appeal the ICWA finding in the first place. The Legislature did not provide for automatic ICWA appeals but did so in other contexts. (See Pen. Code, § 1239, subd. (b) ["When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or her or his or her counsel."]; Prob. Code, § 1962, subd. (b) ["When a judgment authorizing the conservator of a person to consent to the sterilization is rendered, an appeal is automatically taken by the person proposed to be sterilized without any action by that person, or by his or her counsel."].)

This omission was noted by Justice Chin in *In re Isaiah W.*: "[P]arents may waive their own rights to appeal an ICWA issue. Mother had no obligation *ever* to appeal on this ground. Certainly, if a tribe is not given notification, and a parent does not raise this issue on appeal, the tribe is not likely to learn that

a potential Indian child is involved in the dependency proceeding. But this circumstance is not due to California's appellate time limits. Neither the ICWA nor our state statutes require notification of all possible tribes of all dependency matters, and the tribes no doubt would not want to be inundated by such notifications. Because nothing compels a parent ever to raise an ICWA issue, condoning the belated raising of such an issue – thus depriving a tribe of the ability to intervene in a timely fashion – will not itself guarantee the tribe will receive the notice to which it is entitled. It will merely encourage unnecessary delay – delay that can harm the child." (*In re Isaiah W., supra,* 1 Cal.5th at p. 19 (dis. opn. of Chin, J.).)

Considering the Legislature did not provide for automatic ICWA appeals, which it has done in other contexts, it is unreasonable to apply a rule of automatic reversal when a parent raises an ICWA inquiry error on appeal, especially after the parent remained silent below, potentially for years.

(2) The Legislature Did Not Designate Indian Tribes As Parties Or Real Parties In Interest To Dependency Proceedings.

A different reason for rejecting the "automatic reversal rule" when a parent raises ICWA error for the first time on appeal is that the Legislature did not designate any Indian tribe or even the BIA as a party or real party in interest to any dependency proceeding. (*In re J.K., supra,* 83 Cal.App.5th at p. 513 (dis. opn. of Yegan, J.) ["The caption of a dependency case is telling. It does not mention an Indian tribe. An Indian tribe is

neither a party nor a real party in interest in a dependency case."].)

This Court, in *In re Christopher L.*, cataloged a number of cases applying an "automatic reversal rule," and not one involved protecting the rights of a non-party. (*In re Christopher L., supra,* 12 Cal.5th at pp. 1073-1075.) As mentioned, the issue in *In re Christopher L.* was whether the failure to appoint an incarcerated parent counsel at the combined jurisdiction and disposition hearing at which the parent was not present required automatic reversal. (*Id.* at p. 1069.) This Court declined to apply a rule of automatic reversal, noting it had never applied such a rule in dependency proceedings, but did not foreclose its application in the dependency context. (*Id.* at pp. 1074-1075, 1084.) In its analysis, this Court cited several cases that had applied an "automatic reversal rule," all of which pertained to the rights of a defendant, codefendant, or another named party in the action. (*Id.* at pp. 1073-1074, citing *Gideon v. Wainwright* (1963) 372 U.S. 335 [defendant deprived of right to counsel]; *Tumey v. Ohio* (1927) 273 U.S. 510 [defendant denied right to trial by impartial judge]; *People v. Wheeler* (1978) 22 Cal.3d 258, 283 [defendants' rights abridged by improper jury selection]; *People v. Douglas* (1964) 61 Cal.2d 430, 437-439 [codefendant denied right to separate counsel]; *Fewel v. Fewel* (1943) 23 Cal.2d, 431, 433, [mother in a custody proceeding denied right to fair trial in open court]; *In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1116 [mother in a dependency case not provided notice of hearing to terminate parental rights]; *Judith P. v. Superior Court* (2002)

102 Cal.App.4th 535, 558 [mother in dependency case did not timely receive report recommending termination of reunification services]; *In re Josiah S.* (2002) 102 Cal.App.4th 403, 417-418 [mother in dependency proceeding improperly denied a contested hearing]; *In re Kelly D.* (2000) 82 Cal.App.4th 433, 440 [father in dependency proceeding not provided notice]; *In re James Q.* (2000) 81 Cal.App.4th 255, 268 [mother in dependency case improperly denied a contested hearing].)

