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NO. 98003-9

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DEPENDENCY of Z.J.G. AND M.E.J.G.,
minor children.

**SUPPLEMENTAL BRIEF OF DEPARTMENT OF
CHILDREN, YOUTH, AND FAMILIES**

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I. INTRODUCTION

The Indian Child Welfare Act (ICWA) and the Washington Indian Child Welfare Act (WICWA) provide important protections to Indian children, parents, and Indian tribes.¹ Among those protections are WICWA’s statutory requirement that the Department of Children, Youth, and Families must investigate whenever there is evidence that a child might have a connection with a federally recognized Indian tribe, including a duty to inquire with all tribes to which the child may potentially be connected. The Acts also provide a heightened level of protection, requiring formal, legal notice to affected tribes, when the court has “reason to know” the child is an Indian child. These heightened protections—and attendant burdens on the Department and court—apply in a narrower set of circumstances than the Department’s obligation to inquire with tribes.

The lower courts here applied binding federal regulations to determine that there was sufficient information at the shelter-care hearing stage to require the Department to continue to investigate and to contact all potentially interested Tribes (which it did), but not to provide a reason to know the children were Indian children. This Court should affirm.

¹ The Department uses the term “Indian” throughout this brief because it is the expression adopted by both ICWA and WICWA, despite acknowledging that it may not be the preferred term. No disrespect is intended.

II. STATEMENT OF ISSUES

1. The federal Indian Child Welfare Act and Washington Indian Child Welfare Act define “Indian child” as a person who is under eighteen “and is either: (a) A member of an Indian tribe; or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” RCW 13.38.040(7); 25 U.S.C. § 1903(4). Does a court have reason to know that a child is or may be an Indian child in relation to a federally recognized tribe when that tribe informs the Department social worker that neither the child nor the parent is an enrolled member?

2. Does a court have reason to know a child is an Indian child under ICWA and WICWA based upon a parent’s report of Indian heritage alone?

3. At the trial court and in briefing to the Court of Appeals, the father treated the ICWA and WICWA definition of “Indian child” as identical. Should the Court consider the father’s argument, raised for the first time in his motion for reconsideration at the Court of Appeals, that the WICWA definition is broader?

III. STATEMENT OF FACTS

A. ICWA and WICWA Provide Important Protections to Indian Children, Their Families, and Tribes

Congress enacted the Indian Child Welfare Act in 1978 to address a crisis in which an alarmingly high percentage of Indian children had been separated from their families and placed in adoptive homes. 25 U.S.C. § 1901 (Congressional findings); Dep’t of the Interior, Bureau of Indian Affairs, *Indian Child Welfare Act Proceedings*, 81 Fed. Reg. 38,778-01 (June 14, 2016) (Bureau Commentary to 2016 Rules). Congress found that among the causes of this crisis were state and private agencies that often failed to recognize “the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and

families.” 81 Fed. Reg. at 38,779. ICWA establishes minimum federal standards for the removal of Indian children from their families and the placement of Indian children, and confirms tribal jurisdiction over child-custody proceedings involving Indian children. *See generally* 25 U.S.C. §§ 1901-1923.

ICWA defines “Indian child” as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]” 25 U.S.C. § 1903(4). ICWA requires legal notification to a tribe in any involuntary proceeding in a state court “where the court knows or has reason to know that an Indian child is involved[.]” 25 U.S.C. § 1912(a). ICWA applies to Department-initiated dependency proceedings and child custody proceedings initiated by private parties such as adoptions, stepparent adoptions, and nonparental custody actions. 25 U.S.C. § 1903(1); RCW 26.33.040; RCW 26.10.034; *see also In re Adoption of T.A.W.*, 186 Wn.2d 828, 501-02, 383 P.3d 492 (2016) (ICWA applies to private stepparent adoptions); *In re Custody of C.C.M.*, 149 Wn. App. 184, 195-96, 202 P.3d 971 (2009) (finding grandparent’s petition for nonparental custody qualifies as an action for foster care placement under ICWA).

