AMICUS CURIAE BRIEF IN SUPPORT OF

DEFENDANT/RESPONDENT, JOSEPH A.

I.

Regardless of Whether the ICWA Applies, the Agency Has an Obligation to Assist in Enrollment.

Although the Indian Child Welfare Act[1] (25 U.S.C. §§ 1901 *et seq*.) was enacted in 1978, and codified in California in 2006 (Senate Bill No. 678 (2005-2006 Reg. Sess.); 2006 Cal. Stats. Ch. 838), a disproportionate amount of judicial energy has been spent on notice issues, at the expense of substantive provisions of the ICWA. As a consequence, the actual application and implementation of the Act has had limited case interpretation, including issues that are important to tribes, such as when and how "active efforts" applies to dependency cases.

The primary issue pending is whether the Agency has any obligation to facilitate enrollment of a minor in his or her tribe as part of the Agency's ongoing duty to safeguard the health, safety and welfare of dependent minors. To a large degree, this case hinges upon terminology. Whether efforts to enroll an eligible child are called "active efforts" (25 U.S.C. § 1912(d)), "reasonable services" (Welf. and Inst. Code § 361.5[2]), "reasonable efforts" (42 U.S.C. § 671), or simply part of the "full array of

[1] All future references to "the Act" are to the Indian Child Welfare Act.
[2] Unless stated otherwise, all further statutory references are to the Welfare and Institutions Code.

social and health services to help the child" (§ 300.2) is not determinative, because the Agency must still make a statutorily required *effort.*

California Rule of Court 5.482(c) uses the term "active efforts" as the standard by which the Agency must secure tribal membership once a tribe indicates a child is eligible. In so doing, it incorporates the terminology in an unrelated section, Rule 5.484(c) (based on § 361.7 and 25 U.S.C. § 1912(d)) that applies to the level of remedial services and rehabilitative programs required before breaking up an Indian family. In other words, the terminology of "active efforts" to prevent the break-up of Indian families is not common currency, and the use of the same name confuses the issue.

When a child is removed from its parents in the dependency system, the Agency steps into the shoes of the parent and is obligated to enroll a child in school, facilitate health care, dental care, IEP plans, special education and disability programs, to name a few examples. Section 16001.9 prescribes the rights of children in foster care, and mandates that they receive medical, dental, vision and mental health services. In addition, § 16001.9(a)(13) specifies that it is a *right* of foster care minors to "participate in extracurricular, cultural and personal enrichment activities"—which should include tribal cultural activities, and assistance in enrollment in the child's tribe.

Furthermore, the Agency has an ongoing obligation to reunify parents and children, and the efforts to enroll an Indian child help keep the family intact by accessing tribal resources, programs and culture. Once enrolled, an Indian child is eligible for federal benefits provided by the Indian Health Service, educational benefits, housing, and depending on the tribe, possible financial stipends, which are without question in the best interest of the child. (*In re Barbara R.* (2006) 137 Cal.App.4th 941, 947.)

One court held that active efforts under the ICWA and reasonable reunification efforts under California law are "essentially undifferentiable." (*In re Michael G.* (1998) 63 Cal.App.4th 700, 714.) Even though active efforts suggest a non-passive, higher level of services than reasonable efforts, both sets of obligations are tasked to the Agency, as part of their duties to reunify or prevent the break-up of families, and cannot be delegated to someone else, or ignored.

In short, the obligation to assist and make *efforts* to secure tribal membership for a child, as specified by Rule 5.482(c) is already an affirmative obligation of the Agency, and it should not be dispositive of whether the obligation is called "active efforts" or "reasonable efforts" or some other name.

/ / /

/ / /

/ / /

II.
"Active Efforts" to Enroll is a Misnomer, and in Fact is Similar to Many Other Orders Routinely Made by Juvenile Courts.

