
YALE LAW & POLICY REVIEW

Beyond *Brackeen*: Active Efforts Toward Antiracist Child Welfare Policy

*Andrea Jane Martin**

*Due to structural racism, legal protections afforded to families of children in the foster care system have been significantly eroded and continue to be challenged. The latest attempt to dismantle child welfare protections for a historically marginalized group was a prolonged attack on the Indian Child Welfare Act. Motivated in part by the racist belief that they are unfairly disadvantaged in adopting American Indian children, American Indian adversaries reached the pinnacle of their incessant attack on the law's constitutionality and its heightened requirements. Fortunately, in *Haaland v. Brackeen*, the United States Supreme Court upheld the law's important protections for American Indian children, families, and tribes.*

This Article shows that federal child welfare legislation for non-American Indian children once provided similar safeguards, but those protections were in fact eroded based on a similar racist ideology that the many Black and Brown children in foster care would fare better if adopted by White families. As a result, families of color, who are disproportionately represented in the foster care system, do not receive the support needed to maintain or regain custody of their children and preserve their families.

* Andrea Jane Martin is an Assistant Professor of Law at Penn State Dickinson Law. She earned a J.D. from Howard University School of Law, MBA from Suffolk University, and B.A. in History from the University of Rhode Island. She has worked as a corporate attorney and as a Special Assistant Attorney General for the Rhode Island Department of Attorney General. The author would like to thank Dan Lewerenz (Iowa Tribe of Kansas and Nebraska), Carolyn Williams, and members of the Section on Legal Writing, Reasoning, and Research of the Association of American Law Schools for their valuable feedback and suggestions. Additional thanks to Aranda Stathers for her assistance with research and footnotes. The author also gratefully acknowledges the *Yale Law & Policy Review* editors and staff for their valuable contributions and assistance with this Article.

BEYOND BRACKEEN

In 1978, Congress passed the Indian Child Welfare Act (ICWA), requiring “active efforts” toward family preservation for Indian children and their families. Two years later, Congress passed similar legislation for children who were not American Indian, mandating the use of “reasonable efforts” toward enabling families to remain together. Although varying standards were used, both required high levels of involvement by social agencies in providing necessary resources to maintain families. This alignment and focus on family preservation significantly benefited individuals and groups subjected to systemic issues that intersect with the child welfare system, including racism, poverty, and homelessness.

However, after twenty years, child welfare protections for non-American Indian children were substantially reduced with the passage of the Adoption and Safe Families Act in 1997. Premised on racist assumptions that parents of color in the foster care system were inherently unfit parents, this legislation reduced “reasonable efforts” to a negligible standard. Many families in the child welfare system no longer receive the level of services required to prevent unnecessary removals of their children or to regain custody of their children. This substantially affects Black children, who are overrepresented in foster care.

On the other hand, child welfare protections for American Indian children and their families have remained constant for 45 years. In fact, protections for American Indian children and families in the child welfare system have endured despite decades of challenges by ICWA opponents and by White adoptive families who dismissed past discrimination against American Indian families, ignored the importance of cultural preservation, and engaged in a concerted effort to dismantle the Indian Child Welfare Act. Furthermore, by accentuating the Act’s critical family preservation standards, and specifically targeting its “active efforts” provision, its opponents fortuitously offered insight into how federal child welfare policies should be realigned to protect all children against unwarranted removals from their homes.

This Article urges Congress to bolster the level of remedial services offered to all families by requiring “active efforts” to prevent the removal of children from their homes and assist in family reunification. Employing a standard of “active efforts” would reestablish consistency in federal child welfare legislation, better serve families in foster care, and improve outcomes for all children. This standard comports with the new and developing American Law Institute’s Restatement of the Law, Children and the Law, which is “built on the understanding that the state’s goal is to assist parents” in providing adequate care for their children, “not to remove children from their homes if other assistance suffices.”

INTRODUCTION	45
I. BACKGROUND OF THE INDIAN CHILD WELFARE ACT.....	48
A. <i>The Assumption That American Indian Children Should Be Assimilated and Placed with White Families</i>	50
B. <i>The Indian Child Welfare Act of 1978: Using an “Active Efforts” Standard to Combat Assimilation</i>	51
II. CONSTITUTIONAL ATTACKS ON ICWA AND ITS ACTIVE EFFORTS STANDARD.....	54
A. <i>Limiting the Active Efforts Requirement — Adoptive Couple v. Baby Girl</i>	55
B. <i>Employing Anticommandeering Grounds to Successfully Attack ICWA — Brackeen v. Zinke</i>	58
C. <i>Finding the Active Efforts Requirement Unconstitutionally Commandeers States — Brackeen v. Haaland</i>	60
D. <i>Holding the Active Efforts Standard Poses No Anticommandeering Problem — Haaland v. Brackeen</i>	62
III. ACTIVE EFFORTS SHOULD BE APPLIED TO ALL CHILDREN IN THE CHILD WELFARE SYSTEM	64
A. <i>Federal Child Welfare Legislation for American Indian and Non-American Indian Children Was Once Aligned with a Common Goal of Family Preservation</i>	65
1. <i>Federal Child Welfare Legislation for Non-American Indian Children: The Adoption Assistance and Child Welfare Act of 1980</i>	66
2. <i>A Divergence in Federal Child Welfare Goals: The Adoption and Safe Families Act of 1997</i>	70
B. <i>An Active Efforts Standard Better Aligns with Federal Child Welfare Policy Goals Before the Adoption and Safe Families Act and Recent Child Welfare Legislation</i>	72
C. <i>The Reasonable Efforts Standard Fails to Meet the Needs of the Majority of Children and Families in the Foster Care System</i>	76
D. <i>“Reasonable Efforts” Is a Nebulous and Ineffective Standard</i>	80
E. <i>“Active Efforts” is Well-Defined, Helps Preserve Families, and Can Be Applied to All Children in the Foster Care System</i>	92
CONCLUSION	105

BEYOND BRACKEEN

INTRODUCTION

Currently, almost 400,000 children of various backgrounds and ethnicities are in foster care in the United States.¹ Although children in foster care have better outcomes if they return to their own homes, approximately half of them are not reunified with their families.² Many children are in the foster care system due to neglect, stemming from underlying issues of poverty. These families require intensive, family-centered support services to re-establish the social and economic stability necessary to maintain or regain custody of their children, but current child welfare policy standards fail to provide them with adequate levels of assistance. This negatively impacts families of color who are disproportionately represented in the child welfare system and are more likely to experience negative outcomes compared to White families.

The goal of federal child welfare policy for all children was once family preservation. In 1978, Congress enacted the Indian Child Welfare Act (ICWA) to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.”³ Based on the need to rectify atrocities against American Indian families, ICWA uses an “active efforts” standard to provide services to Indian families to prevent the removal of children from their homes and to reunify them with their families.

In 1980, Congress addressed child welfare for non-American Indian children. The Adoption Assistance and Child Welfare Act (AACWA) was designed to prevent the unnecessary separation of children from their parents by providing services to strengthen families.⁴ It used a “reasonable efforts” standard to prevent the unnecessary removal of children from their homes into foster care or to reunify them with their families. Despite varying standards, both laws required that social service agencies support families with remedial services and rehabilitative programs, with an overall goal of family preservation.

In 1997, an amendment to the Adoption Assistance and Child Welfare Act was passed. The Adoption and Safe Families Act (ASFA) shifted the

-
1. See CHILD’S BUREAU, AFCARS REPORT NO. 29 (2022), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-29.pdf> [<https://perma.cc/5XC3-5TUD>].
 2. *Id.*
 3. 25 U.S.C. § 1902.
 4. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

purpose of child welfare for the general population of non-American Indian children from family preservation to swift permanency through adoption.⁵ Although this new legislation was purportedly designed to address safety concerns, its undercurrent was the racist belief that children of color would be better served through speedy adoptions by White families. To accomplish this lamentable goal, the “reasonable efforts” requirement in the previous law was eroded with exemptions from having to comply with the “reasonable efforts” standard, the imposition of strict timelines for family reunification, and financial incentives for adoption. Therefore, as the goals of child welfare legislation diverged, the variance in their standards also widened.

While the Indian Child Welfare Act prevents injudicious adoptions of American Indian children and employs “active efforts” to protect connections between American Indian children, families, and communities, the Adoption and Safe Families Act endorses expedient adoptions of non-American Indian children and limits “reasonable efforts” to provide services to maintain their families. Due to the erosion of the “reasonable efforts” standard, families today do not receive adequate levels of support to maintain custody of their children. This is particularly harmful to families of color due to racial and ethnic disproportionality in the child welfare system.

Indeed, ICWA is often referred to as the “gold standard” in child welfare for its emphasis on familial and cultural preservation for American Indian families. In contrast, ASFA is criticized for ineffectually balancing family preservation and permanency due to its emphasis on the speedy adoption of children into other, presumably “better,” White families.

A similar racist ideology, that White families are better suited as parents and should be able to adopt American Indian children more readily, precipitated multiple attacks on ICWA’s requirement that active efforts must be made to provide remedial services and rehabilitative programs to prevent the breakup of Indian families.⁶ Most recently, in *Haaland v. Brackeen*,⁷ a few states and several individuals who adopted or sought to adopt American Indian children, challenged ICWA’s constitutionality and enhanced protections for Indian children,⁸ primarily targeting the “active efforts” safeguard.⁹ The Supreme Court upheld ICWA and validated its

5. See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

6. 25 U.S.C. § 1912(d).

7. 143 S. Ct. 1609 (2023).

8. *Id.* at 1631-32.

9. *Id.*

“active efforts” standard, holding that it did not violate the Tenth Amendment anticommandeering doctrine because it applies to private individuals, agencies, and governmental entities.¹⁰ Therefore, it does not “harness” a State’s legislative or executive authority.¹¹

Thus, “active efforts” has been upheld as a viable federal standard.¹² While the “reasonable efforts” standard applicable to non-American Indian children was once similarly geared toward family preservation, it has become ineffectual. Congress should extend the “active efforts” standard, currently applicable to American Indian children, to *all* children by requiring the use of “active efforts” to provide services to families before foster care placement or the termination of parental rights. Applying this standard will realign federal child welfare policy, help children remain with their families when situations can be effectively remedied with social services, and improve child welfare outcomes.

Part I of this Article explains the historical context of the Indian Child Welfare Act and the important policy goals that led to an “active efforts” standard to combat assimilation.

Part II details the development of “active efforts” jurisprudence, as the standard has been repeatedly challenged and curtailed, but recently validated by the U.S. Supreme Court.

Part III argues that by targeting the Indian Child Welfare Act’s enhanced “active efforts” standard, *Brackeen* veritably underscored deficiencies in current federal child welfare law and offered insight into improving standards for all children and families in the foster care system. This Article shows how federal child welfare legislative goals for all children were once aligned with similar standards, but racist ideology increased procedural and substantive variances in child welfare for American Indian and non-American Indian children.

Although American Indian adversaries complained of the heightened “active efforts” standard under ICWA, it is effectively designed to keep families intact and has been recognized as a viable standard. In contrast, the “reasonable efforts” standard employed in non-American Indian child welfare proceedings is insufficient to assist children and parents who could successfully maintain their families with an increased level of remedial services and rehabilitative programs. This low standard disproportionately impacts families of color and antiracist child welfare policy requires the use

10. *Id.*

11. *Id.*

12. *See Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013); *Haaland v. Brackeen*, 599 U.S. 255 (2023).

of a higher standard. Therefore, Congress should bolster the level of services offered to families by changing the standard from “reasonable efforts” to “active efforts.”

I. BACKGROUND OF THE INDIAN CHILD WELFARE ACT

Throughout U.S. history, American Indian children have been treated as pawns in federal policies and strategies to solve the “Indian problem.”¹³ Euphemisms of “civilization” and “education” disguised the U.S. government’s motives in attempting to eradicate Indian people and their cultures.¹⁴ After the American Revolution, missionaries sought to “civilize” various tribes through the indoctrination of Christianity and the English language. These missionaries targeted American Indian children because children adapt more readily to new languages than adults.¹⁵

In the 1870s, a new focus on “education” led to the historical pattern of American Indian children’s removal from their homes into boarding schools.¹⁶ General Richard Henry Pratt, the founder and first superintendent of the legendary Carlisle Indian Industrial School,¹⁷ expressed the “white man’s burden” in relieving Indians of their “savagery” in an 1890 letter to the commissioner of Indian Affairs:

If millions of black savages can become so transformed and assimilated, and if, annually, hundreds of thousands of emigrants from all lands can also become Anglicized, Americanized, assimilated, and absorbed through association, there is but one plain duty resting upon us with regard to the Indians, and that is to relieve them of their savagery and other alien qualities by the same methods used to relieve the others.¹⁸

13. H.R. REP. NO. 104-808, at 15 (1996) (documenting the history of forced assimilation).

14. *Id.*

15. Ann Murray Haag, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 TULSA L. REV. 149, 151 (2007).

16. *Id.*

17. Larry Gertner, *Richard Henry Pratt*, HIST. MARKER DATABASE (Sept. 3, 2018), <https://bit.ly/3PK4Kbm> [<https://perma.cc/E48D-L6YE>].

