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No. 98487-5

IN THE WASHINGTON SUPREME COURT

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In re the Dependency of  
A.K., L.R.K.S., and D.B.K.S.

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PETITIONER'S SUPPLEMENTAL BRIEF

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## A. INTRODUCTION

Our federal and state governments have a duty to correct “the horrific wrongs of widespread removal of Native children from their families and states’ consistent failure to provide due process to tribes.” *In re Dependency of Z.J.G.*, \_\_ Wn.2d \_\_, No. 98003-9, slip op. at 2 (Sept. 3, 2020). The Indian Child Welfare Act (“ICWA”) and Washington’s counterpart (“WICWA”) were enacted to rectify the continuing “state-sponsored destruction of Native families and communities.” *Id.* ICWA and WICWA allow the government to reduce systemic disparities. They require the government to engage in active efforts to provide services to reunite families before a court finds children dependent.

The department knew Ms. L.K. needed help finding housing and it was capable of helping her. However, it denied her rehabilitative and housing services that she wanted because she declined a voluntary drug test and voluntary drug evaluation.

Indian children may not be removed from their parent’s care and sent to foster care without timely, affirmative, diligent, and active efforts to support the family’s reunification. The government always owes the parents of Indian children active efforts to correct identified problems, even if the parents reject certain services for other problems.

## B. ISSUE

ICWA and WICWA require the department to make “diligent,” “affirmative, active, thorough, and timely” active efforts by helping correct each of a parent’s problems so the family may be reunited before a court finds Indian children dependent and orders an out-of-home placement. Merely providing referrals to services is insufficient. Here, the department’s only effort to help Ms. L.K.’s housing deficiency during this case was to give her a phone number to a community agency and sit with her once as she called the agency. At trial, the department relied on voluntary services that were offered one, two, or six years before. These efforts were not timely. The trial court erroneously found the active efforts requirement was met. The Court of Appeals held Ms. L.K. invited the error by raising a general denial defense to the dependency and not raising the issue of active efforts herself, though the invited error doctrine requires knowing, voluntary, affirmative, and specific action to apply.

a. To satisfy ICWA and WICWA after taking Indian children from their parent, must the government make continuous, affirmative, diligent, and active efforts to support the parent so the family may be reunited?

b. Can a parent invite the error of the government not meeting its statutory burden when she made no knowing, voluntary, and affirmative action to agree that active efforts were either made or unnecessary?

### C. STATEMENT OF THE CASE

After taking her three children, the Department of Children, Youth, and Families [“department” or “DCYF”] offered assistance to Ms. L.K. on one date only, at the start of the case. RP 288-89. In their first meeting, the department’s social worker “offered [Ms. L.K.] housing” by giving her one or two phone numbers and sitting with her while she called a housing program. *Id.* That call did not result in housing for Ms. L.K. or her children. RP 22, 33. The only other things offered were suggestions of a voluntary drug test and drug evaluation that Ms. L.K. declined. RP 289.

Ms. L.K.’s two youngest children are Northern Arapaho. ICWA and WICWA apply to their dependency cases.<sup>1</sup>

Ms. L.K. loves her children immensely. RP 402, 111. She is good with them, close to them, and their visits go well. *Id.* The department removed them after a report they were “abandoned,” though Ms. L.K. was home when CPS took her children. RP 159-63; CP 12.<sup>2</sup> The dependency petition alleged Ms. L.K. had a “chaotic lifestyle,” lacked “appropriate housing,” left her children with others, and might use drugs. CP 5.

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<sup>1</sup> Indian Child Welfare Act [“ICWA”], 25 U.S.C. 1901 *et seq.*; Washington State Indian Child Welfare Act [“WICWA”], Chapter 13.38 RCW.

<sup>2</sup> All citations to “CP” are to the indexed CP. Citations to a child’s file are labeled “L.R.-CP” or “D.B.-CP.” As these children’s files are nearly identical, most cites are to L.R.’s file only.

The court noted WICWA applied and sent the children to a non-Native foster home. L.R.-CP 12-21; RP 290. Ms. L.K. did not sign her consent to the shelter care order requiring she take a drug test. L.R.-CP 21.