Furthermore, as mentioned, none of cases cited in *Weaver* involved the rights of a non-party, either. (*Weaver, supra*, 582 U.S. at pp. ___ [137 S.Ct. at pp. 1907-1914, cited by *In re Christopher L., supra,* 12 Cal.5th at p. 1077.) All of the cases *Weaver* cites implicate the rights of either a criminal defendant or the public – both of which are named in the caption of a criminal case. (*Ibid.*)

Because every case cited by *Weaver* and by this Court applying an "automatic reversal rule" pertained to the rights of a party to the action, and given that the Legislature decided not to include Indian tribes or the BIA as parties or real parties in interest to dependency proceedings, applying the "automatic reversal rule" to an ICWA appeal, especially when the matter was never raised below, is not appropriate.

d. Mother's Reasons For Adopting The "Automatic Reversal Rule" And Rejecting The "Reason To Believe Rule" Are Not Persuasive.

(1) Task Force Report.

In support of her contention that this Court should adopt the "automatic reversal rule," mother (1) filed a Request for Judicial Notice (Request) of the California ICWA Compliance Task Force Report (Report), (2) claims the Report's "express concerns" were addressed in the recent ICWA amendments, (3) states the Report will "assist" this Court, and (4) notes the Report has been considered by "at least two appellate courts in conjunction with the issues presented." (Request 4-5; OMB 28.)

But one of cases in mother's Request explained that the Report carries virtually no weight because there is no evidence that the Legislature ever considered it. (Request 5, citing *In re Ezequiel G., supra,* 81 Cal.App.5th at pp. 1011-1012.) In that case, the dissent suggested the Report was the "catalyst" for the recent ICWA amendments. (*In re Ezequiel G., supra,* 81 Cal.App.5th at p. 1022 (dis. opn. of Wiley, J.).) In response, the majority reviewed all of the reports that had been prepared for the Legislature in connection with the recent ICWA amendments and stated, "Our review of the reports prepared for members of the Legislature in connection with [the recent ICWA amendments], however, does not reveal a single reference to the Report or its recommendations. [Citations.]" (*Id.* at p. 1011.) The majority also noted the Report "was prepared not for the Legislature, but for the Governor," and while it "may have been part of the impetus for introduction of [the recent ICWA amendments], we are not aware of evidence suggesting that the Report was before the Legislature or reflects its intent. (See *Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1218, fn. 3

[enrolled bill reports prepared for the Governor, 'do not take precedence over more direct windows into legislative intent such as committee analyses, and cannot be used to alter the substance of legislation,' although they may be "instructive" in filling out the picture of the Legislature's purpose']; *People v. Allen* (2001) 88 Cal.App.4th 986, 995, fn. 19 [enrolled bill reports prepared by the executive branch for the Governor 'do not necessarily demonstrate the Legislature's intent,' although they can '*corroborate* the Legislature's intent, as reflected in legislative reports']; *K.C. v. Superior Court* (2018) 24 Cal.App.5th 1001, 1008, fn. 2 [same].)" (*Id.* at pp. 1011-1012.)

A concurring opinion in a different appeal also commented that the "attempt to use the [Report] as a basis for inferring legislative intent regarding section 224.2, subdivision (b) fails" because "there is no indication that any legislator, committee, or other participant in the process of passing [the new amendments] was aware of the [Report], much less that any legislator, committee, or other participant considered any particular statement in that [Report] relevant to the adoption of section 224.2, subdivision (b). Thus, the [Report] is not properly considered as shedding light on the legislative intent. [Citations.]" (*In re Adrian L., supra,* 86 Cal.App.5th at p. 370 (conc. opn. of Kelley, J.).)

As such, while the Report may "assist" this Court, there is no evidence it was considered by the Legislature or reflects the Legislature's intent, nor does mother point to anything in the Report suggesting or recommending that automatic reversal is an

appropriate remedy where ICWA inquiry is incomplete. (See Request 4-5; OBM 25-29.) Even if the Report did recommend automatic reversal, the Report would not outweigh the statute (which does not require automatic reversal), nor would it outweigh the constitutional mandate prohibiting reversal without a showing of prejudice. Thus, the Report does not cut in favor of the "automatic reversal rule."

(2) Insulation Of ICWA Inquiry Error From Appellate Review.