The Bureau of Indian Affairs (BIA) issued binding regulations in 2016 to ensure uniformity among states in applying ICWA. 81 Fed. Reg. at

38,779; 25 C.F.R. pt. 23 (Final Rule). With respect to the reason-to-know criteria, the Final Rule states that a court:

has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:

(1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;

(2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;

(3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;

(4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;

(5) The court is informed that the child is or has been a ward of a Tribal court; or

(6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

25 C.F.R. § 23.107(c). If the reason-to-know criteria are met, the Final Rule also requires that the court must “[t]reat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an ‘Indian child’” 25 C.F.R. § 23.107(b)(2).

In 2011, Washington enacted WICWA. RCW 13.38.010. The Legislature intended the Act to be “a step in clarifying existing laws and

codifying existing policies and practices.” RCW 13.38.030. This Court has determined that ICWA and WICWA “should be read as coextensive barring specific differences in statutory language.” *In re Adoption of T.A.W.*, 186 Wn.2d at 844. Among WICWA’s additional requirements are that a party seeking foster care placement of children must make “a good faith effort to determine whether the child is an Indian child.” RCW 13.38.050. This mandatory good faith effort includes contacting “any Indian tribe in which the child may be a member or may be eligible for membership.” RCW 13.38.050. The inquiry is separate and apart from the legal requirements arising from a reason-to-know finding. RCW 13.38.050.

B. The Trial Court and Court of Appeals Held That at the Time of the Shelter Care Hearing, the Reason-to-Know Criteria Were Not Met

1. The trial court ordered the Department to continue to investigate tribal connections, but determined that the reason-to-know criteria had not been met at that time

After receiving multiple reports of neglect and unsuccessfully attempting to work with the parents of two young children, the Department of Children, Youth, and Families filed a dependency petition in King County Superior Court. CP 2-8. Two days later, the court held an initial shelter care hearing, at which the Department sought placement of the children out of the parents’ care. RP 1, 59. A shelter care hearing must take place within seventy-two hours of a child being taken into custody, and is

primarily for the purpose of determining whether the child can be returned home while the dependency proceeds. RCW 13.34.065(1)(a).

As part of its responsibility under ICWA and WICWA, the Department attempted to contact numerous tribes to investigate whether the children were Indian children under the Acts.² RP 11. In an unchallenged finding of fact, the trial court determined that the Department “made a good faith effort to determine whether the child is an Indian child.” CP 10. Before the hearing, a Department social worker contacted the Tlingit and Haida Tribes of Alaska, and was informed that the children’s maternal grandmother was an enrolled member, but that neither the mother nor the children were enrolled members. RP 11. The social worker also testified that to his knowledge, the father was not an enrolled member of any federally recognized tribe. RP at 11-12. During the hearing, the mother testified that she was not a member of the Tlingit and Haida Tribes of Alaska, but that she and her children were eligible for membership. RP 88, 90. The father testified that he had heritage with the Confederated Tribes of Umatilla and that the children were eligible for membership, but he did not testify that he was a member of that or any other tribe. RP 67.

² The children were potentially connected with the Tlingit and Haida Tribes of Alaska, the Klawock Cooperative Association, the Confederated Tribes of the Umatilla in Oregon, and Cherokee tribes. CP 2. The trial court later found that the Department had sent inquiry letters to all potentially interested tribes before the shelter care hearing. Dep’t’s Resp. Br. at Court of Appeals, App. A at 2.

The trial court determined that there was not a reason to know the children were Indian children, stating “mother and father are not enrolled members in a federally recognized tribe. Maternal grandmother is enrolled member, Department continuing to investigate. Mother believes she’s eligible for tribal membership.” CP 10. At the trial court, counsel for petitioner Mr. G made no distinction between ICWA and WICWA, instead arguing the court had a reason to know the children were Indian children under ICWA. RP 110. Subsequently, the trial court granted the motion of the Tlingit and Haida Tribes of Alaska to intervene. CP 19. At a later dependency hearing, the trial court found it had a reason to know the children were Indian children, and applied ICWA and WICWA. CP 59.

