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The Supreme Court of Washington's Broad Interpretation of the "Reason To Know" Standard in *In Re Dependency of Z.J.G.* and Why a Uniform, Broad Interpretation of the Standard Will Lead to Better Outcomes

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THE SUPREME COURT OF WASHINGTON'S BROAD INTERPRETATION OF THE "REASON TO KNOW" STANDARD IN *IN RE DEPENDENCY OF Z.J.G.* AND WHY A UNIFORM, BROAD INTERPRETATION OF THE STANDARD WILL LEAD TO BETTER OUTCOMES

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Introduction

Congress enacted the Indian Child Welfare Act of 1978 (ICWA) to remedy the widespread and disparate removal of Indian Children from their unique cultures.[1] Around the time ICWA was enacted, a survey of sixteen states showed "approximately 85 percent of all Indian children in foster care were living in non-Indian homes."[2] ICWA provides standards for removing Indian children from their families in an effort to further the objectives of keeping Indian children in their cultures and preventing the breaking-up of families.[3] One of these standards, and the focal point of this Note, requires state courts to provide formal notice to the child's tribe where the court has "reason to know" the child is an Indian child in a custody proceeding.[4] The "reason to know" provision plays a key role as a gatekeeping function to afford tribes the opportunity to protect their children.[5] If a court decides there is not "reason to know" the child is, in fact, an Indian child, the child may be deprived of the heightened standards of ICWA.[6] Thus, whether courts apply this standard broadly or take a more narrow view plays a major role in custody proceedings. A uniform, broad application of ICWA's "reason to know" standard better serves legislative intent, delivers more equitable and expedient outcomes for Native American children, and respects tribes' rights to exclusively determine tribal membership.

In 2020, the Washington Supreme Court adopted a broad interpretation of "reason to know" under ICWA in the case of *In re Dependency of Z.J.G.* This Note analyzes the Z.J.G. decision and evaluates how such an

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1. H.R. REP. NO. 95-1386, at 8 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7530.
2. *Id.* at 9, 1978 U.S.C.C.A.N. at 7531.
3. *Id.* at 8, 1978 U.S.C.C.A.N. at 7530.
4. 25 U.S.C. § 1912(a).
5. *In re* Dependency of Z.J.G., 471 P.3d 853, 856 (Wash. 2020).
6. 25 U.S.C. § 1912(a).

interpretation will lead to better outcomes. In addition, this Note explains how a broad interpretation leads to more desirable outcomes while honoring tribes' exclusive role in determining tribal membership.[7] Part I of this Note lays out a history of court decisions inconsistently applying ICWA's "reason to know" standard. Often, these courts take it upon themselves to determine whether a child is an Indian child.[8] In Part II, this Note explores the Supreme Court of Washington's decision, in *In re Dependency of Z.J.G.*, to adopt a broad interpretation of "reason to know" and honor tribes' exclusive role in determining tribal membership.[9] Part III addresses the need for a uniform and broad interpretation of the "reason to know" standard and the benefits it will carry. This Note addresses how to best implement a policy of broadly interpreting the "reason to know" standard in Part IV. Lastly, Part V concludes this Note and summarizes the need for a uniform, broad application of "reason to know."

I. History of States' Application of "Reason to Know" Under ICWA

After the enactment of ICWA in 1978, state courts largely took it upon themselves to define tribal membership and carve out exceptions to the application of ICWA.[10] One example of such an exception is the "existing Indian family" exception, which is no longer a viable doctrine according to the Bureau of Indian Affairs (BIA).[11] The "existing Indian family" exception allowed courts to ignore ICWA if it believed the child was not a member of an "existing Indian family."[12] Yet, even with the repudiation of the "existing Indian family" exception, state courts' application of ICWA remains unpredictable and inconsistent through varying interpretations of the "reason to know" standard.[13]

A. States' Use of the "Existing Indian Family" Exception

Until it was declared inviable, state courts applied an exception known as the "existing Indian family" exception when deciding whether ICWA

7. *Z.J.G.*, 471 P.3d at 870.

8. *See infra* Part I.

9. *See Z.J.G.*, 471 P.3d at 870.

10. *Id.* at 862.

11. *Id.* at 863 (quoting ICWA Proceedings, 81 Fed. Reg. 38778-01, 38815 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23)).

12. *Id.* at 862.

13. Kate Fort, *Reason to Know [ICWA] Out of the Ohio Court of Appeals*, TURTLE TALK (Jan. 25, 2019), https://turtletalk.blog/2019/01/25/reason-to-know-icwa-out-of-the-ohio-court-of-appeals/.

applied to a custody proceeding.[14] In applying this exception, courts would "examine the child and their family and unilaterally determine the 'Indian-ness'" of the family.[15] Even if a court had knowledge of a child's status as a member of a Native American Tribe, it would not afford the child ICWA protection if he or she was not a member of an "existing Indian family."[16] Thus, under the "existing Indian family" exception, a child might meet the statutory definition of an Indian child under ICWA yet not be afforded the protections provided by ICWA.[17]