18. DONALD F. LINDSEY, INDIANS AT HAMPTON INSTITUTE, 1877-1923 24 (1995).

BEYOND BRACKEEN

Based on this imperialist viewpoint and a compulsory attendance law, American Indian children as young as four and five were forcibly separated from their parents, removed from their homes, and sent to boarding schools, which systematically and deliberately stripped them of their Indian cultures.¹⁹ Pratt expressed the overarching goal of the schools in his infamous utterance, “[k]ill the Indian in him, and save the man.”²⁰

To eradicate their cultures, students were forced to assume Anglo names and were prohibited from wearing American Indian dress, speaking Native languages, or participating in their traditions or ceremonies.²¹ Furthermore, American Indian children often never returned to their homes due to high student death rates²² and harsh environments, which included physical and sexual abuse.²³ Today, the Indian boarding schools “symbolize

-
19. Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 929-30 (2017). See generally Aaron R. Denham, *Rethinking Historical Trauma: Narratives of Resilience*, 45 TRANSCULTURAL PSYCHIATRY 391 (2008) (noting government policy regulating American Indian communities, including mandated residential schools and forced adoption programs, resulted in the cumulative loss of American Indian tradition and culture); Teresa Evans-Campbell, *Historical Trauma in American Indian/Native Alaska Communities: A Multilevel Framework for Exploring Impacts on Individuals, Families, and Communities*, 23 J. INTERPERSONAL VIOLENCE 316 (2008); Joseph P. Gone, *A Community-Based Treatment for Native American Historical Trauma: Prospects for Evidence-Based Practice*, 77 J. CONSULTING & CLINICAL PSYCH. 751 (2009); Maria Yellow Horse Brave Heart, *The Historical Trauma Response Among Natives and Its Relationship with Substance Abuse: A Lakota Illustration*, 35 J. PSYCHOACTIVE DRUGS 7 (2003).
 20. K. Tsianina Lomawaima & Jeffrey Ostler, *Reconsidering Richard Henry Pratt: Cultural Genocide and Native Liberation in an Era of Racial Oppression*, 57 J. OF AM. INDIAN EDUC. 79, 84 (2018).
 21. Janice Beller, *Defending the Gold Standard: American Indian Tribes Fight to Save the Indian Child Welfare Act*, IDAHO STATE BAR (June 24, 2022), <https://bit.ly/3G3PNNh> [<https://perma.cc/LV67-KMW6>].
 22. Tsianina Lomawaima & Ostler, *supra* note 20, at 91-92.
 23. Frank Vandervort, *The Indian Child Welfare Act*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 258-60 (D. N. Duquette & A. M. Haralmbie eds. 2nd ed. 2010); see Carol A. Hand, *An Ojibwe Perspective on the Welfare of Children: Lessons of the Past and Visions for the Future*, 28(1) CHILD. YOUTH SERV. REV. 20, 21 n.3 (2006) (noting that children placed in boarding schools “were subjected to military discipline, malnutrition, hard manual labor, and religious and political indoctrination. Harsh physical punishment and abuse,

the historic and continuing trauma inflicted by settler colonialism on Native nations, communities, peoples, and children.”²⁴

A. *The Assumption That American Indian Children Should Be Assimilated and Placed with White Families*

With the decline of the boarding school era, a new strategy was employed to assimilate American Indian children through the Indian Adoption Project.²⁵ For almost a decade, from 1958 to 1967, the Children’s Bureau, the Bureau of Indian Affairs, and the Child Welfare League of America collaborated to identify American Indian children and place them with White adoptive families more easily.²⁶ As a significant number of children were adopted out of American Indian families, tribes expressed alarm about the depletion of their members. Tribes argued that placing their children into White homes not only hurt tribes, but the children themselves, who were unable to develop senses of their identities that were critical to emotional and psychological well-being.²⁷ The narratives of children and families affected by the boarding school era and the Adoption Project began to emerge in the mid to late 1970s.²⁸ Between 1974 and 1978, Congress held a series of hearings comprised of personal stories, expert testimony, and empirical studies about the atrocities committed against American Indian children and their families. It was revealed that child welfare officials frequently removed American Indian children from their homes for “neglect” or “social deprivation”²⁹ because they failed to respect tribes’ social structures and cultures, and assumed that American Indian

as well as sexual abuse, were not uncommon. Contagious diseases spread easily in these unhealthy conditions leading to many deaths.”).

24. Tsianina Lomawaima & Ostler, *supra* note 20, at 79.

25. Fletcher & Singel, *supra* note 19, at 952-55.

26. Lauren van Schilfgaarde & Brett Lee Shelton, *Using Peacemaking Circles to Indigenize Tribal Child Welfare*, 11 COLUM. J. RACE & L. 681, 687-88 (2021).

27. C. Eric Davis, *In Defense of the Indian Child Welfare Act in Aggravated Circumstances*, 13 MICH. J. RACE & L. 433, 440 (2008) (citing Sheri L. Hazeltine, *Speedy Termination of Alaska Native Parental Rights: The 1998 Changes to Alaska’s Child in Need of Aid Statutes and Their Inherent Conflict with the Mandates of the Federal Indian Child Welfare Act*, 19 ALASKA L. REV. 57, 61-62 (2002)).

28. Anita Sinha, *A Lineage of Family Separation*, 87 BROOK. L. REV. 445, 464 (2022).

29. H.R. REP. NO. 95-1386, at 10.

BEYOND BRACKEEN

children would fare better with White families.³⁰ As a result, by the 1970s, approximately 25 to 35 percent of American Indian children were in foster care, adoptive care, or institutions.³¹ Of those, 90 percent were placed with non-American Indian families, even when fit and willing relatives were available.³²

B. The Indian Child Welfare Act of 1978: Using an “Active Efforts” Standard to Combat Assimilation

Congress enacted ICWA to combat decades of official federal policy designed to assimilate American Indians, particularly their children, into American society.³³ An important legislative objective was to protect tribes from encroachment by state or federal authorities.³⁴ Thus ICWA restored judicial power to tribes over child welfare matters involving American Indian children.³⁵ Tribes are given exclusive jurisdiction over any child custody proceeding involving an American Indian child domiciled on Indian land and concurrent jurisdiction with state courts for an American Indian child residing outside of Indian land.³⁶ State courts must transfer Indian child custody proceedings to tribal courts in the absence of a good cause for denial of the transfer, and if proceedings remain in state court, the child’s tribe, parents, and custodians are permitted to intervene.³⁷

30. *Id.*

31. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-33 (1989) (referencing H.R. REP NO. 95-1386 at 9 (1978)); Hearing before the Subcomm. on Indian Affs. of the S. Comm. on Interior and Insular Affs., 93d Cong. (1974) (statement of William Byler) (hereinafter 1974 Hearing); see Beller, *supra* note 21.

32. 1974 Hearing, *supra* note 31, at 60.

33. 25 U.S.C. §§ 1901-1963.

34. Barbara Ann Atwood, *Achieving Permanency for American Indian and Alaska Native Foster Children: Taking Lessons from Tribes*, 37 CAP. U. L. REV. 239, 244 (2009); see 25 U.S.C. § 1902.

35. 25 U.S.C. § 1903(4) (defining 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”).

36. 25 U.S.C. § 1911.

37. *Id.*

Another goal of ICWA was to protect American Indian children against unnecessary removals from their families and tribes. This purpose corresponded with Congress's finding that:

[A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and that the States . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.³⁸

Indeed, by the 1970s, one in four American Indian children had been removed, stolen, or adopted into non-Indian families, with no exposure to their families, tribes, or cultures.³⁹ The crisis was so severe that Congress described the removal of American Indian children from their homes as “the most tragic and destructive aspect of American Indian life today.”⁴⁰

Therefore, ICWA erected barriers to the removal of American Indian children from their homes.⁴¹ Perhaps most important is the requirement that before seeking the removal of an Indian child or the termination of parental rights, “active efforts” must be made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.⁴²

During congressional hearings, several witnesses testified about state agencies' past failures in providing services to American Indian families. For example, caseworkers commonly waited until Indian families reached a point of crisis, and then intervened with the sole intention of terminating parental rights.⁴³ Other issues included the lack of services available to meet

38. 25 U.S.C. §§ 1901(4)-(5).

39. H.R. REP. NO. 95-1386, at 9 (1978).

40. *Id.*

41. *Id.* at 8.

42. Leanne Gale & Kelly McClure, *Commandeering Confrontation: A Novel Threat to the Indian Child Welfare Act and Tribal Sovereignty*, 39 YALE L. & POL'Y REV. 202, 302 (2020); see 25 U.S.C. § 1912(d).

43. Cassandra Crandall, Comment, *Moving Forward From the Scoop Era: Providing Active Efforts Under the Indian Child Welfare Act in Illinois*, 40 N. ILL. U. L. REV. 100, 108-09 (2019).

BEYOND BRACKEEN

Indian families' cultural needs, the "lack of sensitivity to Indian culture and society," and the "need to encourage States to deliver services to Indians without discrimination and with respect to tribal culture."⁴⁴ Child welfare workers were seemingly ignorant of their bias. "To thousands of non-Indian Americans, the testimony of Indian activists . . . came as a shock." Many social workers, adoptive families, and nonprofit agency directors, who were accustomed to seeing themselves as "caring rescuers," viewed "themselves anew through Indian eyes: as child snatchers."⁴⁵

Based on Congress's conclusion that agencies rarely provided American Indian families with remedial services and used discriminatory practices in removing children from their homes, ICWA employed an "active efforts" standard to ensure that, moving forward, social service agencies would deliver useful, appropriate services to prevent the separation of Indian children from their families.

In addition, Congress attempted to counteract biased child welfare removals by requiring expert opinions concerning their necessity. Before foster care placement or the termination of parental rights, ICWA requires testimony from "qualified expert witnesses" as to whether the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.⁴⁶ The standard of proof for foster care placement is clear and convincing evidence and for the termination of parental rights, the standard is beyond a reasonable doubt.⁴⁷

Finally, because Congress recognized the importance of American Indian culture and traditions, ICWA emphasizes the importance of familial and tribal connections when an Indian child is removed from the home. As the 1977 final report of the American Indian Policy Review Commission concluded, "[r]emoval of Indian children from their cultural settings seriously impacts a long-term tribal survival and has damaging social and psychological impact[s] on many individual Indian children."⁴⁸ Therefore,

44. *Id.* at 109.

45. Sinha, *supra* note 28, at 464 (quoting MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING & ADOPTING OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD 128 (2014)) (documenting the history of child welfare removal).

46. 25 U.S.C. § 1912.

47. 25 U.S.C. §§ 1912(e), (f).

48. *Miss. Band of Choctaw Indians*, 490 U.S. at 50 (referencing 1974 Hearing, *supra* note 31, at 52).

the law provides preferred foster care, pre-adoptive, and adoptive placements and requires records of adoption placements.⁴⁹

ICWA's restoration of judicial power to tribes and assurances of "rigorous standards"⁵⁰ in Indian child welfare proceedings were necessary to fulfill the "[f]ederal responsibility to Indian people."⁵¹ By establishing minimum federal standards for Indian child custody proceedings, Congress acknowledged American Indian children as a "resource" that is "vital to the continued existence and integrity of Indian tribes"⁵² and enacted ICWA to protect American Indian children's rights and American Indian tribes' rights to retain their children.⁵³

II. CONSTITUTIONAL ATTACKS ON ICWA AND ITS ACTIVE EFFORTS STANDARD

From its inception, ICWA has been challenged for its "bold policy" of treating American Indian children differently than non-American Indian children in child custody proceedings.⁵⁴ However, in the past decade, anti-

49. 25 U.S.C. §§ 1915(a), (b). The preferred adoptive placement options, in order, include a member of the child's extended family, other members of a child's tribe, or other Indian families unless there is good cause to deviate from them. The preferred foster care or pre-adoptive placement options include (i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

50. Atwood, *supra* note 34, at 248.

51. 25 U.S.C. § 1901 ("Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to the Indian people, Congress finds . . .").

52. 25 U.S.C. § 1901(3).

53. See Hearings on S. 1214 before the Subcomm. on Indian Affs. and Pub. Lands of the H. Comm. on Interior and Insular Affs., 95th Cong. 50 (1978).

54. Lucy Dempsey, *Equity over Equality: Equal Protection and the Indian Child Welfare Act*, 77 WASH. & LEE L. REV. ONLINE 411, 413 (2021); see Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 496, 516 (2020) (noting that the Supreme Court's recognition of an equal protection anti-discrimination principle applicable to the federal government housed in the Due Process Clause of the Fifth Amendment coupled with the civil rights movement of the 1960s naturally led to scrutiny of Indian affairs statutes in the 1970s).