At first blush, it seems tautological to require the Agency to exert active efforts to assist with enrollment, in order to then apply the higher active efforts standard of reunification. However, application of the ICWA before disposition is not tautological, and in many instances the juvenile court does exactly the same thing by applying dependency rules pre-jurisdictionally. Even before a child has been found to fall under the jurisdictional descriptions of § 300(a)-(j), and adjudged a dependent child, the court can make detention orders (before jurisdiction). Pre-jurisdictional orders include: inquiries and orders regarding paternity (§ 316.2(a)); directing parents to provide medical, dental, mental health and education information, and questionnaires (§ 16010(f)); ordering reunification services to commence, including psychological evaluations (§ 319 and Rule 6.678(c)(3)(C).) If the child is detained, the court can order temporary custody and control be vested with the county welfare department (Rule 5.678(d)), and if warranted exclude a parent or person from the child's dwelling under its inherent powers. (*In re M.B.* (2011) 201 Cal.App.4th 1057, 1062 fn. 1, citing § 213.5(a) and (d).)

Ordering some level of efforts to assist in enrolling a child, even if the Act's application is still being investigated, is not different from juvenile courts making detention orders before the court has taken

jurisdiction. Calling it active efforts is not putting the cart before the horse, but is consistent with the Agency's mandate to exert every effort to avoid removing children and breaking up Indian families.

In reality, tribes have varied enrollment processes, but still rely upon the Agency to produce birth or death certificates, Social Security cards, and other documentation necessary to enroll an Indian child. Parents in the dependency system have often abandoned their parental responsibilities, and in many cases the Agency may be the only available entity authorized to obtain records such as birth or death certificates. (Health and Safety Code § 103526(c)(2)(B).) Unless a tribe has a procedure to enroll a child at birth, the process will necessarily rely upon the Agency and court's cooperation. And, if the Agency is uncooperative, or derelict in transmitting records to the appropriate tribal agency, it may have the effect of allowing the Agency to thwart enrollment.

Once the Agency has assumed the custodial duties (even pre-jurisdiction), and is entrusted to safeguard a minor's health, safety, welfare and education, those responsibilities should include expediting a minor's enrollment or membership in their tribe. The burden cannot, and should not, be shifted to the parent, Indian custodian, or the child's tribe. To the extent that using the term "active efforts" for parental enrollment assistance is misnamed, it should be corrected.

III.

Meeting the ICWA's Requirements in a Case Where the Children Are Likely, if not Virtually Certain, to Be Enrolled is Proper.

Even though application of the ICWA was not necessary to compel the Agency to assist in enrollment, and thereby protect the children's best interests, it was proper in this case. The facts here are not identical to those in the Fourth District's recent decision in *In re Jack C., III* ((2011) 192 Cal.App.4th 967), but they are similar. In both cases the children's eligibility for membership was established by their respective tribes, and only mere bureaucratic requirements remained before the children were formally enrolled. (CT 333, 390; *Jack C., supra*, at 974, 980.) The determination of tribal membership is central to sovereignty and self-governance, and is a decision left exclusively to tribes, whose decision is conclusive. (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 55; *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 110; § 224.3(e)(1).)

In the case before the Court, the children's enrollment applications had already been filled out by the Cherokee Nation. (CT 336-342, 393-398.1.) Only signatures and birth or death certificates were needed in order for the children to become enrolled. (CT 343, 391.) Contrary to the ICWA expert witness' testimony, the father did not need to be enrolled as a prerequisite for the children to be enrolled. Instead, the children's lineage through the father needed to be documented—which could be accomplished through the birth and death certificates. Had the Agency

provided signatures and certificates (which it was authorized to do by Health and Safety Code § 103526(c)(2)(B)), it appears the children's enrollment was virtually certain.

The trial court appropriately proceeded as if the ICWA applied and ordered compliance with the Act's procedural requirements (e.g., testimony of an expert witness) in order to avoid "not hav[ing] to redo something and mak[ing] this dependency matter two or three times as long" as necessary. (RT 33.) In doing so, the trial court was acting in both the children's best interests (by advancing towards timely permanency) and the court's (by conserving judicial resources).

IV.
"Active Efforts" to Enroll Does not Impermissibly Expand the ICWA's Application in California.

The term "active efforts" is not defined in the ICWA. California law states that "what constitutes active efforts shall be assessed on a case-by-case basis." (§ 361.7(b).) The California statute also provides that active efforts shall utilize the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies. (§ 361.7(b).)