The origins of the "existing Indian family" exception can be traced back to the Supreme Court of Kansas in *In re Adoption of Baby Boy L.*[18] In this case, a child whose father had Native American ancestry was born out of wedlock.[19] On the date of the child's birth, the mother placed the child for adoption and signed a consent form directed to the child's adoptive parents.[20] The fact that the child may have Native ancestry, possibly invoking ICWA, became apparent after the father objected to the adoption and asked the trial court to grant full custody rights.[21] The father then filed an amended petition asking the court to place the child within his tribe pursuant to ICWA, which the trial court inevitably denied.[22]

On appeal, the Supreme Court of Kansas relied on legislative history—more specifically, congressional intent—when making its decision.[23] The court concluded that Congress enacted ICWA to maintain "family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment."[24] The court, therefore, did not find it appropriate to remove from adoptive custody an "illegitimate infant" who never lived in an Indian home and probably never would; holding otherwise, reasoned the court, would violate legislative intent.[25]

Several states then began to adopt the "existing Indian family" exception. For example, the Supreme Court of Washington endorsed the exception in

14. *Z.J.G.*, 471 P.3d at 863 (quoting ICWA Proceedings, 81 Fed. Reg. at 38815).
15. *Id.* at 862.
16. *Id.*
17. *Id.*
18. 643 P.2d 168, 171 (Kan. 1982).
19. *Id.* at 172.
20. *Id.*
21. *Id.* at 173.
22. *Id.*
23. *Id.* at 175.
24. *Id.*
25. *Id.*

its 1992 decision of *In re Adoption of Crews*.[26] In *Crews*, a pregnant woman decided to put her baby up for adoption.[27] Crews—the mother—testified that, when arranging the adoption, she told her counselor she had Native American ancestry but "didn't know how much."[28] Before the adoption, Crews signed a form relinquishing all of her rights to notice of all proceedings, verifying that ICWA did not apply to the adoption.[29] In mid-1989, the court approved relinquishment of Crews' parental rights of the child.[30] Once the adopting family took the child home, Crews contacted her counselor and requested the return of her child.[31] Following extensive contact with the Choctaw Nation of Oklahoma, Crews received a Certificate of Degree of Indian Blood (CDIB) a few months later and sought to vacate the order terminating her parental rights on the grounds that her consent was obtained in violation of ICWA.[32]

The Supreme Court of Washington affirmed the decision of the lower court, ruling that the child did not become an Indian child until Crews received the CDIB, at which point Crews already waived her parental rights.[33] To bolster its conclusion, the court endorsed the "existing Indian Family" exception utilized by other states, by relying on the fact that Crews "testified that her family [did] not regularly participate in any Indian practices or events."[34] The court further considered the fact that Crews had never been to Oklahoma, that she had no plans to relocate to Oklahoma, that there was insufficient evidence supporting the idea that the child would grow up in an "Indian environment," and Crews' lack of interest in her Native American heritage.[35] While acknowledging "ICWA was enacted to counteract the large scale separations of Indian children from their families, tribes, and culture," the court did not believe applying ICWA to the facts in *Crews* served the statute's purpose.[36] Thus, the court concluded that "[t]o

26. *In re* Adoption of Crews, 825 P.2d 305 (Wash. 1992), *overruled in part by In re* Adoption of T.A.W., 383 P.3d 492 (Wash. 2016).

27. *Id.* at 306.

28. *Id.* at 307.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 307–08.

33. *Id.* at 308.

34. *Id.* at 308–10.

35. *Id.* at 310.

36. *Id.* at 308.

apply ICWA in this specific situation would not further the policies and purposes of [the Act]."[37]

In a concurring opinion, Justice Andersen thought the court ought not look into the "Indian-ness" of the birth family.[38] Instead, Justice Andersen believed that, because the child did not meet the statutory definition of "Indian child" at the time Crews relinquished her parental rights, ICWA did not apply.[39] Justice Andersen's view that courts need not look into the "Indian-ness" of a family turned out to eventually be the prevailing view.[40]

Washington was among numerous states that adopted the eventually overruled "existing Indian family" exception. The Supreme Court of Oklahoma endorsed the exception in *In re Adoption of Baby Boy D*.[41] In *Baby Boy D.*, the court held ICWA did not apply to a child "who has never resided in an Indian family, and who has a non-Indian mother."[42] Similarly, in South Dakota, the state's supreme court held that, although ICWA does not expressly carve out an "existing Indian family" exception, it is "implied throughout the Act."[43] There, the court held that, because the child only lived with their non-Indian mother, the child did not live in an "Indian home" and ICWA did not apply to the adoption proceedings.[44]

The State of Indiana also endorsed the exception in *In re Adoption of T.R.M.*[45] In *T.R.M.*, the Supreme Court of Indiana found it inappropriate to apply ICWA where the child was not separated from her "Indian family."[46] The court reasoned that, despite the *T.R.M.* child's biological Native American ancestry, she was adopted five days after being born and spent the subsequent seven years with the family whom adopted her.[47]

The Supreme Court of Washington, in *Z.J.G.*, addressed the "existing Indian Family" exception as an example of how states have a long history of diminishing the heightened protections afforded to Native American children by ICWA.[48] The court stated that the exception constituted a line

37. *Id.* at 310.

38. *Id.* at 312 (Andersen, J., concurring).

39. *Id.* at 313.

40. ICWA Proceedings, 81 Fed. Reg. 38778-01, 38801–02 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23).

41. 742 P.2d 1059, 1064 (Okla. 1985).