BEYOND BRACKEEN

ICWA advocates, including attorneys supported by large firms and right-wing think tanks like the Goldwater Institute, waged increasingly bold and creative attacks against ICWA.⁵⁵ Most recently, 45 years post-enactment, the overall constitutionality of ICWA reached the U.S. Supreme Court in *Haaland v. Brackeen*.⁵⁶ *Brackeen* represented the culmination of ICWA adversaries' well-funded challenge to the law's overall constitutionality and included a targeted attack on its "active efforts" safeguard. Although the Supreme Court previously limited the applicability of "active efforts" in child custody cases⁵⁷ and federal courts ruled that the "active efforts" standard unconstitutionally commandeered the states,⁵⁸ the standard was ultimately upheld by the highest Court.⁵⁹

A. Limiting the Active Efforts Requirement — *Adoptive Couple v. Baby Girl*

In only the second ICWA case to reach the U.S. Supreme Court, *Adoptive Couple v. Baby Girl*, the Court created an exception to ICWA's active efforts safeguard to provide remedial services and rehabilitative programs to American Indian families prior to terminating parental rights.⁶⁰ Although the Supreme Court affirmed that active efforts must be made to prevent the breakup of Indian families, it found that if a parent lacked custody of the child before the custody proceeding, an Indian family had not been formed, so the active efforts provision is inapplicable.⁶¹

In *Adoptive Couple*, the father, a member of the Cherokee Nation, and the non-American Indian birth mother ended their relationship while she was still pregnant with "Baby Girl."⁶² During pregnancy, when the birth

55. Kathryn Fort, *The Road to Brackeen: Defending ICWA 2013-2023*, 72 AMER. L. REV. 1631, 1641 (2023).

56. *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021), *cert. granted sub nom.*, *Nation v. Brackeen*, 142 S. Ct. 1204 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022), *and cert. granted sub nom.*, *Texas v. Haaland*, 212 L. Ed. 2d 215 (2022), *and cert. granted*, 142 S. Ct. 1205 (2022).

57. *See Adoptive Couple*, 570 U.S. 637.

58. *Brackeen v. Zinke*, 338 F. Supp.3d 514, 546 (N.D. Tex. 2018); *Brackeen v. Haaland*, 994 F.3d 249.

59. *Haaland v. Brackeen*, 599 U.S. 255 (2023).

60. *Adoptive Couple*, 570 U.S. 637.

61. *Id.* at 641.

62. *Id.* at 643.

mother suggested that the father either pay child support or relinquish his parental rights, he elected to relinquish his rights.⁶³ The mother placed their child, “Baby Girl,” up for adoption and selected a non-Indian South Carolina couple as the adoptive parents.⁶⁴ The father did not initially contest the adoption when notified, but the next day, requested a stay of the adoption proceedings and sought custody.⁶⁵

During the proceedings, the father indicated that he believed the birth mother would raise the child when he relinquished his parental rights.⁶⁶ The South Carolina Family Court found that Adoptive Couple had not proven that the child would suffer serious emotional or physical damage if the Indian father had custody, as required by ICWA.⁶⁷ It therefore granted custody of “Baby Girl,” who was then twenty-seven months old, to the birth father.⁶⁸

The South Carolina Supreme Court affirmed the family court’s decision, and also held that the ICWA requirement to make active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family prior to the termination of parental rights had not been satisfied.⁶⁹ It suggested that active efforts could have entailed contact with the father and education about his parental role, which could have “stimulate[d]” his desire to engage in fatherhood.⁷⁰

However, the U.S. Supreme Court reversed this decision and limited the applicability of the “active efforts” standard. It held that “active efforts” to reunify the family prior to the termination of parental rights⁷¹ did not apply to the father’s custody proceeding because he did not have custody of the

63. *Id.*

64. *Id.* at 644.

65. *Id.* at 644-45.

66. *Id.*

67. *Id.* at 645.

68. *Id.*

69. *Id.* at 645-46.

70. *Adoptive Couple v. Baby Girl*, 731 S.E. 2d 550, 647 (S.C. 2012).

71. *See* 25 U.S.C. § 1912(d) (“Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.”).

BEYOND BRACKEEN

child *before* the family court’s decision.⁷² It reasoned that active efforts to prevent the breakup of an Indian family are not required when a parent “abandons” an Indian child before birth and never had custody of the child.⁷³ As a result, although “Baby Girl” had been living with the biological Cherokee father and extended family for over a year,⁷⁴ custody was granted to a non-Indian adoptive couple.⁷⁵ Therefore, *Adoptive Couple* limited the application of the “active efforts” standard.

Dissenting, Justice SOTOMAYOR argued that the active efforts provision should not be restricted because it requires an attempt to “cure familial deficiencies” before the drastic measures of foster care placement or the termination of parental rights.⁷⁶ She countered that the majority should have applied ICWA to protect the biological father’s parental rights because the active efforts provision applies in “actions terminating the ‘parent-child relationship’ that exists between a birth father and his child . . . As a logical matter, that relationship is fully capable of being preserved via remedial services and rehabilitation programs.”⁷⁷

However, based on the majority opinion, American Indian parents, even biological ones, cannot invoke ICWA’s “active efforts” safeguard to help maintain their family without a previous custodial or parental relationship. Therefore, the Court created an exception to the “active efforts” requirement under ICWA, paving the way for future challenges to the law and its active efforts requirement.

72. *Adoptive Couple*, 570 U.S. at 656 (emphasis added).

73. *Id.* at 651.

74. Matthew L.M. Fletcher & Wenona T. Singel, *Lawyering the Indian Child Welfare Act*, 120 MICH. L. R. 1755, 1756 (2022).

75. *See Adoptive Couple v. Baby Girl*, 746 S.E.2d 51 (S.C. 2013) (Following the U.S. Supreme Court decision in *Adoptive Couple*, the South Carolina Supreme Court directed entry of an order finalizing the adoption and the termination of the biological father’s parental rights.).

76. *Adoptive Couple*, 570 U.S. at 674 (SOTOMAYOR, J., dissenting).

77. *Id.* at 674-75.

B. Employing Anticommandeering Grounds to Successfully Attack ICWA
— Brackeen v. Zinke

A new, anticommandeering strategy to attack ICWA was used in *Brackeen v. Zinke*.⁷⁸ This case originated when the Brackeens, White parents of two biological sons, felt called by their evangelical faith to foster children.⁷⁹ They fostered a ten-month-old American Indian child, a member of the Navajo Nation, known in court records as A.L.M. for approximately a year. The toddler was then scheduled for placement with a Navajo family in New Mexico based on ICWA's placement preferences for Indian children.⁸⁰ The Brackeens filed petitions to stop the transfer, asserting that the child would be forced to leave the only home he has ever known.⁸¹ The Texas Department of Family Services found that the Brackeens failed to show good cause to deviate from ICWA's placement preferences, which required that

78. *Brackeen v. Zinke*, 338 F. Supp.3d 514, 546 (N.D. Tex. 2018) (noting that plaintiffs claimed Congress did not have the constitutional authority to pass Sections 1901-23 and 1951-52 of ICWA under the Indian Commerce Clause). Defendants countered that the Indian Commerce Clause grants Congress plenary authority over Indian Affairs. *See* Federal Appellants' Reply Brief, *Brackeen v. Zinke*, 338 F. Supp.3d 514, 546 (N.D. Tex. 2018) (No. 4:17-cv-00868-O), 200619 WL 763699 at *20-22; Reply Brief of Appellants Cherokee Nation et al., *Brackeen v. Zinke*, 338 F. Supp.3d 514, 546 (N.D. Tex. 2018) (No. 4:17-cv-00868-O), 2019 WL 763698 at *27-28.

79. *See generally* Rebecca Nagle, *This Land*, Crooked Media (2021) [<https://perma.cc/3CPE-7W3E>] (conducting a year-long investigation into *Brackeen v. Haaland* and reporting how the far right is using Native children to attack American tribes and advance a conservative agenda); Jenna Kunze, *Q&A Rebecca Nagle, Host, 'This Land' Podcast*, YAHOO NEWS (Sept. 8, 2021) [<https://perma.cc/K9AP-DLST>].

80. *See* 25 U.S.C. § 1915 (b). The full text of the provision is provided below:

In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—(i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

Id.

81. *Brackeen v. Zinke*, 338 F. Supp.3d at 525.

BEYOND BRACKEEN

A.L.M. be placed with an Indian family.⁸² Ultimately however, the tribe approved of the Brackeens' petition to adopt A.L.M.⁸³

Nevertheless, the Brackeens, joined by six other non-Indian families, and the States of Texas, Louisiana, and Indiana, challenged ICWA's constitutionality in the U.S. District Court for the Northern District of Texas.⁸⁴ They moved for summary judgment based on a myriad of claims, including that ICWA's mandates impede on state's rights in violation of the anticommandeering doctrine of the Tenth Amendment.⁸⁵

The anticommandeering doctrine is rooted in the Tenth Amendment which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁸⁶ The Supreme Court has held that "Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,"⁸⁷ but it has also recognized the distinctive nature of courts in enforcing federal law. Indeed, pursuant to the Supremacy Clause, state courts and judges are required to enforce federal claims.⁸⁸

In 2018, the U.S. District Court for the Northern District of Texas granted summary judgment in part, declaring that ICWA and the Final Rule⁸⁹ contravene multiple constitutional provisions and violate the anticommandeering doctrine.⁹⁰ Thus, after over 40 years in existence, ICWA was declared unconstitutional.⁹¹

82. Brackeen v. Zinke, 338 F. Supp.3d at 526; see 25 C.F.R. § 23.132 (c).

83. *Id.*

84. Brackeen v. Zinke, 338 F. Supp.3d at 519.

85. *Id.* at 530.

86. U.S. CONST. amend. X.

87. *New York v. United States*, 505 U.S. 144, 145 (1992).

88. *Gale & McClure*, *supra* note 42, at 318 (citing *New York*, 505 U.S. at 178-79).

89. In June 2016, the BIA promulgated the Final Rule, to clarify the minimum Federal standards governing implementation of ICWA and to ensure consistency among the States. See 81 Fed. Reg. 38,782 (June 14, 2016).

90. Brackeen v. Zinke, 338 F. Supp.3d at 534.

91. CONG. RSCH. SERV., LSB10245, IS THE INDIAN CHILD WELFARE ACT CONSTITUTIONAL? (2019), <https://crsreports.congress.gov/product/pdf/LSB/LSB10245> [<https://perma.cc/UQ85-EKU6>].

*C. Finding the Active Efforts Requirement Unconstitutionally
Commandeers States — Brackeen v. Haaland*

Following the *Zinke* ruling, the defendants, which included the United States of America, several federal agencies and government officers in their official capacities, and five intervening Indian tribes, appealed.⁹² In *Brackeen v. Bernhardt*, the Court of Appeals for the Fifth Circuit addressed the plaintiffs' claim that several provisions of ICWA, including active efforts, violate the anticommandeering doctrine.⁹³ ICWA defenders countered that the law's safeguards, including its requirement of active efforts, do not impermissibly commandeer states and that the anticommandeering doctrine is inapplicable when federal laws, like ICWA, regulate both state agencies and private actors.⁹⁴

The Court of Appeals reversed the district court's decision that ICWA was unconstitutional on all grounds.⁹⁵ The majority emphasized that the "active efforts" requirement did not violate the anticommandeering doctrine because it applies to both state agencies *and* other parties.⁹⁶ Indeed, ICWA does not specifically instruct that a *state agency* must use active efforts; it refers to "[a]ny party" seeking to affect a foster care placement or termination of parental rights as bearing the responsibility for satisfying the court that active efforts have been made to provide remedial

92. *Brackeen v. Bernhardt*, 937 F.3d 406, 406 (5th Cir. 2019) (including Defendants U.S. Department of the Interior and its Secretary, Bureau of Indian Affairs (BIA) and its Director and Principal Assistant Secretary for Indian Affairs, Department of Health and Human Services (HHS) and its Secretary, the Morongo Band of Mission Indians, and the Cherokee, Oneida, and Quinault Indian Nations).

93. *Brackeen v. Bernhardt*, 937 F.3d at 431-32.

94. *Brackeen v. Bernhardt*, 937 F.3d at 432; *see, e.g.*, Brief for the Federal Parties, *Haaland v. Brackeen*, 142 S. Ct. 1205 (2022) (No. 21-376), 2022 WL 3449156 at *34-47; Reply Brief for the Petitioners, *Haaland v. Brackeen*, 142 S. Ct. 1205 (2022) (No. 21-376), 2021 WL 6139818 at *2-11; Brief for the States of California et al. in Support of the Federal and Tribal Parties, *Haaland v. Brackeen*, 142 S. Ct. 1205 (2022) (No. 21-376), 2022 WL 3691303 at *19-26.

95. *See Brackeen v. Bernhardt*, 937 F.3d at 437 (vacated by en banc review).

96. *Brackeen v. Bernhardt*, 937 F.3d at 432-33 (citing *Murphy*, 138 S. Ct. 1461 at 1478) (holding that the anticommandeering doctrine is not implicated when Congress regulates an activity in which the state and private actors both engage.).