2. The Court of Appeals affirmed the trial court, holding that binding federal regulations setting forth the factors that show a reason to know a child is an Indian child control over prior precedent

The father moved for discretionary review of the shelter care order, arguing among other things that a court had reason to know a child was an Indian child whenever a parent reports Indian heritage. Mot. Disc. Rev. at 24. Although recognizing the case as moot, the Court accepted review and affirmed. *In re Dependency Z.J.G. and M.E.J.G.*, 10 Wn. App. 2d 446, 448 P.3d 175 (2019). It held that the evidence before the trial court did not show that either parent was a member of a federally recognized tribe, so the trial

court did not have a reason to know the children were Indian children. *Id.* at 465. The Court also rejected Mr. G’s argument that the language in WICWA that a court must determine whether there is a reason to know a child is or may be an Indian child required the casting of a “wider net” than ICWA. *Id.* at 462-63. The Court noted that WICWA mirrors the Final Rule, reasoning that the reason-to-know determination under both WICWA and ICWA necessarily reflects some degree of uncertainty. *Id.* at 463. Like at the trial court, Mr. G argued as if the WICWA and ICWA definitions of “Indian child” were coextensive. *See* Opening Br. at 13.

Mr. G filed a motion for reconsideration, and for the first time argued that WICWA’s definition of “Indian child,” combined with the “member” definition set forth at RCW 13.38.040(12), results in a broader state definition of Indian child than ICWA provides. Mot. Recons. at 13-14. The Court of Appeals denied reconsideration without comment.

IV. ARGUMENT

A. The Court Should Dismiss the Case as Moot

This case is moot and the Court should dismiss the petition as improvidently granted. Both before and after the shelter care hearing, the Department made efforts to inquire with all tribes who might have an interest in the case. RP 11; Dep’t’s Resp. Br. at Court of Appeals, App. A at 2. Shortly after the shelter care hearing, the Tlingit and Haida

Tribes of Alaska intervened. CP 19. Mr. G agreed to dependency, the court found that there was a reason to know the children were Indian children, and the subsequent dependency and dispositional orders satisfy all ICWA and WICWA requirements. *See* Answer to Pet. for Review at 5-6. In addition, as discussed below, at least some of the arguments raised in this Court were not argued to the trial court at all and were raised for the first time at the Court of Appeals in a motion for reconsideration. Thus, the record and briefing do not support considering the case despite its mootness. Finally, a determination of whether a court has a reason to know a child is an Indian child is a fact-intensive inquiry, so a ruling here is unlikely to provide guidance in future cases with different facts.

B. The Court of Appeals Properly Applied ICWA Reason-to-Know Factors

ICWA's plain language, binding federal regulations, BIA commentary, and strong policy all support the Court of Appeals determination that a court has reason to know that a child is an Indian child under ICWA and WICWA based on political affiliation with a tribe as a member, not based on Indian heritage alone.

1. ICWA's Plain Language and Binding BIA Regulations Support the Court of Appeals Opinion

Under ICWA, when the court has "reason to know" a child is an Indian child, but it does not have sufficient information to determine

whether the child is or is not an Indian child, the court must treat the child as an Indian child, unless and until it is determined on the record that the child is not an Indian child. 25 C.F.R. § 23.107(b)(2). A reason-to-know finding is therefore a momentous one; it brings into full force the significant requirements designed to protect Indian children, parents, and tribes. These protections include heightened burdens for out-of-home placements, placement preferences, requiring expert Indian witness testimony, requiring “active efforts” be made to prevent the breakup of an Indian family, and requiring formal legal notice to the tribe or tribes and the BIA. *See* 25 U.S.C. §§ 1911-1922.

ICWA defines “Indian child” as a person under eighteen who (a) is a member of an Indian tribe, or (b) is eligible for membership in an Indian tribe and is the biological child of a member. 25 U.S.C. § 1903(4). Thus, under the plain language of ICWA, a reason to know that a child is an Indian child would necessarily require that a court have a reason to know that the child is a member or that a parent is a member and the child is eligible for membership.