Mother's next contention is that applying the harmless error standard "does not follow the ICWA's inquiry requirements, ignores the remedial purpose of the statutes, and essentially insulates 'failure to inquire' error from review." (OBM 41.) But that is not true – and it ignores that courts applying the "automatic reversal rule" engage in a de facto harmless error analysis (without acknowledging doing so) with respect to other people named in the statute who were not inquired of but were not raised in an appeal. Still, rather than ignoring the ICWA's requirements or purpose, the "reason to believe rule" actually safeguards the requirements and purpose of ICWA by allowing an appealing parent to demonstrate that there is reason to believe further inquiry is warranted. (*Dezi C., supra,* 79 Cal.App.5th at pp. 781-782.) And remand will be ordered in appeals where there is reason to believe a child is or may be an Indian child, which is a far cry from "insulating failure to inquire error from review." (OBM 41; see *Dezi C., supra,* 79 Cal.App.5th at pp. 781-782 ["the 'reason to believe' rule effectuates the rights of the tribes in those instances in which those rights are most

likely at risk, which are precisely the cases in which the tribe's potential rights do justify placing the children in a further period of limbo. The 'reason to believe' rule . . ., by allowing parents to cite their proffers on appeal as well as the juvenile court record, still sends a 'message' to agencies that ICWA's mandates are not to be ignored because remand will be ordered in any case where there is reason to believe the failure to inquire mattered."].)

As such, mother is wrong that applying *Dezi C.*'s harmless error standard does not follow the ICWA's inquiry requirements, ignores the remedial purpose of the statutes, and insulates ICWA inquiry error from review.

(3) Federal Due Process Error.

Mother also argues violation of California's ICWA inquiry requirements should be viewed not as a violation of California state law but "a violation of a tribe's right to notice, guaranteed by the Due Process Clause of the Fourteenth Amendment." (OBM 41-42.) However, it appears mother forfeited the right to raise this argument by failing to raise it in the trial court, not to mention in the appellate court or in her petition for review. (*People v. Mendoza* (2016) 62 Cal.4th 856, 913 [defendant's claims on appeal "are forfeited because they were not raised below"], citing *People v. Tully* (2012) 54 Cal.4th 952, 1066; *People v. Howard* (2010) 51 Cal.4th 15, 26; *People v. Jennings* (2010) 50 Cal.4th 616, 687-688; *People v. Gurule* (2002) 28 Cal.4th 557, 597.) And the fact that mother invokes the Constitution should not relieve her of the forfeiture doctrine. As this Court explained: "Constitutional claims raised for the first time on appeal are not

subject to forfeiture only when 'the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution.' [Citations.] However, '[a] party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct.' [Citation.]" (*People v. Tully, supra,* 54 Cal.4th at pp. 979-980.) Mother does not address the forfeiture doctrine in her opening brief, nor does she explain how her Due Process argument may or may not invoke facts or legal standards different from those the trial court was asked to apply or how the trial court's acts or omissions had the additional legal consequence of violating the Constitution. (OBM 41-43.) As a result, this argument should be considered forfeited.

Forfeiture notwithstanding, mother undercuts her Fourteenth Amendment Due Process argument by later acknowledging in her brief that "when the error is one of state law only," the *California Constitution's* "miscarriage of justice" requirement applies. (OBM 43.) But even if mother were correct that somehow this case should be viewed through the lens of the Fourteenth Amendment's Due Process Clause, there was no federal violation in this case because the federal ICWA inquiry requirement was satisfied here – the participants in the proceeding, i.e., mother and father, both denied having Indian ancestry. (*Dezi C., supra,* 79 Cal.App.5th at p. 776; see 25 C.F.R. § 23.107(a).)

Nevertheless, none of the cases mother relies on in support of her Due Process argument are persuasive because none are analogous to this case, none involve the purported due process rights of a non-party, and none pertain to situations where both parents denied having Indian ancestry. (OBM 41-43.) And to the extent that mother asserts that an agency's failure to conduct a proper inquiry precludes Indian tribes from receiving notice, that is an issue remedied by the "reason to believe rule" and its opportunity for a parent to show that there is reason to conduct further inquiry and, if appropriate, send notice to any applicable tribes. (*Dezi C., supra,* 79 Cal.App.5th at pp. 781-782.)

As mentioned, this is a sound approach that protects the rights of Indian tribes and places the burden to demonstrate prejudice on the appealing parent who failed to raise the issue below – an approach endorsed by the Supreme Court of the United States. (*Weaver*, 582 U.S. at pp. ___ [137 S.Ct. at pp. 1907-1914.). Accordingly, this Court should reject the argument that violation of California's ICWA inquiry requirements should be viewed as a violation of a tribe's right to notice under the Due Process Clause of the Fourteenth Amendment. (OBM 41-42.)

(4) Mother's Three Rationales For Structural Error Are Faulty.