BEYOND BRACKEEN

services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.⁹⁷

Nevertheless, one judge partially dissented, finding that three ICWA provisions, including the “active efforts” provision, violated the Tenth Amendment’s anticommandeering doctrine.⁹⁸ Judge Richman⁹⁹ found that although the text of ICWA applies broadly to “a party,” the removal of a child from their home will inevitably fall upon state officers or state agencies, as they handle child removal and custody matters.¹⁰⁰

The Fifth Circuit granted a rehearing en banc. Although the court upheld the overall constitutionality of ICWA in *Brackeen v. Haaland*,¹⁰¹ the majority also found that its requirement of “active efforts” to provide remedial services to prevent the breakup of the Indian family before foster care placement or the termination of parental rights, unconstitutionally commandeers state actors.¹⁰²

Thus, ICWA’s adversaries achieved success through a novel, “rarely invoked” anti-commandeering argument designed to question the law’s constitutionality and to eliminate the need to provide “active efforts” to

97. Jessie Shaw, *Commandeering the Indian Child Welfare Act: Native American Rights Exception to Tenth Amendment Challenges*, 42 CARDOZO L. REV. 2007, 2022 (2021); see 25 U.S.C. § 1912(d).

98. In a partial dissent, Judge Richman wrote that she would have found that three sections of ICWA improperly commandeer the states: § 1912(d) (active efforts), § 1912(e) (qualified expert witnesses), and § 1915(e) (recordkeeping). *Brackeen v. Bernhardt*, 937 F.3d 406, 441-46 (5th Cir. 2019), *on reh’g en banc sub nom. Brackeen v. Haaland*, 994 F.3d 249 (Owen, J., concurring in part and dissenting in part).

99. As of April 2022, Judge Priscilla Richman Owen, is named Judge Priscilla Richman and serves as Chief Judge of the U.S. Court of Appeals for the Fifth Circuit. During the *Brackeen* case in 2019, she used the last name Owen.

100. *Brackeen v. Bernhardt*, 937 F.3d at 443 (quoting Judge Owens’ dissent).

101. *Brackeen v. Haaland*, 994 F.3d 249 (Owen, J., concurring in part and dissenting in part).

102. *Id.* at 267-268 (per curiam) (The en banc court found that Congress did in fact possess the authority to enact ICWA under Article I of the Constitution and that the statute’s “Indian child” classification did not violate equal protection. The en banc court was equally divided as to whether two of ICWA’s placement preferences violate equal protection. Further, it found that several challenged provisions validly preempt state law (at least as applied to state courts) and therefore did not commandeer states, but was equally split on whether ICWA’s placement preferences, recording provisions, and notice requirements, violate anticommandeering.).

preserve Indian families.¹⁰³ Based on the fractured opinion by the en banc court of appeals, the U.S. Supreme Court granted certiorari to rule on the constitutionality of ICWA in *Haaland v. Brackeen*.¹⁰⁴

D. Holding the Active Efforts Standard Poses No Anticommandeering Problem — Haaland v. Brackeen

In *Haaland v. Brackeen*, the Petitioners challenged Congress's authority to enact ICWA,¹⁰⁵ asserted that "active efforts" and other safeguards violate the anticommandeering doctrine,¹⁰⁶ and argued that the Act uses racial classifications that unlawfully disadvantage non-American Indian families in fostering and adopting American Indian children.¹⁰⁷ The U.S. Supreme Court, in a 7-2 decision, rejected all challenges to the statute, either for lack of standing or for non-meritorious claims.¹⁰⁸

First, the Court affirmed Congress's power to enact ICWA. Adhering to Congress's plenary power in Indian Affairs, the Court confirmed that although not absolute,¹⁰⁹ Congress's power to legislate Indian affairs is "well established and broad," and ruled that ICWA is consistent with Article I.¹¹⁰ Thus, it took "steps in the right direction" by recognizing that Congress's powers with respect to the Tribes "derives from the Constitution, not the [political] atmosphere."¹¹¹

The Court also rejected the petitioners' anticommandeering challenges to numerous ICWA provisions and observed that "their primary target" was the requirement that a party demonstrate "active efforts" to keep the Indian family together.¹¹² It held that when a federal statute, like ICWA, applies on its face to both private and state actors, no anticommandeering problem is

103. Gale & McClure, *supra* note 42, at 315, 344.

104. *Haaland v. Brackeen*, 599 U.S. 255.

105. *Id.* at 272.

106. *Id.* at 280.

107. *Id.* at 292.

108. *Id.* at 264.

109. *Id.* at 276.

110. *Id.* at 275.

111. *Id.* at 330 (Gorsuch, J., concurring, with whom Justice Sotomayor and Justice Jackson join as to Parts I and III, concurring).

112. *Id.* at 281.

BEYOND BRACKEEN

posed.¹¹³ Because the statute indicates that “[a]ny party” seeking to effect an involuntary foster care placement or termination of parental rights must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful, the active efforts standard extends beyond government entities to private individuals and agencies as well.¹¹⁴ For example, the active efforts provision applies not only in situations where a state removes a child from a home for neglect, but in private suits in which one biological parent arranges for a private adoption without the other parent’s consent or when a relative seeks guardianship for a child to remove them from a neglectful or abusive home.¹¹⁵

Similarly, the Court found that because the other challenged ICWA provisions applied to both private and public parties, no anticommandeering issues exist with its notice requirements, expert witness requirements, evidentiary standards,¹¹⁶ placement preferences in making custody determinations,¹¹⁷ or recordkeeping provisions.¹¹⁸

Finally, the Court held that no party had standing to raise an equal protection challenge to ICWA’s placement preferences or to bring a nondelegation challenge to the provision allowing tribes to alter placement preferences.¹¹⁹

Brackeen is a victory for American Indian children, families, and tribes as well as those involved in lawyering American Indian child welfare cases. Although ICWA’s “active efforts” standard was curtailed in *Adoptive Couple v. Baby Girl*,¹²⁰ and successfully challenged in federal courts, the Supreme Court validated the active efforts standard and confirmed that ICWA’s requirements do not “tread” on the States’ authority over family law.¹²¹ It reiterated that although “Congress lacks “a general power over domestic

113. *Id.* at 284-85.

114. *Id.* at 281 (emphasis added).

115. *Id.* at 284.

116. *Id.* at 285; *see* 25 U.S.C. § 1912(d).

117. *Haaland v. Brackeen*, 599 U.S. at 286-87; *see* 25 U.S.C. § 1915(a)-(b).

118. *Haaland v. Brackeen*, 599 U.S. at 291; *see* 25 U.S.C. § 1951(a).

119. *Brackeen*, 599 U.S. at 291.

120. 570 U.S. at 638.

121. *Haaland v. Brackeen*, 599 U.S. at 276.

relations . . . the Constitution does not erect a firewall around family law.”¹²² Indeed, the federal government can and should play a major role in child welfare.

III. ACTIVE EFFORTS SHOULD BE APPLIED TO ALL CHILDREN IN THE CHILD WELFARE SYSTEM

Regulation of child welfare in the United States is shared between federal and state governments. Although states bear the primary responsibility for administering child welfare services, Congress plays a significant role in establishing policy and attaching conditions to funding for such policies. Most federal funds specifically targeted toward child welfare activities flow to the states through the Social Security Act, including entitlement funding for foster care maintenance and adoption assistance through Title IV-E. Many programs under the Social Security Act are highly centralized, with important policies established at the national level and implemented by the states. This strong national role in setting policy and allocating funding for foster care and adoption reflects Congress’s judgment that child welfare policies are too critical to vary based on state law and politics and that a unified approach is necessary.¹²³ By creating a unified national approach to child welfare and foster care, Congress has “defined a minimum standard of public care and support to which every child in the nation is entitled.” This begs the question: Isn’t every child in the nation entitled to a level of support that adequately prevents that child from having to be removed from their home and placed in foster care and to enable that child to return home from foster care when feasible?

Initially, when ICWA was enacted in 1978 and AACWA was passed in 1980, Congress recognized that all children deserve remedial services and rehabilitative programs that prevent them from being unnecessarily removed from their homes and assist them in reunifying with their families. Although the level of effort exerted toward providing those services and programs was once similar for all children, the level of “reasonable efforts” required for non-American Indian children was diminished. On the other hand, ICWA’s “active efforts” standard to keep families together remains robust.

122. *Id.* at 271.

123. Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL’Y 267, 294 (2009) (evaluating federalism in family law).

BEYOND BRACKEEN

Certainly, American Indian children, families, and tribes deserve heightened levels of protection in the child welfare system and most of ICWA's safeguards should apply to them exclusively. For example, the Act's notice requirements ensure that tribes can exercise their authority to determine whether a child is a member of a tribe or eligible for membership and enable tribes' continued involvement. Its expert witness safeguard allows for consideration of testimony from experts with knowledge of prevailing social and cultural standards and child-rearing practices within a tribal or American Indian community. And its placement preferences ensure that American Indian children have connections to their community, tribe, and culture. These and other ICWA provisions are unique, extremely important protections for American Indian children, families, and tribes.

In contrast, "active efforts" could be applied to all children in the child welfare system. Congress should return to its previous ideal of family preservation and enact legislation to create a uniform standard to help parents retain or regain custody of their children. An active efforts standard comports with the pre-ASFA legislative goal of family preservation which was altered based on racist assumptions that children of color should be adopted quickly into White families rather than expending time and effort to maintain Black families. The same biases, constructed from a White, nuclear-family model that led social workers to haphazardly remove Indian children from their homes also cause Black children to be taken from their homes needlessly and placed into foster care.

Furthermore, the existing "reasonable efforts" standard fails to meet the needs of most children and families in the foster care system. Many of these families are in the system due to poverty-related issues that cannot be rectified with insufficient levels of support from agencies and the law's expedited timetables for adoption.

Finally, while "reasonable efforts" is a nebulous standard that is difficult for social service agencies to implement and challenging for judges to assess, the "active efforts" standard is well-defined, enabling judges to evaluate adherence to the standard.

A. Federal Child Welfare Legislation for American Indian and Non-American Indian Children Was Once Aligned with a Common Goal of Family Preservation

Two years after enacting ICWA, Congress directed its attention to the broader population of dependent children in the foster care system. At that time, approximately 500,000 children were in foster care, many of whom

had been in multiple foster care placements for extended periods of time.¹²⁴ These issues were attributed to social welfare's failure to provide adequate services to vulnerable families to prevent the removal of children from their homes and "the resultant emphasis" on placing children in foster care, residential facilities, and group homes.¹²⁵ To address these problems, Congress focused on family preservation as the solution.

1. Federal Child Welfare Legislation for Non-American Indian Children: The Adoption Assistance and Child Welfare Act of 1980

In 1980, Congress passed the Adoption Assistance and Child Welfare Act (AACWA)¹²⁶ to address "concerns that children were being removed unnecessarily from their homes and then left to drift in foster care."¹²⁷ It

-
124. Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. TOL. L. REV. 321, 324 (2005); Susan Vivian Mangold, *Challenging the Parent-Child-State Triangle in Public Family Law: The Importance of Private Providers in the Dependency System*, 47 BUFF. L. REV. 1397, 1434 (1999); Cristine H. Kim, Note, *Putting Reason Back into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases*, 1999 U. ILL. L. REV. 287, 291 (1999); see also S. REP. NO. 96-336, at 11 (1979) (noting that, according to a 1977 study, of all children in foster care "almost 400,000 were living in foster family homes, 12,000 were in public group homes, []23,000 were in private group homes," while "[a]lmost 30,000 were in residential treatment centers and 43,000 were in public and private care institutions," and, additionally, the median length of time spent in foster care was two-and-a-half years); *Proposals Related to Social and Child Welfare Services, Adoption Assistance, and Foster Care: Hearing on H.R. 3434 Before the Subcomm. on Pub. Assistance of the S. Comm. on Fin., 96th Cong.* 76 (1979) [hereinafter *Hearing on H.R. 3434*] (statement of Arabella Martinez, Assistant Secretary for Human Development Services, Department of Health, Education, and Welfare).
 125. Marc Mannes, *Family Preservation: A Professional Reform Movement*, 20 J. SOCIO. & SOC. WELFARE 5, 8 (1993).
 126. Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended in scattered sections of 42 U.S.C.).
 127. Barbara Bennett Woodhouse, *The Adoption and Safe Families Act: A Major Shift in Child Welfare Law and Policy*, 2000 INT'L SURV. FAM. L. 375, 379 (2000); see also *Hearing on H.R. 3434*, 96th Cong. 52 (statement of Sen. Carl Levin) (noting that the law was designed to address "the substantial number of foster children who spend the most significant years of their lives floating from family to family, never knowing the stability of a permanent home, a most precious aspect of our existence which so many Americans take for granted").

BEYOND BRACKEEN

adopted the Family Preservation Movement's philosophy that "children's needs are best met by their natural families," and the government owes a duty to children to implement policies and programs that support the well-being of families.¹²⁸ Therefore, the law's objective was to keep families intact through "services to support and strengthen families."¹²⁹

AACWA marked the first instance in which the federal government sought to define the roles and responsibilities of the state in child welfare for non-American Indian children.¹³⁰ The legislation offered federal funds to states, but only if reasonable efforts were made to reunite families.¹³¹ Eligibility for payments was conditioned on a state plan approved by the Secretary of Health and Human Services which provides that, in each case, *reasonable efforts* will be made "(i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and (ii) to make it possible for a child to safely return to the child's home . . ."¹³² Federal funds could be used to design and operate programs to help children remain with their families and, where appropriate, help children return to their families.¹³³ Moreover, under AACWA, states were obligated to show that staying in the home would have been "contrary to the welfare of such child," and that reasonable efforts to keep the child at home were used.¹³⁴

128. Mannes, *supra* note 125, at 5-6.

129. *Id.* at 14.