42. *Id.*

43. Claymore v. Serr, 405 N.W.2d 650, 653 (S.D. 1987).

44. *Id.*

45. 525 N.E.2d 298, 303 (Ind. 1988).

46. *Id.*

47. *Id.*

48. *In re* Dependency of Z.J.G., 471 P.3d 853, 862–63 (Wash. 2020).

of thinking that ICWA sought to prevent.[49] Moreover, it drew on the eventual abrogation of the "existing Indian family" exception as an illustration of the trend towards a progressive application of ICWA.[50]

B. The Abrogation of the "Existing Indian Family" Exception

By 2016, many states had overturned the "existing Indian family" exception—including Kansas, the exception's state of origin.[51] In fact, "[o]nly a handful of courts continue[d] to recognize the exception" by 2016.[52] However, the BIA later clarified in an agency regulation that there is not an "existing Indian family" exception under ICWA.[53] In this regulation, the BIA noted that states that already rejected the "existing Indian family" exception were correct; where Congress intends there to be a categorical exception, "it provide[s] one expressly."[54] For example, Congress expressly provided for other ICWA exemptions such as divorce proceedings and placement resulting from juvenile delinquency.[55] Contrary to state courts' views that Congress was more concerned with Native American children living in Indian culture, such as on reservations, Congress was every bit as concerned with Native Americans whose families have "sporadic contact with the tribe."[56] As an illustration, the BIA regulation "applied the vast majority of ICWA provisions to off-reservation Indian children."[57]

Prior to the BIA's regulation declaring the "existing Indian family" exception improper, there was debate over whether the U.S. Supreme Court partially endorsed the exception in *Adoptive Couple v. Baby Girl* in 2013.[58] *Adoptive Couple* has a notably similar fact-pattern to *Baby Boy L.*—the Kansas case that gave birth to the "existing Indian family" exception.[59] Both cases involved a non-Indian mother attempting to place her baby up

49. *Id.* at 863.

50. *Id.*

51. ICWA Proceedings, 81 Fed. Reg. 38778-01, 38801 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23).

52. *Id.* at 38802.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. 570 U.S. 637 (2013); *see* Shawn L. Murphy, Comment, *The Supreme Court's Revitalization of the Dying "Existing Indian Family" Exception*, 46 MCGEORGE L. REV. 629, 645–47 (2014).

59. Murphy, *supra* note 58, at 644–45.

for adoption and a father, enrolled as a member in a federally recognized tribe, who sought to block the adoption.[60]

Some scholars argue that the courts' reasoning in both cases is synonymous and that the U.S. Supreme Court seemed to endorse the "existing Indian family" exception in *Adoptive Couple*.[61] While the arguments that the Supreme Court partially adopted the "existing Indian family" exception are convincing, the BIA tackled this contentious debate head-on. The BIA states that "the Supreme Court did not adopt the . . . exception, even though some parties urged the Court to adopt it in the *Adoptive Couple* case."[62] Instead, the holding in *Adoptive Couple* applies to a very narrow set of facts where "a parent . . . abandoned the child prior to birth and never had legal or physical custody of the child."[63]

The "existing Indian family" exception is an example of courts' disregard for ICWA. While the abrogation of the "existing Indian family" exception was a step in the right direction, courts still get ICWA wrong—specifically, by narrowly construing the "reason to know" standard. Yes, the Supreme Court of Washington, in *Z.J.G.* adopted a broad interpretation of the "reason to know standard" under ICWA,[64] but other states have recently applied narrower interpretations.

C. Narrow Interpretations and Other Shortcomings of the "Reason to Know" Standard

Children are afforded the protections of ICWA if a court has "reason to know that an Indian Child is involved . . . ."[65] An Indian child is defined 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."[66] When a court has "reason to know" there is an Indian child involved in a custody proceeding, it must provide legal notice to the tribe so the tribe has the opportunity to intervene and determine the status of the child.[67]

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60. *Id.*
61. *Id.* at 647–50.
62. ICWA Proceedings, 81 Fed. Reg. 38778-01, 38802 (June 14, 2016) (codified at 25 C.F.R. pt. 23).
63. *Id.* at 38815.
64. 471 P.3d 853, 865 (Wash. 2020).
65. 25 U.S.C. § 1912(a).
66. *Id.* § 1903(4).
67. *Z.J.G.*, 471 P.3d at 865 (citing 25 U.S.C. § 1912(a)).

As exemplified in *Z.J.G.*, the crux of a case may often be "whether there is a 'reason to know' that the child is . . . an Indian child" under ICWA.[68] Without notice of a Native American child's status as "Indian," a tribe may be deprived of the opportunity to intervene.[69] Whether a court adopts a narrow or broad interpretation of the "reason to know" standard becomes the determinative factor in triggering ICWA.