The department argued Ms. L.K.'s housing instability was a parental deficiency. RP 210, 289; CP L.R.-CP 5. It knew Ms. L.K. was poor and lacked reliable transportation. RP 69, 75, 216, 310. It also alleged Ms. L.K. had mental health and drug problems. RP 29, 211.

Before this case began, Ms. L.K. had twice participated in voluntary family services with the department. RP 215. Those cases began in 2013 and 2017. RP 252, 260. The 2017 case ended six months before the children's removal, and services were provided between 10 to 20 months before the trial in this case. RP 159-60, 258, 278. In 2017, the department provided help finding housing, transportation, full-time childcare, "[s]omebody in the home to help assist with any needs of the family," and "gas vouchers, bus passes, diapers, [and] basic necessities for the children." RP 263-65, 270. Ms. L.K.'s response to its help satisfied the department that no dependency petition was necessary. RP 250-51.

At the dependency and disposition trial, Ms. L.K. noted she had "volunteered willingly with the department... several times and have completed successfully." RP 20. She had no "problem doing that again if

[she got] a fair report” about her. *Id.* She had declined drug testing because the department’s allegations were “a complete lie.” RP 20-21.

Ms. L.K. acknowledged she was poor and had trouble finding stable housing. RP 22. She was not receiving child support. RP 392-93, 395. As a single mother, she could not work full-time unless her children were in day care or school. RP 42-43, 394. She had appealed the decision that banned her from receiving TANF financial assistance. RP 69, 216. Ms. L.K. readily admitted she “need[ed] a lot of support for a lot of different things.” RP 41-42.

On her own, Ms. L.K. had acquired a recreational vehicle for her family to live in, identified a safe and permanent parking location, and started repairs to make it comfortable for her children. RP 11, 67-68. She also updated her information every 90 days with the two publicly available community-housing resources, to no avail. RP 22.

The department argued the services it had provided years ago in the older voluntary cases constituted active efforts to reunify in the present case. RP 402. The trial court accepted this argument, found the children dependent, and ordered a foster care placement. RP 402-04; CP 141, 152.

The Court of Appeals did not reach the issue of active efforts. Instead, it held Ms. L.K. invited the department’s failure to meet its statutory obligation of active efforts under ICWA and WICWA.

#### D. ARGUMENT

**Indian children may not be taken from their parents and sent to foster care without continuous, affirmative, diligent, and active efforts to support the family’s reunification.**

*1. ICWA and WICWA correct disparities in child welfare cases that continue to the present day.*

The federal and Washington governments recognize their duty to “rectify[ ] the horrific wrongs of widespread removal of Native children” and enacted ICWA and WICWA “to remedy the historical and persistent state-sponsored destruction of Native families and communities.” *Z.J.G.*, No. 98003-9, at 2; 25 U.S.C. § 1901(4).

ICWA and WICWA govern child custody proceedings involving an “Indian child.”<sup>3</sup> 25 U.S.C. §§ 1911-23; 25 C.F.R. Part 23; Chapter 13.38 RCW. Before Indian children may be taken from their parent and sent to foster care, the government must provide the parent continuous, affirmative, diligent, and active efforts to reunify the family.

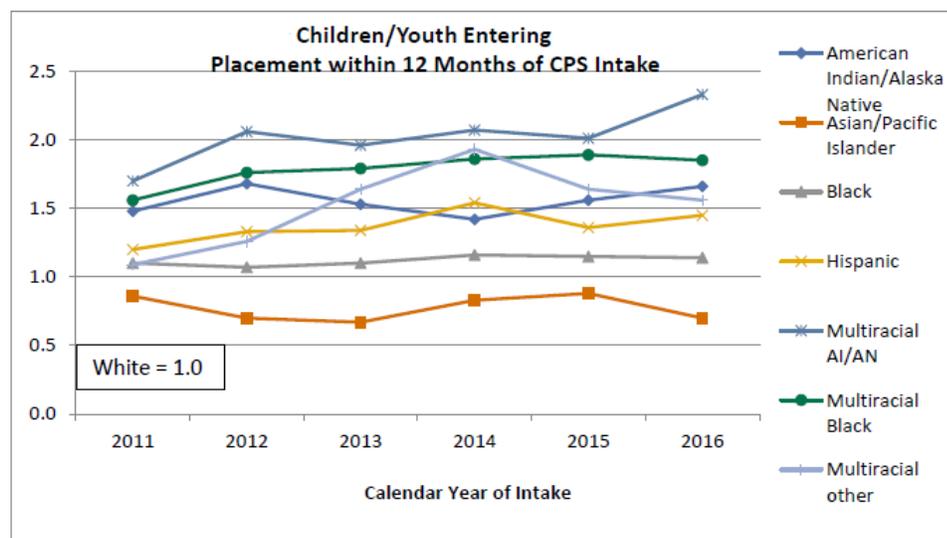
“There are virtually no other statutes more central to rectifying” the historical and present-day harms than ICWA and WICWA. *Z.J.G.*, No. 98003-9, at 1-2. The Attorney General agrees, acknowledging tribes’ and Native peoples’ “multigenerational trauma ... caused by centuries of family disruption and dismemberment” after “having survived genocide,