130. Bob Friend & Kelly Beck, *How Reasonable Efforts Leads to Emotional and Legal Permanence*, 45 CAP. U. L. REV. 249, 252 (2017).

131. Bean, *supra* note 124, at 325.

132. The Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671(a)(15)(B). Additionally, the AACWA required the development of a case plan to help "improve family conditions and facilitate returning the child to his home." H.R. REP. NO. 96-900, at 46 (1980) (Conf. Rep.), *as reprinted in* 1980 U.S.C.C.A.N. 1561, 1566.

133. S. REP. NO. 96-336, at 3-4 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 1448, 1453.

134. 42 U.S.C. § 672(a)(2)(A)(ii); *see also* Atwood, *supra* note 34, at 254 n.66 (explaining that generally, Congress sought through AACWA to bar removals of children except where necessary for the child's safety and to require states to reunite the family whenever possible); Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1195-96 (1999).

Thus, a second “efforts” test became part of federal child custody law.¹³⁵ AACWA did not define “reasonable efforts,” nor did it mention or compare the “reasonable efforts” standard to ICWA’s existing “active efforts” test.¹³⁶ The different standards reflect distinct congressional concerns when enacting each law. With ICWA, Congress sought to remediate the “cultural genocide” of Indians committed through compulsory boarding school education, improper termination of parental rights, and forced adoption. Its goals were twofold: (1) to protect Indian children by maintaining and strengthening their familial, tribal, and cultural ties; and (2) to ensure the continued viability of Indian tribal communities. Based on past discriminatory actions of social welfare agencies and the detrimental effects on Indian children, families, and tribes, a standard of active efforts to provide remedial services and rehabilitative programs was deemed necessary.

On the other hand, Congress’s primary concern when enacting AACWA was that Child Protective Services case managers were unnecessarily placing children in foster care in situations that could be remedied with social services, thus contributing to the growth of the nation’s foster care population.¹³⁷ AACWA’s reasonable efforts initiative “began as an endeavor to ensure that states provided an adequate level of social services to families before removing children from their homes.”¹³⁸ Thus, despite varying standards, the child welfare laws for all children shared a common goal of family preservation and employed similar strategies of using social service agencies to assist families through services and programs.

Although the need for states to make reasonable efforts to preserve and reunify families was an “indispensable part”¹³⁹ of AACWA when enacted,

135. Mark Andrews, “Active” Versus “Reasonable” Efforts: The Duties to Reunify the Family Under the Indian Child Welfare Act and the Alaska Child in Need of Aid Statutes, 19 ALASKA L. REV. 85, 108 (2002) (emphasis added).

136. 42 U.S.C. § 622(b)(ii). However, an amendment to AACWA reinforced compliance with ICWA by requiring that state plans for child welfare services “contain a description, developed after consultation with tribal organizations . . . of the specific measures taken by the State to comply with the Indian Child Welfare Act.” *Id.*

137. Raymond C. O’Brien, *Reasonable Efforts and Parent-Child Reunification*, 2013 MICH. ST. L. REV. 1029, 1042 n.73 (2013).

138. *Id.*

139. Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State’s Burden under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 260 (2003).

confusion abounded as to the “reasonable efforts” standard, which was not defined in the law.¹⁴⁰ The lack of a clear definition for “reasonable efforts” resulted in confusion for child welfare system workers¹⁴¹ and may have caused child protective services case managers to “misinterpret the provision.”¹⁴² For example, in cases where a decision to leave a child in the home resulted in harm to the child, case managers claimed that they lacked the authority to remove the child because the state had not yet made reasonable efforts to assist the family.¹⁴³ Policymakers concluded “that children’s safety was being sacrificed in the name of family integrity” and advocated for a system in which children’s health and safety would be prioritized.¹⁴⁴

As a result, “Congress moved toward a second round of reform efforts.”¹⁴⁵ Instead of relying on studies that demonstrated that most children are placed in foster care due to neglect rather than abuse, Congress focused on high-profile cases of child abuse.¹⁴⁶ During congressional hearings, the late child welfare advocate Richard Gelles recounted instances where case workers’ misinterpretations of reasonable efforts resulted in the deaths of several children.¹⁴⁷ Other child welfare advocates expressed a need to solve the problem of “foster care drift”—children languishing in the child welfare system as they waited for their parents to safely reclaim them.¹⁴⁸ They also expressed child safety concerns, arguing that the

140. *Suter v. Artist M.*, 503 U.S. 347, 360 (1992) (holding that Congress did not intend to create a private right of action for the reasonable efforts requirement in federal child welfare law). The Court also noted that the meaning of the reasonable efforts standard will vary with the circumstances of each individual case: “How the State was to comply with this directive, and with the other provisions of the Act, was, within broad limits, left up to the State.” *Id.*; see also Kim, *supra* note 124, at 287 (noting that reasonable efforts was “left undefined” by Congress).

141. Friend & Beck, *supra* note 130, at 253.

142. Crossley, *supra* note 139, at 273.

143. *Id.*

144. Kim, *supra* note 124, at 316-17 (internal quotation marks omitted).

145. Steven M. Cytryn, Note, *What Went Wrong? Why Family Preservation Programs Failed to Achieve Their Potential*, 17 *CARDOZO J.L. & GENDER* 81, 84 (2010).

146. *Id.* at 84-85.

147. Crossley, *supra* note 139, at 273.

148. *Id.* at 278.

emphasis on family preservation led to the maintenance of harmful child-family relations.¹⁴⁹

Compelled by these accounts, Congress “labeled family preservation as the source of the problem,”¹⁵⁰ even though family preservation and reunification “have never been about keeping families intact when a child is unsafe.”¹⁵¹ To answer the national calls for foster care reform, Congress amended AACWA with the passage of the Adoption and Safe Families Act (ASFA) of 1997.¹⁵²

2. A Divergence in Federal Child Welfare Goals: The Adoption and Safe Families Act of 1997

The family preservation goal of both the Indian Child Welfare Act of 1978 and the Adoption Assistance and Child Welfare Act of 1980 diverged with the passage of the Adoption and Safe Families Act of 1997,¹⁵³ which significantly diminished AACWA’s “reasonable efforts” standard.

Although the ultimate objective of ASFA was purportedly the health and safety of children, only a fraction of its parameters focuses primarily on child safety; the majority is geared toward speedy adoptions of children.¹⁵⁴ For example, the Act provides exemptions to the reasonable efforts requirement in certain circumstances in which it may be unsafe for a child to remain with a parent.¹⁵⁵ If a court has found that a parent subjected the

149. Bean, *supra* note 124, at 326; see Adrienne Whitt-Woosley & Ginny Sprang, *When Rights Collide: A Critique of the Adoption and Safe Families Act from a Justice Perspective*, 93 CHILD WELFARE 111, 115 (2014).

150. Cytryn, *supra* note 145, at 84.

151. Crossley, *supra* note 139, at 275.

152. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

153. *Id.*

154. Woodhouse, *supra* note 127, at 381.

155. 42 U.S.C. § 671(a)(15)(D); see Bean, *supra* note 124, at 327. For example, reasonable efforts are not required, and a petition for termination of parental rights must be filed, with some exceptions, in aggravated circumstances, such as if a parent has murdered another child of the parent, the parent has “committed voluntary manslaughter of another child of the parent,” the parent “aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter,” or the parent “committed a felony assault that has resulted in serious bodily injury to the child or another child

BEYOND BRACKEEN

child to certain aggravated circumstances, committed certain offenses, or had their parental rights involuntarily terminated for a sibling of the child, reasonable efforts are not required.¹⁵⁶

However, most provisions are geared toward encouraging permanency through speedy adoption. For example, ASFA significantly shortened the time frame to work toward family reunification before terminating parental rights.¹⁵⁷ The previous law required six-month reviews of a child's Family Service Plan, which identifies goals for the child and outlines programs and services the state must provide to the family,¹⁵⁸ and sets eighteen months as the period to initiate a permanency hearing. In contrast, ASFA mandates a permanency hearing at twelve months and requires states to initiate proceedings to terminate parental rights once a child has been in foster care for fifteen out of the most recent twenty-two months, unless certain conditions exist.¹⁵⁹ For example, ASFA specifies that the state does not have to file for termination if: (1) at the state's option, the child is being cared for by a relative; (2) the agency documents a compelling reason in the case plan why filing for termination would not be in the child's best interest; or (3) the state did not provide the child's family with services deemed necessary for the child's safe return home in a timely manner.¹⁶⁰

Another ASFA provision allows for concurrent planning, enabling the state agency to make efforts to eventually place a child in a permanent guardianship or an adoption placement, while simultaneously making efforts to reunify the child with the family.¹⁶¹ Many caseworkers interpreted the previous law as requiring them to work exclusively for family reunification for at least eighteen months *before* pursuing alternative permanent placements.¹⁶²

Finally, ASFA provides financial incentives to states that accomplish successful foster care adoptions. Individual states are given a baseline number for the estimated number of foster care adoptions the state should

of the parent." Bean, *supra* note 124, at 327 (quoting 42 U.S.C. § 671(a)(15)(D)(ii)).

156. Bean, *supra* note 124, at 327.

157. 42 U.S.C. § 675(5)(E).

158. Woodhouse, *supra* note 127, at 381.

159. *Id*; see 42 U.S.C. § 675(5).

160. 42 U.S.C. § 675(5)(E).

161. 42 U.S.C. § 671(a)(15)(F).

162. David J. Herring, *The Adoption and Safe Families Act: Hope and Its Subversion*, 34 FAM. L.Q. 329, 338 (2000).

reach within the fiscal year and are awarded adoption incentive payments starting at \$4,000.¹⁶³ There are additional payments for children with special needs.¹⁶⁴ To receive these adoption-incentive awards, the state must file a petition to terminate the natural parents' rights if reunification has not occurred within fifteen months.¹⁶⁵

Therefore, although the elimination of the need to make "reasonable efforts" in certain aggravated circumstances might contribute to child safety, other provisions place significant time constraints on family reunification endeavors, divert attention from concerted efforts toward reunification by allowing concurrent planning, and favor adoption over reunification based on state funding. Collectively, ASFA's provisions encourage social service agencies to spend less effort on family preservation and more effort on the quick, permanent placement of children in adoptive homes.

ASFA represented a "major revision" of existing child welfare policies because "[a]fter two decades of emphasis on family preservation and reunification, federal child welfare policy outside the context of Indian children began to move toward an emphasis on permanency."¹⁶⁶ By altering the overarching goal in non-Indian child welfare, "ASFA moves away from the ICWA ideal of reunifying children with their parents unless all other options are exhausted."¹⁶⁷

B. An Active Efforts Standard Better Aligns with Federal Child Welfare Policy Goals Before the Adoption and Safe Families Act and Recent Child Welfare Legislation

Both the Indian Child Welfare Act and the Adoption Assistance and Child Welfare Act reflected the critical importance of familial relationships

163. DeLeith Duke Gossett, *The Client: How States Are Profiting from the Child's Right to Protection*, 48 U. MEM. L. REV. 753, 784 (2018) (citing Adoption and Safe Families Act of 1997 § 201, 111 Stat. 2115, 2122-23 (codified as amended at 42 U.S.C. § 673b)).

164. *Id.*

165. *Id.* (citing Adoption and Safe Families Act of 1997 § 305).

166. Atwood, *supra* note 34, at 253.

167. Justine van Straaten & Paul G. Buchbinder, *The Indian Child Welfare Act: Improving Compliance through State-Tribal Coordination*, CTR. FOR CT. INNOVATION 6 (2011), <https://www.innovatingjustice.org/sites/default/files/documents/ICWA.pdf> [<https://perma.cc/4KPB-GBJE>].

BEYOND BRACKEEN

and the role of social service agencies in actively assisting families in accessing the resources necessary to maintain their families.

In contrast, the Adoption and Safe Families Act marked a significant divergence from the original intent and important goal of family preservation that once applied to federal child welfare policies for both American Indian and non-American Indian children. This amendment transformed child welfare policy from family preservation to permanency through speedy adoption. Therefore, the focus of child welfare for children who are not American Indian is no longer primarily on providing services to keep families intact.¹⁶⁸ Instead, “the legislation’s goal is to achieve permanency for children and at an accelerated pace.”¹⁶⁹

Although ASFA theoretically aims to continue its predecessor’s legislative goal of strengthening families by requiring “reasonable efforts...to preserve and reunify families,”¹⁷⁰ its reasonable efforts requirement is now “toothless.”¹⁷¹ Despite retaining the verbiage “reasonable efforts” to reunify the family, the standard was diminished by exemptions from having to make reasonable efforts,¹⁷² expedited timetables for terminating parental rights,¹⁷³ a concurrent planning model, which distracts from agencies’ already tenuous requirements to make “reasonable efforts,”¹⁷⁴ and financial incentives for adoption instead of reunification.¹⁷⁵

An active efforts standard should be employed in child welfare for all children to prevent them from being placed into foster care and to help rebuild families if a child is removed from the home. While exemptions related to child safety could be maintained, an active efforts standard would require the elimination of expedited timetables and the concurrent planning model, as well as the end of adoptive incentive awards. This

168. See 42 U.S.C. § 673b.

169. O’Brien, *supra* note 137, at 1043.

170. Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 558 (2019).