Some courts have taken a narrow approach in applying the "reason to know standard" under ICWA, such as in *In re L.R.D.*[70] This case involved a custody proceeding that ensued after police arrived at a hotel to find two parents under the influence of drugs.[71] The police found drug paraphernalia and observed that the minor children were malnourished.[72] After the trial court granted permanent custody to a local agency, the father of the children appealed, contending that the trial court erred in granting permanent custody without invoking ICWA and providing notice to the child's tribe.[73] The trial court, however, did inquire as to the existence of any Native American ancestry the children may have in a pretrial hearing.[74] The mother stated that she knew her father was Native American but that she didn't know if he was a registered member of a tribe.[75] The mother herself was an unregistered member.[76] The trial court determined that ICWA did not apply because the mother was not a member of a federally recognized tribe.[77]

On appeal, the Ohio Court of Appeals examined whether the trial court had reason to know that the *L.R.D.* child was an "Indian child" within the meaning of ICWA.[78] The court held that, in order for a child to receive heightened protection under ICWA, the party raising the issue "must do more than simply raise the possibility that a child has Native American ancestry."[79] The court took a textualist approach in applying the statute and determined that, the children were not *children* of a registered member of a

68. *Id.* at 864–65 (citing 25 U.S.C. § 1912(a)).
69. *Id.* at 861.
70. 2019-Ohio-178, 128 N.E.3d 926, at ¶ 19 (Ct. App. 2019).
71. *Id.* ¶ 3.
72. *Id.*
73. *Id.* ¶¶ 17–18.
74. *Id.* ¶ 22.
75. *Id.*
76. *Id.* ¶¶ 22–23.
77. *See Id.* ¶ 22.
78. *Id.* ¶¶ 18–20.
79. *Id.* ¶ 21.

tribe because only their grandfather was a registered member, and thus, ICWA protections were not warranted.[80]

Another example of a narrow reading of the "reason to know" standard occurred in the Virginia Court of Appeals' case of *Geouge v. Traylor*.[81] In *Geouge*, a woman discovered she was pregnant after being convicted of various crimes.[82] While serving her sentence, she gave birth to L.T.[83] After her birth, L.T. bounced around between the Department of Social Services, her biological father, and her eventual adoptive parents.[84] L.T.'s father then filed a petition to the Juvenile and Domestic Relations District Court to accept his consent for adoption and transfer of custody and to accept the consent of the mother or to "otherwise address her parental rights."[85] Subsequently, the mother filed a petition requesting L.T.'s transfer to the grandmother's cousin and for visitation rights.[86] The trial court denied the mother's petition.[87] The couple seeking to adopt L.T. filed a petition for custody of the child, to which L.T.'s mother replied with a motion to dismiss.[88] The Juvenile and Domestic Relations District Court denied the mother's motion to dismiss and granted custody to the couple seeking to adopt L.T.[89]

Subsequently, L.T.'s mother filed a motion to stay the proceedings with the Virginia Circuit Court, claiming that L.T. had Native American ancestry, and thus ICWA should have applied.[90] The court denied the mother's stay and granted custody to the couple seeking to adopt L.T.[91] L.T.'s mother then filed an appeal with the Virginia Court of Appeals.[92]

In determining whether the Circuit Court erred in denying the mother's stay, the Virginia Court of Appeals had to decide whether the lower court had "reason to know" L.T. was an Indian Child under ICWA.[93] Although the Virginia Court of Appeals acknowledged that L.T.'s mother was not

80. *Id.* ¶ 23.
81. 808 S.E.2d 541 (Va. Ct. App. 2017).
82. *Id.* at 543.
83. *Id.*
84. *Id.*
85. *Id.* at 544.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 545, 548.
92. *Id.* at 549.
93. *Id.* at 551.

required to prove that L.T. was an Indian child, she did bear the burden of establishing ICWA's application.[94] However, the court held that L.T.'s mother did not meet this burden, that the Circuit Court did not have "reason to know," and therefore the Circuit Court did not err in deeming ICWA inapplicable.[95] The court reasoned that, although the mother claimed L.T. was of Cherokee descent, she could not in good faith claim that her daughter met the definition of an "Indian child" under ICWA.[96] The court insinuated that a party raising ICWA must make more than a "bald assertion" that the act "might apply."[97]

More recently, California adopted a narrow interpretation of "reason to know" in *In re M.W.*[98] The *M.W.* facts are similar to those in *Geouge*: during the child's custody proceedings in *M.W.*, the father said he had Native American ancestry and that his "grandparents 'may have membership.'"[99] After speaking with the father's sister, the court ordered the Sacramento County Department of Child, Family, and Adult Services ("the Department") to inquire further for purposes of ICWA.[100] The Department eventually contacted the child's grandfather who stated that the child may have Navajo and Apache ancestry.[101] Other family members indicated potential Cherokee ancestry.[102]

The Department identified and contacted twelve tribes.[103] Four responded, stating that the child was not an Indian child under ICWA.[104] Thus, the juvenile court terminated the father's parental rights and concluded that ICWA did not apply.[105] Subsequently, a social worker testified that six other tribes also confirmed the child was not an Indian child under ICWA.[106]

The father appealed the orders of the juvenile court, claiming they did not comply with ICWA.[107] In its analysis, the California Court of Appeals