2016 regulations issued by the BIA confirm the reason-to-know standard is based on political affiliation with a tribe rather than Indian heritage. 81 Fed. Reg. at 38,864-76 (codified at 25 C.F.R. pt. 23). The regulations have the force of law and are binding. *See, e.g., Perez v.*

Mortg. Bankers Ass'n, 575 U.S. 92, 96, 135 S. Ct. 1199, 191 L. Ed. 2d 186 (2015) (rules issued through notice-and-comment process have force and effect of law). The BIA regulations set forth the circumstances when a court has reason to know a child is an Indian child, including that a participant in the proceeding informs the court that the child is an “Indian child” or has discovered information indicating that the child is an “Indian child” as defined in the statute. 25 C.F.R. § 23.107(c). Additional factors include that the child or parent is domiciled on a reservation or Alaskan Native village, or that the child or parent possesses an identification card indicating membership. 25 C.F.R. § 23.107(c)(4). Conspicuously, all of the factors relate to information showing membership with a tribe, and none rely merely on Indian heritage. The language and breadth of the factors establish an exclusive list, especially when compared with other parts of the regulation that make clear when they are providing an illustrative list. *Compare* 25 C.F.R. § 23.107(c) *with* 25 C.F.R. § 23.2 (“Active efforts are to be tailored to the facts and circumstances of the case and may include, for example: [list of 11 efforts].”).

2. BIA commentary supports requiring a reason to know of a political affiliation with a tribe

The commentary issued by the BIA when it promulgated the rule setting forth the reason-to-know factors confirms that the factors listed are

exclusive, and removes all doubt that a court must be informed of a political affiliation with a tribe rather than simply Indian heritage. Where commentary reflects an agency's interpretation of its rules, courts give it "controlling weight" unless plainly erroneous or inconsistent with the rule. *Stinson v. United States*, 508 U.S. 36, 45, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993). In responding to concerns that the reason-to-know criteria would sweep too broadly, particularly in light of the requirement to treat a child as an Indian child until and unless the court finds otherwise, the BIA explained: "[T]he trigger for treating the child as an 'Indian child' is the reason to know that the child is an Indian child. This is not based on the race of the child, but rather indications that the child and her parent(s) may have a political affiliation with a Tribe." 81 Fed. Reg. at 38,806; *see also* 81 Fed. Reg. at 38,804 ("The inquiry into whether a child is an "Indian child" under ICWA is focused on only two circumstances: (1) Whether the child is a citizen of a Tribe; or (2) whether the child's parent is a citizen of the Tribe and the child is also eligible for citizenship.").³ The commentary shows that the reason-to-know determination must be based on political affiliation rather than heritage.

³ Although not binding, BIA Guidelines issued in 2016 are even more explicit: "ICWA does not apply simply based on a child or parent's Indian ancestry. Instead, there must be a political relationship to the Tribe." Dep't of the Interior, Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act* 10 (Dec. 2016), <https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf>.

3. Strong policy reasons support requiring more than Indian heritage to have reason to know a child is an Indian child

In addition to ICWA's plain language and BIA regulations and commentary, there are good reasons for treating only those with a reported political affiliation with a Tribe as an Indian child under the Act, and de-emphasizing Indian heritage as the basis of invoking ICWA. At several points in its commentary, the BIA addressed concerns regarding whether its rules implementing ICWA were unconstitutionally based on race, and each time the BIA responded that ICWA and the rule was based on a political affiliation rather than race. 81 Fed. Reg. at 38,795, 38,804, 38,806.

Given ICWA's important purposes, the BIA had good reason to adopt interpretations that avoid constitutional concerns. At least one district court has held ICWA unconstitutional as improperly race-based, and that case is currently pending en banc review in the Fifth Circuit. *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018); *see also* Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 Cal. L. Rev. 495, 497-98, 500, 552 (2020) (discussing possibility of ICWA's invalidation); Allison Elder, "Indian" as a Political Classification: *Reading the Tribe Back into the Indian Child Welfare Act*, 13 Nw. J. Law & Soc. Pol'y 410, 413 (2018) (same).

The Department believes that ICWA is constitutional, even under the interpretation urged by Mr. G. Nevertheless, Mr. G's interpretation makes ICWA and the BIA regulations more vulnerable to such attack, and the BIA's discussion of these concerns shows that the regulations require more than Indian heritage to meet the reason-to-know standard.