171. *Id.*

172. Bean, *supra* note 124, at 338.

173. The Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671(15)(E).

174. *Id.* § 671(a)(15)(F); see Carolyn Lipp, *Fostering Uncertainty?: A Critique of Concurrent Planning in the Child Welfare System*, 52 FAM. L.Q. 221, 223 (2018).

175. Dorothy E. Roberts, *Poverty, Race, and New Directions in Child Welfare Policy*, 1 WASH. U. J.L. & POL’Y 63, 67 (1999).

standard would restore the original policy goals of federal child welfare legislation and reestablish the importance of family preservation for all children.

An “active efforts” standard would also reflect post-ASFA federal child welfare policy goals focusing on family reunification. For example, in 2014, Congress enacted the Preventing Sex Trafficking and Strengthening Families Act, which strengthened reunification efforts by requiring ongoing and intensive efforts to return children to their families.¹⁷⁶ The Act added several other requirements to the United States Social Security Act to ensure the best permanent placement, to promote children’s emotional and developmental growth, and to prevent and address the sex trafficking of children in foster care.¹⁷⁷

Federal policy also shifted back toward family preservation with the Family First Prevention Act in 2018.¹⁷⁸ It extended the use of Title IV-E of the Social Security Act funds beyond foster care and adoption assistance to prevention services and programs.¹⁷⁹ Before Family First, Title IV-E funds could only be used to help with the costs of foster care maintenance; administrative expenses; staff funding and training; adoption assistance; and kinship guardianship assistance.¹⁸⁰ Under Family First, states, territories, and tribes with approved Title IV-E plans may use these funds for prevention services that allow “candidates for foster care” to stay with their parents or relatives. States are then reimbursed for prevention services for up to 12 months. To qualify, states must have a trauma-informed prevention plan, and services need to be rated by the Title IV-E Prevention Services Clearinghouse as promising, supported, or well-supported to receive federal reimbursement.¹⁸¹ Eligible services include evidence-based mental health treatment programs, substance abuse

176. Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, 128 Stat. 1919 (2014) (codified as amended in scattered sections of 42 U.S.C.).

177. *Id.*

178. Bipartisan Budget Act of 2018, tit. VII, Pub. L. No. 115-123, 132 Stat. 64, 232 (codified as amended in scattered sections of 42 U.S.C.).

179. *Id.*

180. *Family First Prevention Services Act Summary*, CASEY FAM. PROGRAMS (May 2019), <https://www.familyfirstact.org/sites/default/files/FFPSA%20short%20summary%20May%202019%20update.pdf> [<https://perma.cc/W2TT-RRPA>].

181. *Id.*

prevention and treatment programs, and certain in-home parenting skill-based programs.¹⁸²

More recently, as part of COVID relief, “\$45 million was allocated ‘to support the child welfare needs of families during’ the pandemic and to ‘help keep families together’ under the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act.¹⁸³ Therefore, post-ASFA federal child-welfare laws reflect policymakers’ recognition of the importance of devoting resources to preventing foster care placements and to enabling family reunification. They also exemplify how existing funding streams under Title IV-E of the Social Security Act or additional funding mechanisms can be utilized to reimburse states for costs associated with family-preservation and reunification efforts.

Currently, the disparity between funding allocated for services to prevent the removal of children compared to foster care monies¹⁸⁴ is significant, as only \$553 million is spent on reunification services versus \$5.3 billion on the foster care industrial complex.¹⁸⁵ The United States provides ongoing subsidies for over 469,000 adoptions and terminates parental rights at an unprecedented rate.¹⁸⁶ According to the National Coalition for Child Protection Reform, children are removed from families “prematurely or unnecessarily” due to strong financial incentives of states to disband families, rather than provide services to help families remain together.¹⁸⁷

182. *Id.*

183. Shanta Trivedi & Matthew Fraidin, *A Role for Communities in Reasonable Efforts to Prevent Removal*, 12 COLUM. J. RACE & L.F. 29, 42 (2022) (quoting Press Release, Admin. for Child. & Fams., The Administration for Children and Families to Release Funding to Support Child Welfare Services (Apr. 24, 2020), <https://www.acf.hhs.gov/media/press/2020/administration-child-ren-and-families-release-funding-support-child-welfare> [<https://perma.cc/258L-8NQH>]).

184. *Id.*183, at 42.

185. *Id.* (citing *State-by-State Data*, CASEY FAM. PROGRAMS (Aug. 2021), <https://www.casey.org/state-data> [<https://perma.cc/W52G-RKY3>]).

186. Chris Gottlieb, *Remembering Who Foster Care Is for: Public Accommodation and Other Misconceptions and Missed Opportunities in Fulton v. City of Philadelphia*, 44 CARDOZO L. REV. 1, 21 (2022).

187. Trivedi & Fraidin, *supra* note 183, at 42 (quoting *NCCPR Issue Paper #9: The Unreasonable Assault on “Reasonable Efforts”*, NAT’L COAL. FOR CHILD PROT. REFORM (Oct. 8, 2022) (internal quotation marks omitted),

An “active efforts” standard, which by necessity eliminates time constraints for reunification and concurrent planning, alongside financial incentives for family preservation and reunification instead of adoption, would reestablish the original intent of federal child-welfare policy and create consistency with subsequent policy goals as well.

C. The Reasonable Efforts Standard Fails to Meet the Needs of the Majority of Children and Families in the Foster Care System

The current “reasonable efforts” standard under the Adoption and Safe Families Act is deficient because it limits requirements for family preservation, purporting to instead focus on “perceptions of child safety.”¹⁸⁸ While no one would dispute the laudable goal of safety and the importance of protecting abused children, ASFA failed to address the much larger population in the foster care system.

Children at “imminent risk of harm constitute a very small minority of those removed from their homes and placed in foster care.”¹⁸⁹ Most children enter the foster care system as a result of neglect due to underlying causes of poverty and homelessness, not physical or sexual abuse.¹⁹⁰ Poverty is often conflated with neglect or causes circumstances that lead to neglect.¹⁹¹

Neglect-based removals accounted for 74.9% of all removals in 2019.¹⁹² Neglect is defined as the failure to provide needed, age-appropriate care, food, shelter, supervision, and medical attention.¹⁹³ Housing-based removals accounted for 10% of child removal cases¹⁹⁴ and child welfare workers and judges are reluctant to reunify families without adequate and

<https://nccpr.org/nccpr-issue-paper-9-the-unreasonable-assault-on-reasonable-efforts> [<https://perma.cc/5A4D-BEYZ>].

188. MICAL RAZ, *ABUSIVE POLICIES: HOW THE AMERICAN CHILD WELFARE SYSTEM LOST ITS WAY* 90 (2020).

189. *Id.*

190. CHILD.'S BUREAU, *AFCARS REPORT No. 29*, *supra* note 1, at 2.

191. Trivedi, *supra* note 170, at 536.

192. Trivedi, *supra* note 170, at 536 (citing Child.'s Bureau, *CHILD MALTREATMENT 2019*, U.S. DEP'T OF HEALTH & HUM. SERVS. 90 (2019), <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2019.pdf> [<https://perma.cc/U7AB-HZ38>]).

193. Teena M. McGuinness & Kristina Schneider, *Poverty, Child Maltreatment, and Foster Care*, 13 J. AM. PSYCHIATRIC NURSES ASSOC. 296, 298 (2007).

194. CHILD.'S BUREAU, *AFCARS REPORT No. 29*, *supra* note 1, at 2

BEYOND BRACKEEN

stable housing. This results in longer foster care placements and delayed reunification for these children.¹⁹⁵ Therefore, children are frequently removed from their homes due to homelessness, a lack of heat, a food shortage, a lack of health care, or inadequate supervision.¹⁹⁶ In fact, inadequacy of income is the prevailing factor that causes children to be removed from their homes.¹⁹⁷

The existing low “reasonable efforts” standard and its expedited timeframe to cure the problems that caused the child’s removal under ASFA are insufficient to effectively assist families living in poverty, given that they struggle with simply meeting the day-to-day needs of their families. Families are not provided with ample time or opportunities to address the issues related to poverty that caused the removal of their children. Instead, “reasonable efforts” usually amounts to “last-minute, crisis-driven, unrealistic, and minimal” efforts by agencies.¹⁹⁸ For example, a mother facing a crisis is provided with “a list of substance abuse treatment facilities; or is placed on a waiting list for mental health services; or is handed a bag of groceries.”¹⁹⁹

The complexity of parents’ problems combined with the inadequacy of “short-term services” offered by agencies results in the removal of children from their homes.²⁰⁰ In fact, approximately half of the children in foster care will not return to a parent²⁰¹ and many “children will have their relationship with their biological parents legally terminated because the parents are unable to resolve their problems sufficiently” within the limited timeframe allowed for reunification.²⁰² Although some states allow for the reversal of decisions regarding the termination of parental rights decisions, the extreme measure of termination permanently severs the legal ties between

195. Rong Bai, Cyleste Collins, Robert Fischer, Victor Groza & Liuhong Yang, *Exploring the Association Between Housing Insecurity and Child Welfare Involvement: A Systematic Review*, 39 CHILD & ADOLESCENT SOC. WORK J. 247, 248 (2022).

196. Trivedi & Fraidin, *supra* note 183, at 32.

197. Trivedi, *supra* note 170, at 536 (citing DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 175 (2d ed. 2004)).

198. Trivedi & Fraidin, *supra* note 183, at 33.

199. *Id.*

200. Maxine Eichner, *Children, Parents, and the State: Rethinking Relationships in the Child Welfare System*, 12 VA. J. SOC. POL’Y & L. 448, 456 (2005).

201. *See* Gottlieb, *supra* note 186, at 26.

202. Eichner, *supra* note 200, at 456.

parent and child and ends the parents' rights to have any relationship with their child, including the rights to communicate or visit their child.²⁰³

ASFA's low standard of "reasonable efforts," in combination with its strict time limits for reunification, most negatively impacts Black families. While both American Indians and Black Americans are significantly affected by systemic bias and discriminatory child-welfare decisions, social-service agencies are only required to put forth an eroded "reasonable" level of effort to prevent the removal of Black children from their homes or to attempt to reunify them with their families. Nationally, studies of disparity ratios show that Blacks and American Indians are twice as likely as Whites to be investigated or substantiated, and three or four times more likely than White children to be placed in foster care.²⁰⁴ This disparity suggests systemic bias affecting key child-welfare decisions for both groups of people.

The heightened active-efforts requirement under ICWA was deliberately employed to help combat bias and discriminatory practices by social workers who failed to understand or respect Indian and tribal cultures, and ascribed a White, nuclear-family model when making child-welfare determinations.²⁰⁵ Black children and families face similar biases, subjecting them to increased investigations and placements in foster care,²⁰⁶ but are only entitled to "reasonable efforts" to prevent their removal and help them return to their families under ASFA.

"Researchers have found that racial bias exists at each stage of child welfare proceedings, from investigation to mitigation efforts to ultimate removal."²⁰⁷ A caseworker's subjective views of "good parenting" and their subconscious biases can easily be used to accuse a parent of neglect because if a caseworker believes there is even a potential for harm, a child can be removed from their home.²⁰⁸ Not only are Black parents investigated for abuse and neglect at twice the rate of White parents,²⁰⁹ but once in the child welfare system, Black children are more likely than White children to be

203. *Santosky v. Kramer*, 455 U.S. 745, 749 (1982).

204. ROBERT B. HILL, AN ANALYSIS OF RACIAL/ETHNIC DISPROPORTIONALITY AND DISPARITY AT THE NATIONAL, STATE, AND COUNTY LEVELS 10 (2007).

205. Crandall, *supra* note 43, at 106-07.

206. Trivedi & Fraidin, *supra* note 183, at 32.

207. Trivedi, *supra* note 170, at 536.

208. *Id.* at 535.

209. See Lipp, *supra* note 174, at 228.

BEYOND BRACKEEN

removed from their parents and placed in foster care and less likely to be reunified with their parents or ever achieve permanency.²¹⁰

There is increasing recognition of the profound structural racism that permeates the foster care system and the negative effects on Black children and families.²¹¹ Renewed attention to racial justice issues has led political and policy leaders, including the Biden Administration, the American Academy of Pediatrics, and leading children's advocacy organizations, to publicly acknowledge that the child welfare system has unnecessarily separated families, Black families in particular, and to advocate for family-preservation and reunification efforts.²¹²

The effects of unnecessary separation on children are profound. Studies show that separating children from their families and placing them in foster care causes trauma and leads to worse outcomes for children "on virtually every socioeconomic measure."²¹³ The children feel abandoned, confused about their identities and backgrounds, and lack "mirroring," the "affirmation of seeing one's own features and personality traits reflected in one's parents, siblings, and extended family."²¹⁴

ASFA's "reasonable efforts" standard is insufficient to help combat systemic bias in the child-welfare system. While ICWA was enacted to fight discriminatory practices, ASFA's creation was premised on racist assumptions. Its primary author, Richard Gelles, later admitted that originally, the Act was "not really an adoption bill at all," but a "safe families bill," meant to limit family preservation and reunification, "facilitating the quick termination of parental rights" based on the assumption that the parents of color of the children in foster care "were inherently unfit and simply unable to care for them, no matter what services they were offered."²¹⁵ ASFA proponents believed that limits on reunification services and the speedy termination of parental rights enabled children in foster

210. *Child Welfare Practice to Address Racial Disproportionality and Disparity*, CHILD WELFARE INFO. GATEWAY 3 (Apr. 2021), https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf [<https://perma.cc/L68W-KP5V>].