94. *Id.* at 550–51.
95. *Id.* at 553.
96. *Id.* at 552–53.
97. *Id.* at 553.
98. 263 Cal. Rptr. 3d 427 (Cal. Ct. App. 2020).
99. *Id.* at 430.
100. *Id.*
101. *Id.*
102. *Id.* at 431.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 432.
107. *Id.*

was not convinced the juvenile court had "reason to know."[108] The court reasoned that the father only indicated that he "may have Indian ancestry," and "there was at best a *reason to believe*" under California law, but not "reason to know" under ICWA.[109] Moreover, the only person in the family with information regarding Native American ancestry was the paternal grandfather, but "the paternal family had not been involved with the reservation for generations."[110] The court further justified its holding with the fact that all but two of the tribes confirmed the child was not an "Indian child" under ICWA.[111] With all relevant facts in mind, the California Court of Appeals found that the notice to the tribes was not required despite the fact that the child might have Native American ancestry.[112]

In re J.W.E. presents yet another shortcoming of a narrow "reason to know" interpretation.[113] Despite the fact the Oklahoma Court of Civil Appeals ultimately held there was "reason to know" in this case, the court adopted a more narrow interpretation.[114] Here, the child became an enrolled member of a tribe in the middle of trial.[115] The mother moved for a new trial because this enrollment invoked ICWA procedures, which were not followed by the trial court.[116] The court held that ICWA applied starting from the date the child became eligible for enrollment or actually enrolled as a member of the tribe.[117] Thus, the court erred in not granting a new trial when ICWA procedures were not followed.[118]

The *J.W.E.* court clarified that its holding did not mean ICWA applied from the filing of the case in 2011; rather, ICWA was invoked starting at the time the child became eligible for enrollment.[119] Under a broad interpretation of "reason to know" explored later in this Note, there would likely have been "reason to know" from the moment the court knew the child had tribal heritage and not just when the child became eligible for enrollment.

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108. *Id.* at 435
109. *Id.* at 434–35.
110. *Id.* at 435.
111. *Id.*
112. *Id.*
113. 2018 Ok Civ. App. 29, 419 P.3d 374 (Okla. Civ. App. 2018).
114. *Id.* ¶ 18, 419 P.3d at 379.
115. *Id.* ¶ 7, 419 P.3d at 376.
116. *Id.* ¶¶ 7–9, 419 P.3d at 376.
117. *Id.* ¶ 29, 419 P.3d at 381.
118. *Id.* ¶ 31, 419 P.3d at 381.
119. *Id.* ¶ 29, 419 P.3d at 381.

II. The Supreme Court of Washington's Broad Interpretation in In re Dependency of Z.J.G.

The issue of notice and "reason to know" under ICWA recently arose in Washington in the case of *Z.J.G.*[120] With an assortment of applications of the "reason to know" standard under ICWA, this case presented an opportunity for Washington to clear the air.

A. Facts of the Case

Police removed Z.G. and M.G. from the care of their parents based on concerns of neglect and unsanitary living conditions.[121] At this time, Z.G. was twenty-one months old and M.G. was two years old.[122] After being entrusted to the Department of Children, Youth, and Families (the Department), the Department found that the state had "reason to know" that both children met the definition of "Indian child" under ICWA.[123] This conclusion was based on the fact that the children's "[m]other [had] Tlingit-Haida heritage and [was] eligible for membership with Klawock Cooperative Association."[124] The Department then initiated contact with the tribes to inquire into the children's status.[125]

At the shelter care hearing, the trial court asked a social worker whether the children qualified under WICWA—Washington's version of ICWA.[126] The social worker responded: "To my knowledge, not at this time."[127] The social worker contacted Alaskan tribes that informed him that the maternal grandmother was an enrolled member of the Tlingit-Haida Tribe but neither the mother nor the children were enrolled.[128] The father of the children then testified that the mother was eligible for membership with the Tlingit-Haida Tribe and the Klawock Cooperative Association of American Indians.[129] The father stated that the children's mother also had Cherokee heritage and that he also possessed some Native American ancestry.[130] The mother

120. 471 P.3d 853 (Wash. 2020).
121. *Id.* at 857.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 857–58.

confirmed the father's testimony and additionally stated that the children were eligible for membership with the same tribes.[131]

The trial court then determined that, based on the testimony of both the social worker and the parents, ICWA did not apply.[132] The trial court then removed the children from their parents without following ICWA procedures.[133] The state's court of appeals affirmed the decision of the trial court and the Supreme Court of Washington took the case to review.[134]

B. The Supreme Court of Washington's Analysis

The Supreme Court of Washington decided there is "reason to know" a child is an Indian child when someone at a proceeding claims the child has Native American ancestral ties.[135] This is a much broader approach to the "reason to know" standard than the courts in *L.R.D.*,[136] *Geouge*,[137] *M.W.*,[138] and *J.W.E.*[139] followed. The court adopted this broad interpretation of the "reason to know" standard based on (1) respect of the tribe's exclusive jurisdiction to determine tribal membership, (2) canons of statutory interpretation, (3) statutory language and regulations, and (4) congressional intent.[140]

The court referred to case law and BIA regulations to determine that a broad interpretation of the "reason to know" standard respects tribes' exclusive jurisdiction in determining tribal membership.[141] It explained that tribal affiliation is not merely based on ancestry or blood quantum.[142] Rather, the determination of tribal membership is one of political affiliation with the tribe.[143] Because tribes hold the exclusive jurisdiction to decide whether a political affiliation exists, a broad interpretation best serves tribes' exclusive jurisdiction.[144] Further, because "[t]ribal membership is unique to each tribe," leaving the determination to state agencies or parents