Mother next notes that in *In re Christopher L.*, this Court looked to *Weaver* for the "three broad rationale" categories for treating an error as structural. (OBM 44-45.) Quoting *Weaver*, this Court explained:

> First, an error has been deemed structural in some instances if the right at issue is not designed to

> protect the defendant from erroneous conviction but instead protects some other interest. This is true of the defendant's right to conduct his own defense, which, when exercised, 'usually increases the likelihood of a trial outcome unfavorable to the defendant.' [Citation.] . . . [¶] Second, an error has been deemed structural if the effects of the error are simply too hard to measure. For example, when a defendant is denied the right to select his or her own attorney, the precise 'effect of the violation cannot be ascertained.' [Citation.] Because the government will, as a result, find it almost impossible to show that the error was 'harmless beyond a reasonable doubt,' [citation], the efficiency costs of letting the government try to make the showing are unjustified. [¶] Third, an error has been deemed structural if the error always results in fundamental unfairness. For example, if an indigent defendant is denied an attorney or if the judge fails to give a reasonable-doubt instruction, the resulting trial is always a fundamentally unfair one. [Citations.] It therefore would be futile for the government to try to show harmlessness.

(*In re Christopher L., supra,* 12 Cal.5th at p. 1077.)

Mother claims that these three rationales are all implicated with respect to ICWA inquiry error. (OBM 44-45.) As to the first rationale, she states ICWA inquiry error is structural because "'the right at issue is not designed to protect' the parents, but instead protects another interest, the interest of the tribe and its right to notice." (*Ibid*.) But when *Weaver* spoke of "some other interest" beyond a defendant's right against erroneous conviction, it was not referring to some other interest of a non-party such as an Indian tribe, it was referring to some other interest of the same defendant – the "*defendant's right* to conduct his own defense, which, when exercised, 'usually increases the likelihood

of a trial outcome unfavorable to the *defendant*.'" (*Weaver, supra*, 582 U.S. at pp. ___ [137 S.Ct. at p. 1903], italics added.) Therefore, *Weaver*'s first rationale focused on the defendant in the proceedings, not an entity not named in the caption. And again, to the extent mother is belatedly concerned about a tribe's right to notice, the "reason to believe rule" protects the right to notice by permitting appellants to demonstrate that a tribe might potentially have a right to receive notice. (*Dezi C., supra,* 79 Cal.App.5th at pp. 781-782.) As such, mother is wrong that the first rationale under *Weaver* necessitates that ICWA inquiry error be treated as structural.

The same is true of *Weaver*'s second rationale – when the effects of an error are "too hard to measure." (*Weaver, supra*, 582 U.S. at pp. ___ [137 S.Ct. at p. 1903].) The example *Weaver* gave in this regard, "when a defendant is denied the right to select his or her own attorney," pertained to a party in the action. (*Ibid.*) But, like the first rationale, mother tries to stretch this rationale to apply to a non-party, stating, "the error is too hard to measure because the accuracy of determining whether further inquiry or notice is required is impossible to determine because of a failure to gather and record the very information the juvenile court needs to ensure the accuracy of a finding whether ICWA does nor (*sic*) does not apply." (OBM 45-47, citing *In re K.H., supra,* 84 Cal.App.5th at pp. 589, 591.) This is too expansive an interpretation of *Weaver*, which made it clear that the error must pertain to a party. (*Weaver, supra*, 582 U.S. at pp. ___ [137 S.Ct. at p. 1903].) This is also an example of the gamesmanship that

Dezi C. addressed and quashed by requiring the appealing parent to make a proffer. (*Dezi C., supra,* 79 Cal.App.5th at p. 784.) Therefore, mother is wrong that *Weaver*'s second rationale supports treating ICWA inquiry error as structural.

As to *Weaver*'s third rationale, mother states ICWA inquiry error "will result in fundamental unfairness because the tribe will be deprived of its rights under the ICWA." (OBM 45.) This conclusory argument does not justify finding ICWA inquiry error structural, ignores that a potentially interested tribe's rights *are* protected under the "reason to believe rule," and overlooks the critical factor in each *Weaver* rationale: the error complained of must affect a party. The example *Weaver* provided in relation to its "fundamental fairness" rational was when "an indigent defendant is denied an attorney or if the judge fails to give a reasonable-doubt instruction." (*Weaver, supra*, 582 U.S. at pp. ___ [137 S.Ct. at p. 1903].) The fact that each *Weaver* example mentions a party, and none mentions a non-party, undermines mother's position that the structural error doctrine should be imported into situations where the error affects a non-party. Accordingly, mother's claim that the three rationales in *Weaver* support that ICWA inquiry error should be treated as structural is not persuasive. (OBM 44-45.)

(5) Undeveloped Record.