4. The Court of Appeals Properly Applied the Reason-to-Know Analysis

Applying the correct understanding of when a court has reason to know a child is an Indian child as relating to political affiliation rather than Indian heritage, the courts below properly concluded the standard was not met here. No person testified or otherwise indicated that the parents or children were members of a tribe, and there was significant evidence to the contrary. Information from the Tlingit and Haida Tribes indicated that the children and their mother were *not* enrolled members, and the mother confirmed this in her testimony. RP 11, 88, 90. The father testified as to Indian heritage, but neither he nor any other participant provided information suggesting he was a member of a federally recognized tribe. RP 11-12, 67. Although there was sufficient evidence to oblige the Department to continue its inquiries with tribes, as it did, there was not a reason to know at the time of the shelter care hearing that the children were Indian children.

Mr. G argues that the courts below required evidence that a court “know” a child is an Indian child rather than have a “reason to know.” Pet. for Review at 8. But the lower courts did not even suggest that conclusive evidence, which in most cases would be written confirmation of membership from a tribe, was required to make the reason-to-know finding. Instead, the courts examined the definition of “Indian child” and determined that the facts developed in the earliest stages of dependency showed no information indicating tribal membership and strong evidence to the contrary. The fact that the lower courts primarily relied on information *from the tribe* that the parent and children were not members also refutes Mr. G’s argument that the courts removed the decision of who is a member from the tribes. *See* Pet. for Review at 8. This Court should affirm.

C. Other State Court Decisions Show that Report of Indian Heritage is not a Reason to Know a Child is an Indian Child under ICWA

Decisions from other states that analyze 25 C.F.R. § 23.107(c) show that report of Indian heritage alone is not reason to know a child is an Indian child under ICWA. *E.g., Geouge v. Traylor*, 68 Va. App. 343, 808 S.E.2d 541, 545, 552-53 (2017) (testimony that father “known . . . to be of Cherokee descent” insufficient to be reason to know); *In re A.M.*, 47 Cal. App. 5th 303, 260 Cal. Rptr. 3d 412 (2020) (heritage alone is not reason to know under new California statute amended to be consistent

with 25 C.F.R. § 23.107(c)); *T.W. v. Shelby Cty. Dep't of Human Res.*, Nos. 2180005, 2180006, 2180030, 2019 WL 1970066 (Ala. Civ. App. May 3, 2019) (applying 25 C.F.R. § 23.107(c) to determine mere tribal ancestry insufficient).

The cases cited by Mr. G in his petition do not show otherwise. Some cases cited by Mr. G involved testimony of tribal membership, so they do not support the broader rule he advocates. *E.g.*, *In re J.W.E.*, 2018 OK 29, 419 P.3d 374, 37. Other cases rely on cases prior to the Final Rule without analysis as to the impact of the regulation, depriving them of persuasive force. *See In re Matter of A.P.*, 260 N.C. App. 540, 818 S.E.2d 396 (2018); *In re Matter of S.R. & C.R.*, 394 Mont. 362, 436 P.3d 696 (2019). And none of the cases involve a reason-to-know finding despite information from a tribe that the parent and children are not members.

D. WICWA Provides No Reason to Reverse the Court of Appeals

Mr. G argues that WICWA requires a broader reason-to-know determination than ICWA for two reasons: (1) unlike ICWA, WICWA asks whether a court has reason to know a child is “or may be” an Indian child; and (2) although the definition of “Indian child” is nearly identical under both Acts, WICWA’s definition of “member” circuitously broadens the definition of “Indian child.” Pet. for Review at 13. The first argument was properly rejected by the Court of Appeals. The second was raised for the

first time in Mr. G's motion for reconsideration at the Court of Appeals and should not be considered by this Court.

Under both ICWA and WICWA, the reason-to-know provision addresses circumstances when there is uncertainty about whether the child is or is not an Indian child. The Court of Appeals correctly concluded that despite the difference in statutory language, both statutes address the same concern: uncertainty in satisfying the definition of Indian child. *In re Dependency of Z.J.G.*, 10 Wn. App. 2d at 463. The Court of Appeals correctly determined that the specific facts here, involving a preliminary verbal report from the Tlingit & Haida Tribes of Alaska that neither the parent nor the children were members, provided no basis for undercutting the actual definitions of an Indian child from ICWA and WICWA. *Id.* The Court of Appeals' conclusion is buttressed by the express intent of WICWA to clarify rather than expand ICWA. *Id.* at 461 (citing RCW 13.38.030 and *In re Adoption of T.A.W.*, 186 Wn.2d at 844 n.9).