131. *Id.* at 858.
132. *Id.*
133. *Id.*
134. *Id.* at 859.
135. *Id.* at 865.
136. 2019-Ohio-178, 128 N.E.3d 926 (Ct. App. 2019).
137. 808 S.E.2d 541 (Va. Ct. App. 2017).
138. 263 Cal. Rptr. 3d 427 (Cal. Ct. App. 2020).
139. 2018 Ok Civ. App. 29, 419 P.3d 374 (Okla. Civ. App. 2018).
140. *Z.J.G.*, 471 P.3d at 865.
141. *Id.*
142. *Id.* at 865–66.
143. *Id.* at 866.
144. *Id.*

would be inappropriate, "would undermine tribes' exclusive authority to determine membership and would undermine the protections of [ICWA]."[145] Therefore, formal notice to tribes gives them the opportunity to make membership determinations within their exclusive jurisdiction.[146]

The court also justified its holding using a canon of statutory construction—more specifically, a canon of statutory construction for statutes affecting tribes.[147] It states that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[148] The court noted that a liberal construction favoring notice and the "reason to know" standard is in accordance with the above-mentioned canon of construction.[149] Thus, when there is any indication that the child has tribal heritage, the canon of construction favoring an Indian tribe's interpretation of a statute requires a liberal interpretation of notice in favor of tribes.[150]

In addition, the court found a liberal construction of the "reason to know" standard compelling based on numerous statutes and regulations.[151] First, it cited to federal regulations promoting "compliance with ICWA from the earliest stages of a child-welfare proceeding."[152] The court further cited to regulations noting that early ICWA compliance not only benefits children, families, and tribes but also the judicial system by reducing delays and duplication of proceedings.[153] Second, the court addressed a list of factors provided by the BIA that indicate where there is a "reason to know."[154] The court criticized the court of appeals' analysis claiming that there is only a reason to know if the court finds evidence that the child is a member of a tribe.[155] The court concluded that the factors provided by the BIA did give it "reason to know."[156] Therefore, the court of appeals' construction of the standard was too narrow.[157]

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145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* (quoting Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985)).
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* (quoting ICWA Proceedings, 81 Fed. Reg. 38778-01, 38779 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23)).
153. *Id.* at 866–67.
154. *Id.* at 867.
155. *Id.*
156. *Id.*
157. *Id.*

Furthermore, and arguably most importantly, the court held that the legislative intent of ICWA supports an expansive interpretation of the "reason to know" standard.[158] The court alluded to the history of ICWA's enactment, including the abusive removal of Native children from their families and tribes without respect for Native American culture.[159] The court additionally relied on current BIA regulations such as those providing guidance in the event of known tribal heritage but uncertainty as to which specific tribe is implicated.[160] In that case, the "notice of the child-custody proceeding must be sent to the appropriate Bureau of Indian Affairs Regional Director."[161] Thus, a broad interpretation of the "reason to know" standard best addresses the intent of ICWA.[162]

Lastly, the court noted that other states have recently trended toward a more liberal interpretation of the "reason to know" standard.[163] The court cited cases in California, North Carolina, and Colorado to support its argument.[164] In all of the cited cases, the given court required formal notice despite lack of direct evidence of tribal membership.[165] In most of the cases, there was merely an indication at some point that the child could potentially have tribal heritage.[166]

In conclusion, the trial court had reason to know that the children were "Indian children" for purposes of ICWA because three different people indicated the children had tribal heritage.[167]

III. The Argument for a Uniform Broad Interpretation of "Reason to Know"

The Supreme Court of Washington's broad interpretation of the "reason to know" standard is a step in the right direction for ICWA. For many, *In re Dependency of Z.J.G.* was a historic decision.[168] Regardless, there still

158. *Id.*
159. *Id.*
160. *Id.* at 867–68.
161. *Id.* at 868 (quoting 25 C.F.R. § 23.111(e) (2016)).
162. *Id.*
163. *Id.*
164. *Id.* at 868–69.
165. *Id.*
166. *Id.*
167. *Id.* at 869.
168. Tara Urs, *Washington Supreme Court Delivers Resounding Defense of Indian Child Welfare Act and the Rights of Tribal Nations*, NWSIDEBAR (Oct. 1, 2020), https://nwsidebar.wsba.org/2020/10/01/washington-supreme-court-delivers-resounding-defense-of-indian-child-welfare-act-and-the-rights-of-tribal-nations/.

exists a need for uniformity in the interpretation of the "reason to know" standard. The BIA acknowledges that disparate application of ICWA is manifestly contrary to the intent behind ICWA.[169] Yet, the disparity in courts' interpretation of the "reason to know" standard causes varying results in ICWA cases based on the state where the child lives.[170] A simple solution for this variation is to adopt uniform regulations for the interpretation of the "reason to know" standard. The advantages of a uniform broad interpretation of "reason to know" can be broken down into four categories: (1) early intervention; (2) historical sensibility; (3) judicial efficiency; and (4) enhanced clarity.