Mother next cites two cases that employed the "automatic reversal rule" because the failure of the child welfare agency to conduct proper inquiry resulted in a undeveloped record, which deprived the juvenile court of the information it needed to make a

fully-informed ICWA finding. (OBM 45-47, citing *In re K.H., supra,* 84 Cal.App.5th at pp. 590, 605, and *In re A.R., supra,* 77 Cal.App.5th at p. 207.) Such reasoning, which appears in every automatic reversal case, created the conundrum that was resolved by *Dezi C.*: "Third and lastly, the 'reason to believe' rule, by focusing on what is in the record rather than what is not in the record, largely sidesteps the 'how can we know what we don't know' and burden of proof conundrums that animate the automatic reversal and presumptive affirmance rules." (*Dezi C., supra,* 79 Cal.App.5th at p. 782 ["The 'reason to believe' rule . . . allow[s] parents to cite their proffers on appeal as well as the juvenile court record."].) For this reason, *Dezi C.* is the better approach because it removes the incentive for a parent to leave the record undeveloped below by failing to object, then complain of an undeveloped record on appeal – which always results in undue delay.

Mother notes the appellate court *In re K.H., supra,* 84 Cal.App.5th at page 591, reversed an order terminating parental rights for ICWA inquiry due to an undeveloped record and in doing so adopted a test for prejudice "similar to this Court's holding in" *In re A.R.* (2021) 11 Cal.5th 234 (*A.R.*). (OBM 46.) But because the circumstances in *A.R.* are distinct from those in ICWA inquiry appeals, reliance on *A.R.* is not suited to ICWA inquiry appeals – which may be why no other appellate court has done so. (*In re K.H., supra,* 84 Cal.App.5th at p. 618 ["these cases do not rely upon the California Supreme Court's decision in *A.R.* or detail the underpinnings of their prejudice analysis"].)

In *A.R.*, the mother directed her trial counsel to file a notice of appeal after parental rights were terminated. (*A.R., supra,* 11 Cal.5th at pp. 244, 252.) Her trial counsel was late in filing the notice of appeal, and the appeal was dismissed for lack of jurisdiction. (*Id.* at p. 244.) The mother then filed a writ petition alleging her counsel's failure to file a timely appeal denied her the right to pursue an appeal, but the appellate court denied the writ. (*Ibid.*) This Court granted review to determine whether a parent has the right to challenge her counsel's failure to file a timely notice of appeal from an order terminating parental rights and, if so, the proper procedures for raising such a claim. (*Id.* at pp. 244-245.)

After concluding a parent may challenge her counsel's failure to file a timely notice of appeal, the Court addressed the procedures to make such a claim. (*In re A.R., supra,* 11 Cal.5th at p. 251.) The Court explained that an appellant must prove two elements to succeed on an ineffective assistance of counsel claim. First, there must be a showing of incompetence by counsel, which had been met by the failure to file a timely notice of appeal. (*Id.* at pp. 251-252.) Second, there must be a showing that the counsel's unprofessional performance was prejudicial. (*Id.* at p. 252.) The Court noted the test for prejudice when a state statute is violated is "generally whether 'it is reasonably probable that a result more favorable to [her] would have been reached in the absence of the error.'" (*Ibid.*, citing *People v. Watson, supra,* 46 Cal.2d at p. 836.) The Court then rejected the child welfare agency's contention that the *Watson* test for prejudice required

the mother to demonstrate a likelihood of success on appeal in order to overcome the late notice of appeal and pursue her appeal. (*Ibid.*) This Court explained that "[f]or a parent whose attorney has incompetently failed to file a timely appeal, the relevant injury is not denial of any specific substantive appellate victory; it is the opportunity to appeal at all." (*Ibid.*) The focus was "whether the parent would have taken a timely appeal, without requiring the parent to shoulder the further burden of demonstrating the appeal was likely to be successful." (*Id.* at pp. 252-253.) The Court concluded that "[w]here . . . a parent's failure to file a timely notice of appeal is the result of counsel's error, reinstating an otherwise-defaulted appeal is generally the only meaningful way to safeguard the statutory right to competent representation." (*Id.* at p. 254.)

Therefore, the right at issue in *A.R.* was the right to appeal at all, and this Court recognized that requiring the mother to demonstrate a likelihood of success on appeal was not proper because the mother had a right to appeal regardless of whether her appeal was ultimately successful. (*A.R., supra,* 11 Cal.5th at pp. 251-254.) The issue in *In re K.H.*, and all the other ICWA inquiry appeals, was not whether the parent had the *right* to appeal the ICWA finding – indeed the parents *did* appeal in each of those cases. (*In re K.H., supra,* 84 Cal.App.5th at p. 590.) Instead, the issue was the next step – which is, once the appeal is taken, whether the parent was required to demonstrate prejudice. (*Id.* at pp. 590-621.) The *Dezi C.* court did not hold that a parent must demonstrate a "reason to believe" in order to