211. Gottlieb, *supra* note 186, at 45.

212. *Id.* at 14.

213. *Id.*

214. Ashley Albert & Amy Mulzer, *Adoption Cannot Be Reformed*, 12 COLUM. J. RACE & L. 557, 585-86 (2022).

215. *Id.* at 579.

care to “start their lives anew,” in their “forever” homes, with “better,” presumably White, parents.²¹⁶

The “reasonable efforts” standard fails to prevent unnecessary removals and expedites the termination of parental rights when family preservation is “not hopeless.”²¹⁷ Employing an “active efforts” standard would help combat discriminatory child welfare decisions that result in the removal of children and provide families with the necessary resources and time to establish attainable goals and maintain bonds with their children.

D. “Reasonable Efforts” Is a Nebulous and Ineffective Standard

The Federal Title IV-E program requires states to make reasonable efforts to preserve and reunify families (i) prior to the placement of a child in foster care to circumvent the need for removing the child from the child’s home; and (ii) to make it possible for a child to safely return to the child’s home.²¹⁸ Yet despite this legal requirement, state foster care systems are filled with children who “did not need to be removed and who suffer greater harm from being removed than they would if they had been allowed to stay at home.”²¹⁹ The problem lies with a nebulous “reasonable efforts” standard. Due to a lack of legislative, administrative, and judicial guidance as to what constitutes “reasonable efforts” to prevent child removal, judges frequently make haphazard findings of “reasonable efforts.”

The U.S. Department of Health and Human Services has declined to define “reasonable efforts,” offering the perplexing explanation that defining “reasonable efforts . . . would be a direct contradiction of the intent of the law.”²²⁰ It explained that the states are granted flexibility in satisfying

216. *Id.* at 580.

217. Roberts, *supra* note 175, at 67.

218. 42 U.S.C. § 671(a)(15)(B) (2018).

219. Trivedi & Fraidin, *supra* note 183, at 33.

220. Title IV-E, Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 63 Fed. Reg. 50058, 50073 (1998) (codified at 45 C.F.R. pts. 1355, 1356); *see id.* (“During our consultation with the field, some recommended that we define reasonable efforts in implementing the ASFA. We do not intend to define ‘reasonable efforts.’ To do so would be a direct contradiction of the intent of the law. The statute requires that reasonable-efforts determinations be made on a case-by-case basis. We think any regulatory definition would either limit the courts’ ability to make determinations on a case-by-case basis or be so broad as to be ineffective.”).

BEYOND BRACKEEN

this requirement and judicial determinations will be made on a case-by-case basis.²²¹

Furthermore, its policy manual offers little guidance, as it simply describes *types* of activities that can be used to help families provide safe and stable homes for their children, such as “family therapy, parenting classes, treatment for substance use, respite care, parent support groups, and home visiting programs.”²²² The manual explains that “reasonable efforts” also “refer to the activities of individual caseworkers, including safety checks and home visits, that are performed on an ongoing basis to ensure that parents and other family members are participating in needed services and are making progress on case plan goals.”²²³ It provides examples of services for referrals including child care, homemaker services, counseling, health care services, behavioral health evaluation and treatment, and vocational counseling.²²⁴

These listings of the types of services that agencies and caseworkers can use for referrals do not convey the level of effort necessary to help children remain with their families or to reunify families. A host of questions remain: Does the agency only need to research and identify services based on the case worker’s assessment and then refer the services to the family? Does the agency need to ensure that the services are appropriate, accessible, and useful to the family? Is the caseworker expected to follow up on the adequacy and effectiveness of the services or programs and document progress regarding the case-plan goals? For instance, if parents face difficulties with obtaining housing, employment, medical care, or access to counseling, how much additional assistance and support should the agency provide?

In addition to a lack of federal guidance, state statutes offer little guidance. Although all fifty states have enacted statutes requiring “reasonable efforts”²²⁵ since federal funding is conditioned on compliance

221. *Id.* at 50094.

222. *Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children*, CHILD WELFARE INFO. GATEWAY 2 (Sept. 2019), <https://www.childwelfare.gov/pubPDFs/reunify.pdf> [<https://perma.cc/8WZE-HBLQ>].

223. *Id.*

224. *Id.*

225. *See e.g.*, WASH. REV. CODE 13.34.110, 13.34.130; COLO. REV. STAT. § 19-1-115(6); MD. FAM. LAW § 5-525(e).

with ASFA,²²⁶ most states refer generally to “measures” or “services” to preserve families and indicate that the child’s safety is the primary concern in this determination, without clarifying the level of effort necessary to satisfy the “reasonable efforts” requirement.²²⁷ For example, a South Carolina statute specifies that reasonable efforts “include services that are reasonably available and timely, reasonably adequate to protect the child, and realistic under the circumstances.”²²⁸ Some state statutes require due diligence by state agencies. For example, a Minnesota statute requires due diligence by state agencies.²²⁹ In determining whether reasonable efforts were made, a district court must consider whether the services were: (1) relevant to the safety and protection of the child; (2) adequate to meet the needs of the child and family; (3) culturally appropriate; (4) available and accessible; (5) consistent and timely; and (6) realistic under the circumstances.²³⁰

An Oregon statute also attempts to clarify the standard. The efforts to reunify a family must bear a rational relationship to the reason for placing the child in state custody.²³¹ To ensure effective planning for the child, the case plan must include “[a]ppropriate services to allow the parent the opportunity to adjust the parent’s circumstances, conduct or conditions” to make it possible for the child to safely return home within a reasonable time.²³² Nevertheless, in most circumstances, state statutes are unclear and state agencies and caseworkers must formulate their own assessments in attempting to follow the “reasonable efforts” standard.²³³

Courts have also struggled with defining “reasonable efforts.” The Utah Court of Appeals attempted to glean the legislative meaning of “reasonable efforts” from the definition of the individual words comprising the

226. *See* 42 U.S.C. § 671(a)(15)(B) (2018) (“In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . provides that . . . reasonable efforts shall be made to preserve and reunify families . . .”).

227. *See e.g.*, N.J. ANN. CODE § 30:4C-11.1; D.C. CODE § 4-1301.09a; IND. CODE ANN. § 31-34-21-5.5.

228. S.C. ANN. CODE § 63-7-720.

229. MINN. STAT. § 260.012(f) (2022).

230. *Id.* § 260.012(h); GA. CODE ANN. § 15-11-202 (2023).

231. OR. REV. STAT. § 419B.343(1)(a) (2022).

232. *Id.* § 419B.343(2)(a).

233. Trivedi, *supra* note 170, at 562.

BEYOND BRACKEEN

phrase.²³⁴ It explained: “Reasonable is commonly defined to mean ‘not extreme or excessive’ or ‘fair.’ ‘Effort’ is commonly defined to mean ‘a conscious exertion of power: hard work’ or as a ‘serious attempt.’”²³⁵ The court concluded that a state agency “would comply with its statutory obligation to make reasonable efforts . . . if it makes a fair and serious attempt to reunify a parent with a child prior to seeking to terminate parental rights.”²³⁶ Alaska courts have stated that “reasonable efforts” entails identifying family-support services that will assist the parent in remedying the conduct or conditions in the home that caused the issues and referring the parent to the services.²³⁷ Therefore, it seems that referrals to identified services are sufficient.

But since “what exactly is required [for reasonable efforts] remains largely undefined”²³⁸ and has been described in different ways, it is not surprising that there is considerable variance in its interpretation.²³⁹ The National Council of Juvenile and Family Court Judges commented on the burden placed on judges in deciphering the undefined “reasonable efforts” standard. It noted that “[b]ecause Congress and state legislatures have largely declined to articulate anything more than a minimal definition of reasonable efforts, courts have been left to determine whether agency efforts meet the reasonableness standard.”²⁴⁰

234. *State ex rel. A.C. v. State*, 97 P.3d 706, 712 (Utah Ct. App. 2004).

235. *Id.* (citations omitted).

236. *Id.*

237. ALASKA STAT. § 47.10.086(a) (2018); *Moirra M. v. State*, Dept. of Health & Soc. Servs, Off. of Child.’s Servs., 370 P.3d 595, 602 (Alaska 2016), *as amended on reh’g*, (Apr. 27, 2016).

238. Tara Morrison, *Child Protection Law—Care and Protection of Walt: Reexamining the Scope of Judicial Authority in the Enforcement of the Reasonable Efforts Requirement*, 42 W. NEW ENG. L. REV. 127, 166 (2020).

239. *Id.*

240. Leigh Goodmark, *Reasonable Efforts Checklist for Dependency Cases Involving Domestic Violence*, NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES 20 (2008), https://www.ncjfcj.org/wp-content/uploads/2012/02/reasonable-efforts-checklist_web2010.pdf [<https://perma.cc/2SZL-RXL9>].

The Department of Health and Human Services offered that “[i]n the absence of a definition, courts *may* entertain” the following questions in determining whether reasonable efforts were made:²⁴¹

- Would the child’s health or safety have been compromised had the agency attempted to maintain him or her at home?
- Was the service plan customized to the individual needs of the family or was it a standard package of services?
- Did the agency provide services to ameliorate factors present in the child or parent, i.e., physical, emotional, or psychological, that would inhibit a parent’s ability to maintain the child safely at home?
- Do limitations exist with respect to service availability, including transportation issues? If so, what efforts did the agency undertake to overcome these obstacles?
- Are the State agency’s activities associated with making and finalizing an alternate permanent placement consistent with the permanency goal? For example, if the permanency goal is adoption, has the agency filed for termination of parental rights, listed the child on State and national adoption exchanges, or implemented child-specific recruitment activities?

Based on the first four questions, it seems that “reasonable efforts” determinations could entail an assessment of whether an agency created a customized plan of services that were specifically geared toward the reason(s) for the child removal and whether the agency worked to overcome barriers including the lack of service availability or a family’s transportation issues. However, these inquiries are suggested, not required, and many barriers remain for judges determining whether “reasonable efforts” have been made by social service agencies.

Judge Leonard Edwards, who has been commended and described as “the conscience and the voice for juvenile court judges nationwide,” has

241. 8.3C.4 TITLE IV-E, FOSTER CARE MAINTENANCE PAYMENTS PROGRAM, STATE PLAN/PROCEDURAL REQUIREMENTS, REASONABLE EFFORTS, CHILD’S BUREAU (emphasis added), https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=59 [<https://perma.cc/UN32-W9QU>].

BEYOND BRACKEEN

brought national attention to the significant challenges in judicial findings of “reasonable efforts.”²⁴² He calls the analysis a “difficult task” due to the lack of clarity in the definition and clear incentives for judges to find that a state agency made “reasonable efforts.”²⁴³ He explained that due to the lack of a clear meaning, judges feel compelled to afford substantial deference to state agencies in determinations as to whether they have provided adequate reunification services, such as visitation time, parenting classes and re-housing.²⁴⁴ Further, judges are hesitant to make a finding that “reasonable efforts” have not been provided because the law penalizes agencies with a loss of federal dollars if they have failed to provide reasonable services to reunite a separated family,²⁴⁵ and judges are reluctant to interfere with agencies’ resources.²⁴⁶

Judge Edwards detailed specific barriers trial court judges face in reaching “no reasonable efforts” findings:

- Judges do not receive sufficient information to make informed decisions regarding reasonable efforts because usually, the only information comes from the agency.²⁴⁷ Since judges are not experts in community services, they are hesitant to second-guess expert social workers.²⁴⁸
- A “no reasonable efforts” finding will negatively impact financially strapped agencies.²⁴⁹

242. Michael Nash, *Preface* to LEONARD EDWARDS, *REASONABLE EFFORTS: A JUDICIAL PERSPECTIVE* 11 (2014), <http://www.judgeleonardedwards.com/docs/reasonableefforts.pdf> [<https://perma.cc/KYR5-KHQ4>]. Michael Nash is the Presiding Judge of the Los Angeles Juvenile Court.

243. Judge Leonard Edwards, *Ignoring Reasonable Efforts: How Courts Fail to Promote Prevention*, *THE IMPRINT* (2018), <https://imprintnews.org/top-stories/ignoring-reasonable-efforts-why-court-system-fail-promote-prevention/32974> [<https://perma.cc/5ZFF-HCBG>].