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<sup>3</sup> This brief only uses “Indian child” when referencing statutes using that term.

catastrophic plagues and systematic oppression.” Bob Ferguson & Fawn Sharp, *Native children benefit from knowing their heritage. Why attack a system that helps them?* Wash. Post, Mar. 20, 2019.<sup>4</sup> Yet here, despite the government’s ability to do much more, the Attorney General argues the mother of Indian children is owed no more help to reunite her family than a phone number for a housing wait list and offers of voluntary tests. Resp. to MDR at 14-17; 25 C.F.R. § 23.2; RCW 13.38.040(1)(a)(ii).

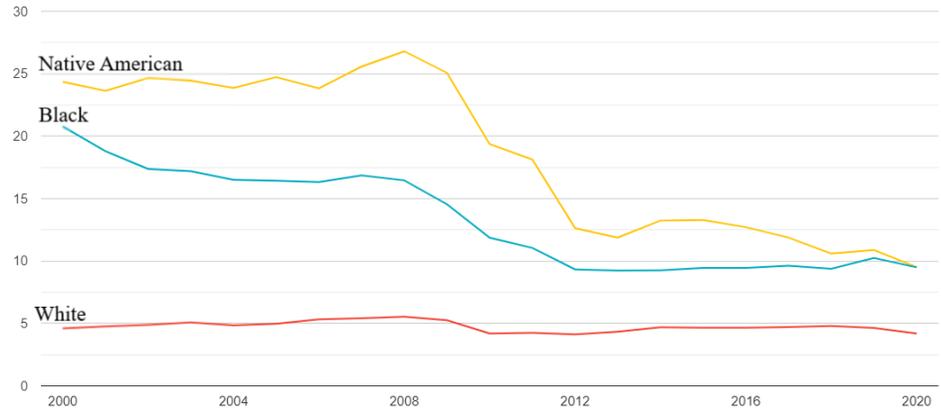
The greatest racial disparity in the foster care placement of children is for multiracial Native children, like Ms. L.K.’s children:



<sup>4</sup> Available at [www.washingtonpost.com/opinions/2019/03/20/native-children-benefit-knowing-their-heritage-why-attack-system-that-helps-them/](http://www.washingtonpost.com/opinions/2019/03/20/native-children-benefit-knowing-their-heritage-why-attack-system-that-helps-them/)

Wash. St. DCYF, *Wash. St. DCYF Racial Disparity Indices Report*, at 11, 13 (2018).<sup>5</sup>

When considering all Native children together, the department sends Native children to foster care twice as often as White children:



Center for Social Sector Analytics & Technology, *Children in Out-of-Home Care in Washington State* (Aug. 26, 2020) (showing the number of children per 1,000 out of their homes on the first day of each year).<sup>6</sup>

When trial and appellate courts limit the protections of ICWA and WICWA, they perpetuate the systematic oppression Native peoples have experienced for centuries. This Court has made clear its duty to correct those past injustices “still plaguing our country.” Open Letter from the Wash. St. Supreme Court to the Members of the Jud. and the Legal Cmty.