A. Early Intervention

The broad interpretation of the "reason to know" standard adopted by the Supreme Court of Washington will prompt parties and courts to invoke ICWA earlier in cases.[171] This early intervention will remedy some of the shortcomings of a narrow interpretation such as motions for new trials where ICWA procedures are not followed (as exemplified in *In re J.W.E.*).[172] A more encompassing interpretation of "reason to know" sets a lower standard to trigger ICWA and thus reduces the risk that courts might fail to follow procedure required under the Act. As the Supreme Court of Washington noted in its opinion, the "reason to know" standard "ensures that the court applies the heightened ICWA . . . standards early on in any proceeding and ensures that tribes receive adequate notice of the proceeding in order to protect their children and the tribes' sovereign interests."[173] Further, BIA regulations state that "[e]arly compliance promotes the maintenance of Indian families, and the reunification of Indian children with their families whenever possible, and reduces the need for disruption in placements."[174] The lower threshold to trigger ICWA procedures adopted by the Supreme Court of Washington is an advantage for tribes and Native children alike because it will cause courts to comply with ICWA early in child custody proceedings.

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169. OFF. OF THE ASSISTANT SEC'Y – INDIAN AFFS., U.S. DEP'T OF THE INTERIOR, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT 6 (2016) [hereinafter DOI, GUIDELINES].

170. *Id.*

171. Urs, *supra* note 168.

172. 2018 OK CIV APP 29, 419 P.3d 374 (Okla. Civ. App. 2018).

173. *In re* Dependency of Z.J.G., 471 P.3d 853, 856 (Wash. 2020).

174. ICWA Proceedings, 81 Fed. Reg. 38778-01, 38779 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23).

B. Historical Sensibility

Second, a broad interpretation of "reason to know" is justified in light of the history of widespread removal of Indian children from their tribal culture and the intent and purpose of ICWA.[175] At the time ICWA was enacted, the disparity of children being removed from their homes between Native Americans and non-Native Americans was alarming.[176] In response, Congress enacted ICWA to protect Native American children and their tribes by ensuring that Native American children were not removed from their unique cultures.[177] Broadly interpreting the "reason to know" standard better serves that intent. When interpreted too narrowly, "reason to know," looks more like an independent determination by the court regarding whether the child is an Indian child.[178] A uniform and broad interpretation of the "reason to know" standard better satisfies the overall purpose of ICWA's enactment: to reduce the number of Native American children removed from their culture.[179] In addition, a broad interpretation respects tribes' exclusive jurisdiction to determine membership.[180] Simply following the notice procedures of ICWA poses little risk,[181] and doing so will benefit Indian children. A broad interpretation of the "reason to know" standard" is thus appropriate considering the historical background of ICWA and the issue Congress sought to rectify through ICWA's enactment.

C. Judicial Efficiency

Third, a uniform and broad interpretation prevents error in child custody proceedings and therefore promotes judicial efficiency. A more inclusive interpretation of the "reason to know" standard ensures increased compliance with ICWA by erring on the side of caution. In fact, doing so presents little risk compared to the costs of erroneously deciding not to

175. *See Z.J.G.*, 471 P.3d at 856, 867.

176. H.R. Rep. No. 95-1386, at 9 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7530 ("It is clear then that the Indian child welfare crisis is of massive proportions and that Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole").

177. *Id.* at 8, 1978 U.S.C.C.A.N. at 7530.

178. Kate Fort, *ICWA Regulations, Reason to Know, and the Importance of* In re Z.J.G., TURTLE TALK (Sept. 3, 2020), https://turtletalk.blog/2020/09/03/icwa-regulations-reason-to-know-and-the-importance-of-in-re-z-j-g/.

179. *Z.J.G.*, 471 P.3d at 859–60.

180. *Id*., at 865, 867.

181. *In re* Morris, 815 N.W.2d 62, 65 (Mich. 2012).

follow ICWA.[182] Not only is the burden of a new trial or other additional proceedings borne by the courts, but the burden, more unfortunately, falls on the individuals, including children, involved in the proceeding.[183] When ICWA procedures are erroneously disregarded, the individuals bear the brunt of the burden through the dissipation of their resources.[184] Most importantly, ignoring ICWA can lead to instability in placements for the child involved.[185] A broad interpretation of the "reason to know" standard would prevent unnecessary court proceedings. It would therefore foster a more efficient process for all parties involved.

D. Enhanced Clarity

Finally, a broad interpretation of the "reason to know" standard is simple. Broad interpretation allows courts to decide whether they must provide formal notice to the child's tribe without need for much inquiry. This interpretation also excuses courts from wrestling with individual tribes' membership requirements which "are unique to each tribe and vary across tribal nations."[186] In the case of *In re Dependency of Z.J.G.*, the court determined that an indication of tribal heritage constitutes "reason to know."[187] Such a simple standard allows courts and state agencies to quickly make an ICWA determination. And courts would not have to consider senseless factors, such as the date of tribal membership in *In re J.W.E.*,[188] in determining whether there is "reason to know" the child is an Indian child. The simplicity carries its way up to judicial review as well; if lower courts do not initiate ICWA procedures after someone indicated a child had tribal heritage, appellate courts would be required to remand the case without spending much time analyzing the appeal.

These advantages are merely a few of the numerous potential advantages of a uniform and broad interpretation of the "reason to know" standard. Another benefit worth mentioning is that there would be uniformity amongst the states. That is, every child would be afforded the protections of ICWA if there was an objective and consistent standard. While the idea of a

182. *See id.* (explaining that erring in favor of notice is a relatively low burden in comparison to the high costs of not following ICWA procedures).