have the *right* to appeal, it held a parent must demonstrate a "reason to believe" in order to *succeed* on appeal. (*Dezi C., supra,* 79 Cal.App.5th at pp. 774-786.) Thus, the *In re K.H.* court incorrectly equated a showing of prejudice with a showing of likelihood of success on appeal, which led to the erroneous conclusion that a parent need not demonstrate prejudice in an ICWA inquiry appeal. (*In re K.H., supra,* 84 Cal.App.5th at pp. 618-619.) The *In re K.H.* court also overlooked the fact that the injury in *A.R.* was to a party, whereas the possible injury in an ICWA inquiry appeal is to a non-party, i.e., an Indian tribe. Accordingly, the *In re K.H.* court's reliance on this Court's holding in *A.R.* was misplaced.

That being said, *A.R. is* instructive with regard to two important issues in ICWA inquiry appeals: delay to a child's permanence and the diligence exercised by an appellant. This Court "emphatically agree[d] that dependent children have a critical interest in avoiding unnecessary delays to their long-term placement," noted the "'pointed and concrete harm' a child may suffer from protracted custody proceedings," referenced the "exceptional need for finality in child-custody disputes," and affirmed the "emphasis on the importance of avoiding protracted litigation over matters concerning a child's long-term placement." (*A.R., supra,* 11 Cal.5th at pp. 249, 251.) This Court also stressed that "the costs of delay are particularly acute" in the dependency context, appellate courts were "to consider whether parents have acted promptly and diligently in pursuing their rights before granting relief," a "parent who seeks to challenge a termination

order therefore must act promptly to avoid jeopardizing the child's long-term placement," and that "[n]owhere is timeliness more important than in a dependency proceeding where a delay of months may seem like 'forever' to a young child." (*Id*. at pp. 251, 253.)

Although the *A.R.* opinion concerned the delay over a late notice of appeal, the principles regarding delay in dependency proceedings and lack of diligence by an appealing parent apply to ICWA inquiry appeals. As noted, parents often remain silent in the juvenile court for years regarding ICWA and wait until parental rights are terminated before raising ICWA inquiry error on appeal. (*In re Ezequiel G., supra,* 81 Cal.App.5th at p. 995; *Dezi C., supra,* 79 Cal.App.5th at p. 774.) This lack of diligence with respect to raising ICWA issues always results in delay to the dependency proceedings and could jeopardize the child's long-term placement. (See *In re Ezequiel G., supra,* 81 Cal.App.5th at pp. 1006-1007.)

Therefore, it is clear that rewarding a parent's lack of diligence below and allowing the parent to complain of an undeveloped record on appeal causes substantial delay for dependent children, which, as this Court found, can cause "pointed and concrete harm" to those children. (*A.R., supra,* 11 Cal.5th at p. 249.) The guidance provided by this Court in *A.R.* counsels against allowing such gamesmanship by parents, and the "reason to believe rule" solves this problem to a degree by limiting the delay to the time it takes to adjudicate the appeal as

opposed to the delay flowing from reversal and remand for ICWA inquiry.

(6) Investigations By Appellate Counsel.

Mother's next argument is that the "reason to believe rule" should be rejected because it requires appellate counsel to conduct investigations regarding a parent's potential Indian ancestry. (OBM 47-48.) But *Dezi C.* never said appellate counsel are *required* to conduct investigations regarding a parent's potential Indian ancestry, it merely opens the door to a parent supplement the record in order to demonstrate prejudice, which may involve minimal questioning by the parent and/or appellate counsel and possibly the filing of a declaration by the parent or extended family member explaining why further inquiry is warranted. (*Dezi C., supra,* 79 Cal.App.5th at p. 779.) Regardless, there is no mention in *Dezi C.* of a *requirement* that appellate counsel conduct an investigation. (*Ibid.*) And, to the extent mother complains about appellate counsel possibly having to conduct minimal questioning of extended family members or others, this could easily be remedied by the parent raising the issue at the trial level. (*In re Ezequiel G., supra,* 81 Cal.App.5th at pp. 1012-1013 ["Had the parents' counsel objected . . . the juvenile court could have decided whether to order a further inquiry"].) As such, mother is wrong that *Dezi C.* requires appellate counsel to conduct investigations regarding a parent's Indian ancestry. Instead, *Dezi C.* merely requires an appellant to satisfy the constitutional mandate to demonstrate prejudice and gives a parent an opportunity to do so on appeal even if the

parent failed to raise the issue below. (*In re Isaiah W., supra,* 1 Cal.5th at p. 19 (dis. opn. of Chin, J.); see *In re J.K., supra,* 83 Cal.App.5th at pp. 512-514 (dis. opn. of Yegan, J.).)