Mr. G's alternative interpretation that the reason-to-know standard is met whenever there is any potential that a child is an Indian child also conflicts with other parts of WICWA. WICWA requires the Department to inquire with potentially connected tribes as part of its good faith effort to determine whether a child is an Indian child. RCW 13.38.050. If a court has reason to know a child is an Indian child based on mere possibility, the

Department would be required to provide legal notice to the tribes, thereby making superfluous any duty to more informally inquire with the tribes. *See* RCW 13.38.070(1). This Court should instead give effect to all provisions in WICWA. *See State v. Ervin*, 169 Wn.2d 815, 823, 239 P.3d 354 (2010) (holding courts should avoid making any part of statute superfluous).

Mr. G also argues that WICWA's definition of "member" and "membership," effectively broadens the definition of "Indian child" and the reason-to-know determination. Pet. for Review at 13 (noting that WICWA defines "membership" as "a written determination by an Indian tribe that a child is a member of or eligible for membership in that tribe" (emphasis removed) (citing RCW 13.38.070(3)(a))). Mr. G raised this argument for the first time in a motion for reconsideration at the Court of Appeals. This Court should not consider the argument for numerous reasons.

First, Washington courts generally do not consider arguments raised for the first time on appeal, let alone those raised for the first time in a motion for reconsideration. *See* RAP 2.5(a); *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 679 n.44, 175 P.3d 1117 (2008) (citing *Seeley v. State*, 132 Wn.2d 776, 808, 940 P.2d 604 (1997); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)).

Second, because neither the trial court nor the Court of Appeals had the opportunity to consider the argument, the record and pleadings were not

developed with that issue in mind. During the shelter care hearing, Mr. G argued his position based solely upon “federal law” and the standard applicable under “ICWA.” RP 110. In his opening appellate brief, Mr. G also appeared to endorse a definition of Indian Child under state law that was coextensive with the federal definition. *See* Opening Br. at 13 (citing both ICWA and WICWA for the quoted definition of “Indian child.”). If necessary, this Court should address the issue when a trial court has had the opportunity to consider whether a different reason-to-know analysis might apply, or might reach a different result.

Third, although Mr. G correctly points to statutory differences, neither this Court nor the Legislature has suggested that “Indian child” has a different meaning under WICWA. *See In re Adoption of T.A.W.*, 186 Wn.2d at 845 (describing definition of “Indian child” in WICWA and ICWA as “nearly identical”); Final Bill Report on Engrossed Substitute S.B. 5656, 62d Leg., Reg. Sess. (Wash. July 22, 2011) (highlighting differences between ICWA and WICWA, but failing to mention the definition of Indian child); *see also* William N. Smith & Richard T. Okrent, *The Washington State Indian Child Welfare Act: Putting the Policy Back Into the Law*, 2 Am. Indian L. J. 146, 148 (Fall 2013) (describing differences between ICWA and WICWA but not mentioning “Indian child” or “member” definitions). Nor has Mr. G attempted to harmonize his

interpretation that “member” and “eligible for membership” are synonymous, which would make the definition of “Indian child” internally inconsistent, effectively redacting from the statute the second prong of the definition: the child is “eligible for membership in an Indian tribe *and* is the biological child of a member” RCW 13.38.040(7) (emphasis added).

Finally, addressing this late-raised argument is entirely unnecessary to resolve this case, which all parties acknowledge is moot.

V. CONCLUSION

ICWA and WICWA provide important protections to Indian children, their parents, and Indian tribes. Applying these protections and requiring formal legal notice to Indian tribes only when a court has information indicating that a child or a parent is a member of the tribe best preserves the efficacy of the Acts. This Court should affirm.

RESPECTFULLY SUBMITTED this 15th day of May 2020.

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