<sup>5</sup> Available at [www.dcyf.wa.gov/sites/default/files/reports/Washington State DCYF Racial Disparity Indices Report - 2018.pdf](http://www.dcyf.wa.gov/sites/default/files/reports/Washington%20State%20DCYF%20Racial%20Disparity%20Indices%20Report%20-%202018.pdf)

<sup>6</sup> Available at [www.vis.pocdata.org/graphs/ooh-rates#](http://www.vis.pocdata.org/graphs/ooh-rates#)

(June 4, 2020); *see* *Z.J.G.*, No. 98003-9; *State v. Towessnute*, S. Ct. Order No. 13083-3 (July 10, 2020).

2. *The active efforts requirement of ICWA and WICWA means the department must affirmatively assist parents to access and obtain services and resources to keep their families together.*

ICWA and WICWA mandate that the department meet a higher standard of action for parents of Indian children than for other parents. *Adoption of T.A.W.*, 186 Wn.2d 828, 841, 844, 383 P.3d 492 (2016). The department must make active efforts “to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.” 25 U.S.C. § 1912(d); RCW 13.38.130. Federal regulations define active efforts and clarify ICWA’s standards. 25 C.F.R. Part 23.

The active efforts requirement persists throughout dependency proceedings and applies to all non-emergency proceedings “that may culminate in” the out-of-home placement of an Indian child. 25 U.S.C. § 1912(d); 25 C.F.R. § 23.2; RCW 13.38.040 (1)(a)(ii), (b). This includes dependency findings, as the department agreed below, though it disputes this for the first time in this Court. 25 C.F.R. § 23.2; RP 404; Resp. to MDR at 10. This Court should disregard the department’s argument; it may not raise this issue for the first time in this Court. *See State v. Ibarra-Cisneros*, 172 Wn.2d 880, 885, 263 P.3d 591 (2011). The canon of construction that “statutes are to be construed liberally in favor of the

Indians, with ambiguous provisions interpreted to their benefit” requires this Court to hold ICWA and WICWA’s protections begin before or at shelter care and continue throughout the case, encompassing dependency decisions. *Z.J.G.*, No. 98003-9, at 38, 28-29 (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985)); 25 U.S.C. § 1912(d); 25 C.F.R. § 23.2.

Active efforts are “affirmative, active, thorough, and timely efforts intended primarily to ... reunite an Indian child with his or her family.” 25 C.F.R. § 23.2. They must be “timely and diligent.” RCW 13.38.040(1)(a). Mere passive efforts, such as “simply providing referrals to ... services,” do not suffice. RCW 13.38.040(1)(a)(ii).

That means the department must assist parents “with accessing or developing the resources necessary to satisfy the case plan.” 25 C.F.R. § 23.2. It must “actively assist” parents to obtain services and “to overcome barriers” in accessing services. *Id.* It must “actively work ... to engage [parents] in remedial services and rehabilitative programs.” RCW 13.38.040(1)(a)(ii). For example, “rather than requiring a client to find a job[ ] [and] acquir[e] new housing, ... [ICWA] would require that the case worker help the client develop job and parenting skills necessary to retain custody of her child.” Craig J. Dorsay, *The Indian Child Welfare Act and Laws Affecting Indian Juveniles* 157-58 (1984).

The department provides active efforts where it helps find housing, helps pay a month's rent, provides numerous, culturally appropriate supportive services, and pays for monthly bus passes and taxi expenses. *In re Welfare of L.N.B.-L*, 157 Wn. App. 215, 227-252, 237 P.3d 944 (2010). The requirement is met where the department funds methadone treatment, daily counseling, and vouchers for the infant's needs. *In re Dependency of A.M.*, 106 Wn. App. 123, 126-28, 22 P.3d 828 (2001).

Conversely, the department falls short when it merely makes a referral to an assessment and provides a referral to a class when it is too late to start. *In re Welfare of A.L.C.*, 8 Wn. App. 2d 864, 875, 439 P.3d 694 (2019). The department fails in its obligation when it knows a parent is homeless and yet makes no effort to find housing resources for three months, "much less assist [him] with 'utilizing and accessing' housing resources." *Id.* (quoting 25 C.F.R. § 23.2(8)).

The department did not make active, thorough, and diligent efforts to reunite L.K.'s family.