(7) Receiving Post-Judgment Evidence On Appeal.

Mother also claims requiring a parent to make a proffer on appeal conflicts with the "mandate" in *In re Zeth S., supra,* 31 Cal.4th 396, that an appellate court receiving post-judgment evidence is only proper if the evidence supports the underlying judgment. (OBM 48.) But *In re Zeth S.* contained no such mandate. *In re Zeth S.* held that the "general" rule was that an appellate court cannot "receive and consider postjudgment evidence that was never before the juvenile court . . . and rely on such evidence outside the record on appeal to reverse the judgment," but "in the rare and compelling case an exception may be warranted." (*In re Zeth S., supra,* 31 Cal.4th at p. 400.) Also, in *In re Josiah Z.*, this Court clarified its holding in *In re Zeth S.* and held that while appellate courts should not consider postjudgment evidence going to the merits of an appeal and introduced for the purposes of attacking the juvenile court's judgment, evidence outside the record could be properly considered under other circumstances. (*In re Josiah Z., supra,* 36 Cal.4th at p. 676.) As noted, *Dezi C.* explained that considering proffers in the context of ICWA inquiry appeals is appropriate under section 909 of the Code of Civil Procedure because they bear on the collateral issue of prejudice rather than the substantive merits and because they expedite the proceedings and promote finality of the juvenile court's orders. (*Dezi C.,*

supra, 79 Cal.App.5th at p. 779, fn. 4; see also *In re Z.N.* (2009) 181 Cal.App.4th 282, 298-299.)

Accordingly, the rule against an appellate court receiving evidence to reverse a judgment is not absolute. (*In re A.C., supra,* 75 Cal.App.5th at pp. 1022-1023 (dis. opn. of Crandall, J.) ["Neither should we fret about appellate courts receiving evidence outside the lower court record. This restriction is not absolute."].) Therefore, mother's claim that requiring a parent to make a proffer on appeal conflicts with *In re Zeth S.* lacks merit.[5]

None of the seven reasons mother offers should persuade this Court to adopt the "automatic reversal rule."

2. *Problems With The "Readily Obtainable Information Rule."*

Mother's last contention is that this Court should adopt *In re Benjamin M.*'s "readily obtainable information rule" "as elaborated by [*In re*] *K.H.*" (OBM 50-52.) This contention is unclear because the *In re K.H.* court "decline[d] to adopt *Benjamin M.* as a mechanical test or rule given its lack of a more precise articulation of prejudice and potential for misapplication, depending on how the decision is interpreted by other courts." (*In re K.H., supra,* 84 Cal.App.5th at p. 617.)

Nonetheless, *Benjamin M.*'s "readily obtainable information rule" sprang from a case where the mother had denied Indian

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[5] On this subject it is worth repeating that *Weaver* held that an appellant who circumvents the doctrines of forfeiture and waiver, like mother did in this case, is required to make an affirmative showing of prejudice. (*Weaver, supra*, 582 U.S. at pp. ___ [137 S.Ct. at pp. 1911-1912].)

ancestry but the father, who was homeless, never appeared in the dependency proceedings, and the child welfare agency never asked the father's extended family members – with whom it was in contact – whether the child was or might be an Indian child. (*In re Benjamin M., supra,* 70 Cal.App.5th at pp. 739-740.) The appellate court noted that, by failing to interview the absent father's extended family members, the child welfare agency failed to obtain information that appeared to have been readily available and potentially meaningful. (*Id*. at p. 744.) The court then held reversal was required "where the record demonstrates that the agency has not only failed in its duty of initial inquiry, but where the record indicates that there was readily obtainable information that was likely to bear meaningfully upon whether the child is an Indian child." (*Ibid*.)

Dezi C. rejected this approach for two reasons, as should this Court. First, as the rule focuses on "the ease of obtaining information that bears on the question of a child's Indian status rather than whether that information is likely to affect the juvenile court's ICWA finding, this rule lacks the *outcome* focus that is the hallmark of usual harmlessness review." (*Dezi C., supra,* 79 Cal.App.5th at p. 785.) "Second, this rule appears to be so flexible and malleable that some courts – and, indeed, mother in this case – have argued that it functions as a type of automatic reversal rule. . . . The same analysis has been hinted at in *J.C., supra*, 77 Cal.App.5th at page 82, and *Antonio R., supra*, 76 Cal.App.5th at pages 426, 436-437. The uncertainty of the meaning and breadth of this rule has led at least one judge to

comment that the rule 'merely shifts' the 'battleground' to the appellate courts, where there will be skirmishes over whether information was readily obtainable. [Citation.]" (*Id*. at p. 786.)