183. ICWA Proceedings, 81 Fed. Reg. 38778-01, 38803–804 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23).

184. *Id.*

185. *Id.*

186. *In re* Dependency of Z.J.G., 471 P.3d 853, 865 (Wash. 2020).

187. *Id.*

188. 2018 OK CIV APP 29, ¶ 26, 419 P.3d 374, 381 (Okla. Civ. App. 2018).

uniform and broad interpretation is compelling, the more challenging aspect lies in implementing new regulations incorporating a broad "reason to know" standard.

IV. Implementing a Broad Interpretation of the "Reason to Know" Standard

In 2016, the BIA provided guidelines for implementing ICWA.[189] In those guidelines, the BIA instructs state courts to ask whether the participants know or have "reason to know" that the child *is* an Indian child.[190] The guidelines also explain the definition of an Indian child as "any unmarried person who is under age 18 and either: (1) a member or citizen of an Indian tribe; or (2) is eligible for membership in an Indian tribe and is the biological child of a member/citizen of an Indian tribe."[191] Thus, the current language of the guidelines allows a reasonable construction of the statute to create a "reason to know" only if a court knows the child is eligible for membership.[192] As it stands, the guidelines do not provide a clear understanding of when there is a "reason to know" a child is an Indian child. Therefore, the BIA should adopt clearer, broader, and uniform "reason to know" standards for states to follow.

A broad, uniform approach to the "reason to know" standard is advantageous for all parties. Implementing the standard, however, presents its own challenges. Although the BIA currently provides a list of factors to determine when there is "reason to know," the use of "Indian child" in the factors have led some courts to engage in a circular, narrow approach of determining a child's eligibility for tribal membership.[193] Indeed, the Supreme Court of Washington addressed this in its opinion:

> The Department argues, and the Court of Appeals found, that the combination of these provisions—the factors indicating a reason to know and the statutory Indian child definition—means that a court has "reason to know" only if there was evidence or testimony at the proceeding that the child or parent is a member of a tribe . . . However, this narrow interpretation commits the error addressed above: it assumes state agencies or participants

189. *See* DOI, GUIDELINES, *supra* note 169.
190. *Id.* at 9 (emphasis added).
191. *Id.*
192. *Id.*
193. Fort, *supra* note 178.

> will know and properly interpret tribal membership and eligibility rules.[194]

To remedy this circular reasoning, the BIA should consider changing the language of its current factors. For example, the first factor currently states a court has "reason to know" where "[a]ny 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*."[195] If the BIA considered amending this factor to exclude the phrase "is an Indian child"[196] in favor of "has tribal heritage," it would create a broad and uniform "reason to know" standard similar to the interpretation by the court in *In re Dependency of Z.J.G.*[197] Simply put, the BIA will clear up any confusion by updating the language in its factors that give courts "reason to know."

Additionally, the BIA can implement a broad and uniform policy of "reason to know" by simply amending the language of the factors provided in the Code of Federal Regulations.[198] Doing so would lead to earlier and more effective ICWA intervention, honor the historical significance of ICWA's enactment, increase efficiency for the courts and parties involved, and create a simple, easy-to-follow standard. While Washington and other states have adopted regulations conducive to a broad interpretation of the "reason to know" standard, improved regulations in more jurisdictions will assure favorable outcomes and serve the purpose of ICWA.

Another way the BIA can develop a uniformly broad interpretation of the "reason to know" standard is to explicitly instruct courts to liberally construe the current factors provided in Code of Federal Regulations. That is, the BIA can tell courts to utilize the canon of statutory construction used by the Supreme Court of Washington in *In re Dependency of Z.J.G.*[199]

Maybe "reason to know" is entirely too narrow. Perhaps a lower standard should substitute the current "reason to know" standard such as a "reasonable possibility" standard. After all, erring in favor of notice is a relatively low burden in comparison to the excessive costs of not following ICWA procedures.[200]

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194. *In re* Dependency of Z.J.G., 471 P.3d 853, 867 (Wash. 2020).
195. 25 C.F.R. § 23.107(c)(1) (2016) (emphasis added).
196. *Id.*
197. *Z.J.G.*, 471 P.3d 853.
198. 25 C.F.R. § 23.107(c).
199. 471 P.3d at 865.
200. *In re* Morris, 815 N.W.2d 62, 65 (Mich. 2012).

V. Conclusion

There is a long, unfortunate history of state courts undermining ICWA. From the "existing Indian family" exception to independently, and erroneously, determining tribal eligibility, state courts consistently fail to carry out ICWA's intent. The current language in the BIA guidelines might be a contributing factor to the widespread adoption of narrow interpretations of the "reason to know" standard by state courts.

Some states, such as Washington, have adopted broader interpretations to honor ICWA's purpose. While the adoption of broad interpretations by these states is a positive development, changes to the current BIA guidelines to be more inclusive will ensure uniform compliance and carry out the legislative intent behind ICWA. The BIA has several options—it can amend the current language, add regulations, or eliminate the entire "reason to know" standard in favor of a more comprehensive test. Regardless, action must be taken in order to remedy the injustice carried out by courts incorrectly applying ICWA .