3. *The minimal efforts the department provided Ms. L.K. during the removal of her children did not constitute "active efforts."*

Active efforts are not merely making services available to a parent, but also providing meaningful case management assistance, financially providing services, and finding ways around resistance by working with

parents to make sure they get the assistance they need. *In re Parental Rights to D.J.S.*, 12 Wn. App. 2d 1, 32, 456 P.3d 820 (2020).

The department knows how to make such efforts. In 2017, it provided involved, direct, holistic services to Ms. L.K. RP 263-65, 270-71. Thanks to the services, the department did not file a dependency petition. RP 250-51. The social worker from 2017 stated Ms. L.K.'s home "was clean[ and] there [were] no safety concerns." RP 271. Inexplicably, the department now asserts these services were "unsuccessful." *See* Resp. to MDR at 15. The department's past efforts kept the family together.

In contrast, during the nearly six-month period before the trial in 2019, the department's passive efforts do not approach the required standard. *See D.J.S.*, 12 Wn. App. 2d at 32; *L.N.B.-L.*, 157 Wn. App. at 227-252; RP 2, 159-60. The department acknowledged its duty to correct Ms. L.K.'s lack of housing, but only provided Ms. L.K. a phone number to a waiting list at the start of the case and sat with her while she called it. 25 C.F.R. § 23.2(2); RP 288-89, 306. The social worker made no follow up. This small effort did not give Ms. L.K. the support or housing she needed. RP 22, 33. This referral was not an active effort to correct the problem or provide rehabilitative support. *See* 25 C.F.R. § 23.2; RCW 13.38.040(1)(a)(ii); *A.L.C.*, 8 Wn. App. 2d at 875.

Chapter 13.34 RCW requires consideration of whether the department provided meaningful assistance to obtain housing before the court places a child into foster care. RCW 13.34.130(6). Indian children cannot be owed less than all other children under Chapter 13.34 RCW.

The department suggests its other actions provide evidence of active efforts: it requested a drug test and evaluation, arranged for visitation, and wrote a case plan no evidence shows Ms. L.K. saw. Resp. to MDR at 13-14; RP 20, 289, 303-06. However, testing and evaluations are diagnostic tools, not remedial services. Like referrals, mere requests are not active efforts. 25 C.F.R. § 23.2; RCW 13.38.040 (1)(a)(ii); *see A.L.C.*, 8 Wn. App. 2d at 875.

Additionally, it is uncertain the department expressly offered Ms. L.K. anything other than a drug test and evaluation, which were all Ms. L.K. knew of. RP 20, 289, 312. The social worker appears to have inferred Ms. L.K. would refuse parenting and counseling services and no testimony establishes if or when those were offered. *Id.*

Further, “[v]isitation is the right of the family,” not a service. RCW 13.34.136(2)(b)(ii)(A). The department made no effort to comply with ICWA’s directive to provide visitation “in the most natural setting possible [and provide] trial home visits;” all visits occurred in the visit supervisor’s office. 25 C.F.R. § 23.2(7); RP 289. Similarly, while the

department made some effort in the first nine days of the case to locate a culturally appropriate foster home, it did not make continuous, active efforts after it initially failed to find a Native foster home for the children. Resp. to MDR (citing RP 222); *see* 25 U.S.C. § 1915; 25 C.F.R. §§ 23.2; Z.J.G., No. 98003-9, at 7 n.5; RP 158, 206, 217, 222, 224, 284.

Had the department made active efforts to help resolve Ms. L.K.'s homelessness, the resultant stability could have improved her ability to address other issues, such as possible drug use and concerns for mental health instability. Having safe, permanent housing prior to treatment interventions increases the efficacy of the subsequent drug and mental health treatment. *See, e.g.*, U.S. Dep't. of Hous. & Urban Dev., *Housing First in Permanent Supportive Housing Brief*, (Jul. 2015);<sup>7</sup> Seattle Univ. Sch. of Law Homeless Rights Advocacy Proj., *The Effectiveness of Housing First & Permanent Supportive Housing* (Jul. 25, 2018).<sup>8</sup> The efforts of the department to find Ms. L.K. housing were insufficient.

After removing Ms. L.K.'s children, the department had a duty to actively assist Ms. L.K. with housing, financial, and transportation resources, as well as to support visitation in a natural setting, so that the

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<sup>7</sup> Available at [www.hudexchange.info/resource/3892/housing-first-in-permanent-supportive-housing-brief](http://www.hudexchange.info/resource/3892/housing-first-in-permanent-supportive-housing-brief).