The *In re K.H.* court also rejected the *Benjamin M.* rule and described how "[s]ome criticism followed" the rule based on its "failure to specifically address the state's constitutional test for prejudice and for its focus on 'readily obtainable information.'" (*In re K.H., supra,* 84 Cal.App.5th at p. 616.) The "readily obtainable information rule" is also "potentially susceptible to being read in different ways, depending on whether courts interpret it broadly or narrowly overall, and depending on how they interpret 'readily obtainable information' and 'likely to bear meaningfully' on the inquiry more specifically." (*Id*. at p. 617, noting appellate courts have disagreed over how to apply the rule, e.g., *In re Antonio R., supra,* 76 Cal.App.5th at p. 435; *In re S.S., supra,* 75 Cal.App.5th 575; *In re Darian R., supra,* 75 Cal.App.5th 502.)

In addition to the reasons set forth by *Dezi C.* and *In re K.H.,* the "readily obtainable information rule" should not be adopted because it does not address circumstances where, as in *Dezi C.*, a parent denies Indian ancestry in the juvenile court but later appeals contending it was error not to have interviewed extended family members. (*In re Benjamin M., supra,* 70 Cal.App.5th at p. 740.) Instead, the *Benjamin M.* court simply noted the mother had denied Indian ancestry, but it did not indicate whether the mother's extended family members had been asked if the child is or may be an Indian child. (*Id*. at pp.

740-746.) Because *Dezi C.* does address the circumstance where a parent denies Indian ancestry below but claims error on appeal because extended family members were not questioned, the "reason to believe rule" is a better approach than the "readily obtainable information rule." (*Dezi C., supra,* 79 Cal.App.5th at p. 786.) *Dezi C.* would also apply to situations where an appealing parent asserts that it was error not to have made ICWA inquiries of the "child, . . . legal guardian, Indian custodian, . . . others who have an interest in the child, and the party reporting child abuse or neglect," all of whom are named in the statute. (§ 224.2, subd. (b).) As with the "automatic reversal rule," the "readily obtainable information rule" leaves a dearth of guidance in this regard.

In light of the foregoing, this Court should decline to adopt the "readily obtainable information rule." Further, mother should not be advocating for the "readily obtainable information rule" because it does not allow a parent to make a proffer on appeal, whereas the "reason to believe rule" does. (*Dezi C., supra,* 79 Cal.App.5th at pp. 785-786.) Allowing a parent to make a proffer on appeal protects an Indian tribe's potential interest to the fullest possible extent compared to limiting the parent to the record of proceedings in the juvenile court. If a parent discovers information that was not part of the juvenile court record, *Dezi C.* provides the parent an opportunity to present it to the appellate court. *Benjamin M.* does not.

For all of these reasons, *Dezi C.* should be affirmed.

Conclusion

The "automatic reversal rule" leads to undesirable consequences – gamesmanship by appellants and delay for dependent children. The "readily obtainable information rule" is unclear and does not eliminate these undesirable consequences. The "reason to believe rule" provides clarity and eliminates the undesirable consequences created by the other two rules. Moreover, it is consistent with the California Constitution's requirement that an appellant demonstrate prejudice before a judgment is disturbed. Accordingly, *Dezi C.* should be affirmed.

DATED: January 13, 2023   Respectfully submitted,

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Certificate Of Word Count Pursuant To Rule 8.360

The text of this brief consists of 18,470 words as counted by the Microsoft Office Word 2016 program used to generate this brief.

DATED: January 13, 2023

Respectfully submitted,

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Declaration Of Service

STATE OF CALIFORNIA, County of Los Angeles:

LIBRADA LEGASPI states: I am employed in the County of Los Angeles, State of California, over the age of eighteen years and not a party to the within action. My business address is Kenneth Hahn Hall of Administration, 500 West Temple Street, Suite 648, Los Angeles, California 90012.

On January 13, 2023, I served the attached **ANSWER BRIEF ON THE MERITS IN THE MATTER OF DEZI C., SUPREME COURT CASE NO. S275578, 2d JUVENILE NO. B317935, LASC NO. 19CCJP08030A-B,** to the persons and/or representative of the court as addressed below.

BY TRUEFILING. I served via TrueFiling, and no error was reported, a copy of the document(s) identified above:

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[Service through TrueFiling]

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 13, 2023, at Los Angeles, California.

LIBRADA LEGASPI

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 1/13/2023 by Robert Toy, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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