Under the most conservative reading of the ICWA and its complementary state legislation, active efforts to prevent the break-up of the Indian family occurs after disposition. Where, as in *Abbigail A.*, the court has taken jurisdiction and approved a plan of disposition, the Agency

has already assumed the burden of reunifying the family, and providing remedial services. Assisting in enrollment is merely a component of those services.

Even if enrollment assistance were broader than ordinary reunification services, federal and state law allow California to exceed the minimum standards set forth in the ICWA. (25 U.S.C. § 1921; § 224(d).) If there is a variance between state and federal law, courts must apply the higher standard. (*Ibid*.)

Moreover, the Bureau of Indian Affairs Guidelines for State Courts and Agencies in Indian Child Custody Proceedings (Guidelines)[3] (80 Fed. Reg. 20256 (February 25, 2015)) include a definition of "active efforts," and clarify that it is intended to require a level of effort beyond "reasonable efforts." (Guidelines, *supra*, § A.2.)

Significantly, the 2015 Guidelines also update the timetable for *when* active efforts commence—and it is much earlier than disposition, starting at detention—because the Guidelines specify that active efforts must begin at the moment the possibility arises that the Indian child *may* be removed. The active efforts continue while the Agency verifies whether the child is a member of the tribe, eligible for membership, or whether a biological parent of the child is a member of a tribe. (Guidelines, *supra*, §§

[3] The Guidelines were originally published in 1979 at 44 Fed. Reg. 67584 (November 26, 1979), but were revised on February 25, 2015.

B.1(a)-(b).) Although the Guidelines are non-binding, California courts have frequently applied them. They are given great deference because of the Bureau of Indian Affairs' long experience in determining who is a Indian, and represent the correct interpretation of the Act (*In re Junious M.* (1983) 144 Cal.App.3d 786, 792-793); and, they are entitled to great weight (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422, fn. 3, citing *In re Junious M.*, *supra,* 144 Cal.App.3d at p. 792, fn.7).

V.
It Would Not Be Futile to Remand With Instructions to Submit the Enrollment Applications.

As the Third District noted, the trial court received testimony from the Agency's expert witness, who asserted that the children's father must be enrolled before the Cherokee Nation would enroll the children. (*Abbigail A.*, *supra*, at 195.) However, that testimony was inaccurate. The Nation states in its January 29, 2013 letter that the children were eligible for enrollment simply by "having direct lineage to an enrolled member." (CT 333.) Neither that letter, nor the Nation's follow-up letter 30 days after receiving no response from the Agency, suggest in any way that the children's enrollment was predicated on a parent first enrolling. (CT 333, 390.) Instead, the Nation's letters stated that it could not intervene in the case until either the children *or* parent was enrolled. The Nation's

determination should have been taken at face value and not relegated to interpretation of the Agency's expert.

By separate submission, CILS requests that this Court take judicial notice of the Cherokee Nation's Constitution and Enrollment Ordinance. Those official tribal acts establish that the children's enrollment does not require any action beyond the Agency's power. Had the Agency simply processed the enrollment applications with a fraction of the effort it has spent contesting its obligation to do so, it would have met the state's policy and goal of "protecting Indian children who are members of, or are eligible for membership in, an Indian tribe." (§ 224(a)(1).)

The trial court properly proceeded as if the act did apply, and ultimately placed the minors in a home that was compliant with the Act's placement preferences without compromising its procedural safeguards.

VI.
Conclusion

Assisting in enrolling Indian children benefits minors, tribes, and even the Agency by accessing potential sources of cultural, political, social service, and financial support. Since the Agency has custody of or access to the records necessary to apply for tribal enrollment or membership, and has a statutory duty to protect a dependent or foster care minor's best interests, including their medical and educational needs, the Agency can be ordered to assist with enrollment. The requirements of Rule 5.482(c) are

coextensive with the Agency's obligation to provide remedial and rehabilitative services to reunify families, and the Court should not be hindered by terminology. Whether securing enrollment or membership for an Indian child is described as active efforts, reasonable efforts, or some other term, the burden remains on the Agency, and the Court should continue to require the Agency to comply with state law to reunify families and protect Indian foster children.

Dated: May 4, 2015

Respectfully Submitted,

Mark A. Radoff
California Indian Legal Services