<sup>8</sup> Available at [law.seattleu.edu/Documents/korematsu/HRAP-Excerpts-of-Studies-on-Housing-First-Permanent-Supportive-Housing.pdf](http://law.seattleu.edu/Documents/korematsu/HRAP-Excerpts-of-Studies-on-Housing-First-Permanent-Supportive-Housing.pdf)

removal would end as soon as possible. 25 C.F.R. § 23.2; *see L.N.B.-L.*, 157 Wn. App. 215; *A.M.*, 106 Wn. App. at 126-28. Stability would have improved the effectiveness of any mental health or substance use services.

*4. The department must make timely active efforts to reunite the family during the pending removal proceedings.*

Both ICWA and WICWA mandate that active efforts be “timely.” 25 C.F.R. § 23.2; RCW 13.38.040(1)(a). They are intended to “reunite” children with their family, thus, past services do not satisfy the duty to provide active efforts during the removal. 25 C.F.R. § 23.2. Courts may not create an exception to ICWA’s and WICWA’s timeliness requirement. *T.A.W.*, 186 Wn.2d at 851.

Yet the only “active” department actions occurred significantly in the past: one or two years before the dependency trial. RP 258, 260, 278; CP 2-3, 140, 151. At trial, the department relied on these past services to argue it made active efforts. RP 402-04. These efforts were not active, timely efforts to reunite the family during the current removal. Relying on stale and years-old efforts deprives the word “timely” of any meaning. *See* 25 C.F.R. § 23.2; RCW 13.38.040(1)(a).

*5. The department’s obligation to provide active efforts was not excused because Ms. L.K. declined voluntary testing*

The department acknowledges all services are voluntary before a dependency finding. Resp. to MDR at 15; *see* RCW 13.34.065(4)(j). Yet it

suggests it could do no more because Ms. L.K. “refus[ed] all services” by declining a drug test and evaluation. Resp. to MDR at 15-17. It is unclear anything else was offered to her. *See* RP 20, 289, 312. However, Ms. L.K. accepted the housing wait list referral and indicated she would welcome the services received before. RP 21, 34, 289, 312. But the department never offered what it had previously offered to her and to other parents. Resp. to MDR at 13-14; *see L.N.B.-L.*, 157 Wn. App. 215. Ms. L.K. never refused rehabilitative services for housing and other needs. RP 20.

The department also claims its failures are absolved because Ms. L.K. did not tell it what help she specifically wanted. *See* Resp. to MDR at 14. A mother’s “lack of effort does not excuse [the State’s] failure to make and demonstrate its efforts.” *Bill S. v. Dep’t of Health & Soc. Servs.*, 436 P.3d 976, 983 (Alaska 2019); 25 U.S.C. § 1912(d). Ms. L.K. had no obligation to name services she would find helpful. ICWA and WICWA place the onus on the department to identify and provide assistance to promote reunification. 25 C.F.R. § 23.2; 25 U.S.C. § 1912(d); RCW 13.38.130. The department knew Ms. L.K. needed housing and help with childcare and her “chaotic lifestyle” from the start, yet its case plan did not address those issues. *See* CP 5; Resp. to MDR at 14.

When the department knows of a parent’s additional needs, it may not rely on a “false premise that all other services should await” a desired

test or assessment regarding a different need. *In re Dependency of T.L.G.*, 126 Wn. App. 181, 203, 108 P.3d 156 (2005). By denying rehabilitative services because Ms. L.K. refused a drug test, despite its capacity and obligation to do much more, that is what the department did here. *Id.*; RP 263-65, 270.

The department quotes a termination case, *D.J.S.*, 12 Wn. App. 2d at 32 (itself citing a termination case, not a dependency case) to assert that courts in dependency cases should “weigh[ ] a parent’s demonstrated lack of willingness to participate in treatment” to assess if active efforts were made. Resp. to MDR at 12-13. This argument fails for several reasons.

First, Ms. L.K. had no obligation to accept services before a disposition order, and she never agreed to them, so her refusal cannot waive the department’s duty. RCW 13.34.065(4)(j); L.R.-CP 21, D.B.-CP 21; *see T.L.G.*, 126 Wn. App. at 203.

Second, futility is a doctrine of termination, not dependency, based on RCW 13.34.180(1)(d)’s requirement for “services ... capable of correcting ... deficiencies within the foreseeable future.”

Third, this Court has never held the judicially created futility exception applies under ICWA or WICWA. It must not, as neither act contains the exception. *See T.A.W.*, 186 Wn.2d at 850-51 (refusing to create an exception to ICWA absent express legislative intent). The

statutes unequivocally state the department must always satisfy the active efforts requirement before any proceeding culminating in a foster care placement. 25 U.S.C. 1912(d); RCW 13.38.130(1).

Ms. L.K. was willing to accept support with housing and childcare and her children were never at risk in her care beyond what voluntary services could correct. Despite ICWA and WICWA's clear directives, the department abdicated its duty to work actively to reunite Ms. L.K.'s family during the nearly six months between her children's removal and the trial. *See* 25 U.S.C. § 1912(d). Its efforts were not affirmative, thorough, or diligent. *See* 25 C.F.R. § 23.2; RCW 13.38.040.

6. *The invited error doctrine requires affirmative, knowing action.*

The invited error doctrine prevents "a party who sets up an error at trial [from] claim[ing] that very action as error on appeal and receiv[ing] a new trial." *In re Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014) (plurality opinion). It exists "in part to prevent parties from misleading trial courts and receiving a windfall by doing so." *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). Failure to object does not invite an error. *State v. Strode*, 167 Wn.2d 222, 229, 217 P.3d 310 (2009).

The doctrine requires proof the party "intentionally or knowingly set up the error." *In re Det. of W.C.C.*, 185 Wn.2d 260, 265 n.3, 370 P.3d

1289 (2016); *In re Thompson*, 141 Wn. 2d 712, 715, 724, 10 P.3d 380 (2000) (“knowing and voluntary actions.”).

A party may only invite error if it “affirmatively assented to the error, materially contributed to it, or benefited from it.” *Momah*, 167 Wn.2d at 154. Contribution is a formal and affirmative act, like proposing an instruction, moving for the admission of an exhibit, or agreeing to a document in writing. *Id.* at 153-54; *In re Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003); *State v. Elmore*, 139 Wn. 2d 250, 280, 985 P.2d 289 (1999); *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

Ms. L.K. did not affirmatively contribute or consent to any error. She stated she needed support. RP 22, 42-43, 69, 216, 392-95. The department had a duty to make active efforts to help her. 25 U.S.C. § 1912(d); RCW 13.38.130. Ms. L.K. did not refuse all services or claim none would help her. She accepted the limited housing assistance offered. RP 288-89. She made efforts to find housing. RP 11, 22, 67-68. She actively participated in her visits. RP 289.

Ms. L.K. did not materially contribute to this error merely by rejecting one service and accepting another. *See Coggin*, 182 Wn.2d at 119; *Thompson*, 141 Wn.2d at 724. Further, Ms. L.K. did not benefit from this invasion of her constitutionally protected relationship with her

children. *See Momah*, 167 Wn.2d at 153-55. She certainly did not make an intentionally “misleading” argument to garner “a windfall.” *Id.*

The Court of Appeals thought Ms. L.K. invited the error through her silence because she “never claimed the department was failing its obligations under ICWA and WICWA.” *Matter of A.L.K.*, slip op. at 2. But silence does not invite error. *Strode*, 167 Wn.2d at 229.

Ms. L.K. had no obligation to accept voluntary testing. *See* RCW 13.34.065(4)(j). She did not waive her right to active efforts to reunite her family by declining testing or asserting a general denial defense. Ms. L.K. never invited the department’s failure to satisfy ICWA and WICWA.

#### E. CONCLUSION

Indian children may not be removed from their parent’s care and sent to foster care without continuous, affirmative, diligent, and active efforts to support the family’s reunification, and this requirement cannot be waived because a mother rejects voluntary evaluations while accepting rehabilitative services.

Submitted this 17th day of September 2020.



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Washington Appellate Project (WAP #91052)  
Attorney for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE A.L.K. AND D.B.C.K-S.,  
A MINOR CHILDREN.

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NO. 98487-5

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