244. Morrison, *supra* note 238, at 148.

245. Edwards, *supra* note 243.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

- Due to ASFA timelines and ASFA’s emphasis on timely permanency, judges may find the state exercised reasonable efforts to move the case along and ensure a permanent and stable home for the child.²⁵⁰
- Some judges do not believe their role entails questioning the agency. “Instead, they see themselves as passive observers of a court process in which the contestants develop the facts and the judge makes a decision.”²⁵¹
- The lack of a definition for “reasonable efforts” in federal law makes it difficult for judges to decide if the agency provided reasonable efforts in individual cases.²⁵²

For all these reasons, the federal reasonable efforts mandate “has not worked well in many jurisdictions,”²⁵³ and courts are “not engaging in proper and meaningful oversight over state efforts to maintain the family.”²⁵⁴

The judicial determination as to whether reasonable efforts were made by an agency is one of “the most powerful tools given to the courts by the federal legislation” because it enables the court to determine whether the agency has acted to prevent removal, assisted in reunifying families, and achieved timely permanency for the child.²⁵⁵ In fact, a study is reportedly underway to better understand factors that influence judges’ reasonable

250. *Id.*

251. *Id.*

252. Leonard Edwards, *Overcoming Barriers to Making Meaningful Reasonable Efforts Findings*, AM. BAR ASS’N (2019), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/overcoming-barriers-to-making-meaningful-reasonable-efforts-find/ [https://perma.cc/HP9B-SE8Z].

253. *Id.*

254. Melissa D. Carter, *An Ounce of Prevention Is Worth A Pound of Cure: Why Children’s Lawyers Must Champion Preventive Legal Advocacy*, 42 CHILD. LEGAL RTS. J. 1, 10 (2021).

255. Edwards, *supra* note 243.

BEYOND BRACKEEN

efforts findings and how they relate to case outcomes, such as the likelihood of reunification and the time for children to achieve permanency.²⁵⁶

Judges must also make numerous “reasonable efforts” determinations to assess case plan progress and to decide whether a child can return home. For example, federal law conditions child welfare funding on an initial determination that reasonable efforts were made to prevent the removal of a child within 60 days and a status review hearing must be held every six months until the child’s case is closed by the court.²⁵⁷ Some states require even more frequent hearings.²⁵⁸ Permanency hearings in most states must be held within 12 months after the child enters out-of-home care, with subsequent hearings every 12 months until permanency is achieved.²⁵⁹ Thus courts are required to play an active role in child protection proceedings due to the fundamental nature of the rights at stake.²⁶⁰

Nevertheless, some judges simply ignore the requirement²⁶¹ and do not make “reasonable efforts” findings at all.²⁶² Despite understanding their responsibility, some judges “are unwilling to exercise their power and rule on social service failures.”²⁶³ Others make positive findings based on inaccurate or incomplete information.²⁶⁴ For many judges, the reasonable efforts determination involves little more than “checking a box on a court

256. The Office of Planning, Research and Evaluation, *Introducing the Reasonable Efforts Findings Study*, OPRE REP. No. 2022-231 (2022), https://www.acf.hhs.gov/sites/default/files/documents/opre/jdmhq_study_design_sept2022.pdf [<https://perma.cc/B5C3-8C8A>].

257. LEONARD EDWARDS, REASONABLE EFFORTS: A JUDICIAL PERSPECTIVE 22 (2014). (citing 42 C.F.R. §§ 1365.21(b)(1); 42 U.S.C. §§ 675(5)(B)).

258. *Id.*; see e.g., WYO. STAT. ANN. § 14-3-440(f); WYO. STAT. ANN. § 14-3-431 (reasonable efforts determinations at every court hearing and all review and permanency hearings); TEX. FAM. CODE ANN. § 262.001; TEX. FAM. CODE ANN. § 262.201; TEX. FAM. CODE ANN. § 262.202 (reasonable efforts determinations at the shelter hearing, the 14-day hearing and all status hearings).

259. CHILDREN’S BUREAU, CT. HEARINGS FOR THE PERMANENT PLACEMENT OF CHILDREN 2 (2020) [<https://perma.cc/M7GH-DW94>].

260. Morrison, *supra* note 238, at 147.

261. Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W.L. REV. 223, 227 (1989-1990).

262. Edwards, *supra* note 243.

263. Leonard P. Edwards, *Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980*, 45 JUV. & FAM. CT. J. 3, 4 (1994).

264. Shotton, *supra* note 261, at 227.

form, with no discussion of the issue.”²⁶⁵ They merely approve the social worker’s level of effort “without much thought.”²⁶⁶ Thus the “reasonable efforts” finding often amounts to a rubber stamp in juvenile court practice and courts “typically find that the state has made sufficient efforts to prevent a child’s removal.”²⁶⁷

Appellate relief from an improper “reasonable efforts” finding is difficult because many clients have court-appointed attorneys and the appellate process is expensive and time-consuming.²⁶⁸ Therefore, erroneous reasonable efforts findings are often never challenged. Furthermore, appellate courts are likely to affirm trial court determinations that nominal actions on behalf of agencies constitute reasonable efforts because generally, the standard of review is clear error.²⁶⁹

For example, in an unreported opinion, the Court of Special Appeals of Maryland upheld a juvenile court’s determination that an agency’s minimal efforts to help a mother reunify with her child satisfied the reasonable efforts requirement. The mother explained that she was unable to care for her child “due entirely to the fact that she lived in a homeless shelter in New York and lacked the resources to move to Maryland.” She sought assistance in moving to a shelter in Maryland to live with her child.²⁷⁰ The agency’s actions included: reviewing the Mother’s records; offering financial

265. *Id.*

266. Edwards, *supra* note 243.

267. Trivedi & Fraidin, *supra* note 183, at 35 (citing Leonard P. Edwards, *Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980*, in NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 140 (1995)); *see also* Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L & SOC. CHANGE 523, 577 (2019) (“[One] study showed that over 90% of judges rarely or never made a no-reasonable-efforts finding and 40 made reasonable efforts findings *even when they believed that the agency had not, in fact made those efforts.*”) (emphasis in original).

268. Edwards, *supra* note 243.

269. *See In re K.T.K.*, 989 N.E.2d 1225, 1229-30 (Ind. 2013) (“When a trial court has entered findings of fact and conclusions of law, we will not set aside the trial court’s findings or judgment unless clearly erroneous.”); *In re V.A.*, 51 N.E.3d 1140, 1143 (Ind. 2016) (“[T]o determine whether a judgment terminating parental rights is clearly erroneous, we review the trial court’s judgment to determine whether the evidence clearly and convincingly supports the findings and the findings clearly and convincingly support the judgment.”).

270. *In re J.I.*, 2021 WL 2143629, at *1 (Md. Ct. Spec. App. May 26, 2021).

BEYOND BRACKEEN

assistance for a temporary hotel room rather than locating a Maryland shelter; researching a shelter with no availability; and suggesting a homelessness program that would not accept her as a non-resident of Maryland. These meager efforts were considered reasonable assistance to help the Mother “overcome any impediments to her ability to properly care for [her child.]”²⁷¹

Similarly, in a housing and medical neglect case, where five children were removed from their home because their parents did not maintain a safe, sanitary home or provide regular medical care for the children, the Court of Special Appeals in Maryland upheld the “reasonable efforts” finding by the juvenile court.²⁷² The Mother testified that she was trying to find a home for the family but received no housing assistance from the agency other than a list of rental properties.²⁷³ The Father testified that as parents, they were “trying our hardest” and “despite trying every day to find a home suitable for the children, most landlords during the pandemic wanted larger security deposits” which the parents could not afford.²⁷⁴ Finding that the agency had made reasonable efforts to facilitate the parents’ reunification with their children, the juvenile court changed the permanency plan to custody or guardianship with a non-relative and/or adoption.²⁷⁵

On appeal, the parents argued that the “reasonable efforts” determination was erroneous because they received no help in obtaining suitable housing or in facilitating visitation with the children.²⁷⁶ The court commented that reunification was difficult due to the pandemic, and that “[a]lthough the Department arguably could have done more than providing a list of properties for rent to assist Mother and Father in obtaining suitable housing, there are limits to what the Department is required to do.”²⁷⁷ In these cases, very minimal efforts on behalf of agencies were deemed sufficient to satisfy the “reasonable efforts” requirement.

And in cases where appellate courts have reversed the trial court’s ruling because the obligation to provide reasonable efforts was not satisfied, the agencies’ level of effort in assisting families with remedial services and/or rehabilitative programs was almost nonexistent. For

271. *Id.* at 6.

272. *In re M.B.*, 2021 WL 3184702, at *5, *10 (Md. Ct. Spec. App. Jul. 28, 2021).

273. *Id.* at *4.

274. *Id.* at *5.

275. *Id.*

276. *Id.* at *9.

277. *Id.* at *10.

example, in *Division of Youth & Family Services v. I.S.*, the Supreme Court of New Jersey described the trial court's "reasonable efforts" finding as "strikingly untethered to any record evidence in this case, to any logical construct or to any principled rule of law."²⁷⁸ It found that the agency "woefully failed to make reasonable efforts to provide services"²⁷⁹ to a 56-year-old father who recently learned that he had a child. The agency never "consulted and cooperated" with the father and never provided him with any services other than "inconveniently scheduled and utterly irrelevant parenting classes" for "a fifty-six-year-old man who had already successfully reared four children."²⁸⁰ The court found that the agency made absolutely no effort to inform the father about the health and safety of the child and never "even attempted" to facilitate visitation between him and his child.²⁸¹

Similarly, the Court of Special Appeals in Maryland reversed the trial court's reasonable efforts finding in *In re James G.* based on an extremely low level of effort by the agency. Even though the social worker met with the father just once and the agency made only a single referral to an employment assistance agency that did not help the father, this was deemed to satisfy "reasonable efforts"²⁸² to achieve reunification.²⁸³ In direct contravention to the record, the court listed the following reasonable efforts: "the agency entered into a service agreement, referred Respondent for therapeutic services and placement in the home of a relative thereby strengthening family ties, monitored Respondent's father's employment, and monitored the respondent's education."²⁸⁴

In fact, the record showed no evidence of any of these actions by the agency to assist the father. A social worker testified that she spoke to the father about his employment status,²⁸⁵ but admitted not knowing if he was working.²⁸⁶ When asked whether there was "anything else" that the agency could have done to help the father with gainful employment, the social

278. N.J. Div. of Youth & Family Servs. v. I.S., 996 A.2d 986, 1007 (N.J. 2010).

279. *Id.* at 1010.

280. *Id.* at 1007.

281. *Id.*

282. *In re James G.*, 943 A. 2d. 53, 58 (Md. Ct. Spec. App. 2008).

283. *Id.* at 64.

284. *Id.* at 64-65.

285. *Id.* at 58.

286. *Id.*

BEYOND BRACKEEN

worker responded, “I don’t know.”²⁸⁷ Therefore, although the agency directed the father to find a job and stable housing, it provided him with no meaningful assistance. The Court of Special Appeals in Maryland reversed, finding that the juvenile court erred in finding that the agency made reasonable efforts toward reunification by making “a single referral to a vocational resource.”²⁸⁸

Also, in *In Re O.G.*, the Court of Appeals of Indiana held the trial court’s finding that an agency made reasonable efforts toward reunification was clearly erroneous.²⁸⁹ Although the agency was supposed to work toward reunifying a mother and child, the department’s therapist focused on the child’s coping skills instead of “restoring the previously strong bond [between] Mother and Child.”²⁹⁰ Even when the court ordered “parenting time,” the department “made minimal efforts to follow through” and repeatedly requested suspensions of the order.²⁹¹ As a result, the Mother did not see her child for almost three years.²⁹²

These cases illustrate the latitude trial judges give agencies in determining that they have provided adequate remedial services and rehabilitative programs to prevent the breakup of the family, as well as the deference appellate courts afford juvenile courts by frequently affirming their “reasonable efforts” findings. Only when the level of effort is so minimal as to be virtually non-existent, do appellate courts reverse “reasonable efforts” findings.

Although courts are expected to play an important role in ensuring that agencies help maintain and preserve families, judges often find that agencies have satisfied their obligation to make “reasonable efforts” to prevent children from being removed from their homes or to enable them to return to their homes based on minimal and ineffective efforts. The lack of clarity around the “reasonable efforts” definition, potential financial implications of “no reasonable efforts” findings, and reduced emphasis on the value of family preservation have rendered the “reasonable efforts” standard in judicial determinations virtually meaningless.

287. *Id.*

288. *Id.* at 86.

289. *In re O.G.*, 159 N.E.3d 36, 45 (Ind. Ct. App. 2020), *trans. denied sub nom.* K.T v. Ind. Dep’t of Child Servs., 165 N.E. 3d 65 (Ind. 2021).

290. *Id.* at 45.

291. *Id.*

292. *Id.*

E. “Active Efforts” is Well-Defined, Helps Preserve Families, and Can Be Applied to All Children in the Foster Care System

In contrast to “reasonable efforts,” the “active efforts” standard has been clearly defined in federal guidelines regarding the implementation of the Indian Child Welfare Act.²⁹³ The regulations provide that active efforts means “affirmative, active, thorough, and timely efforts intended primarily to reunite an Indian child with his or her family.”²⁹⁴ The guidelines encourage the identification of appropriate services to help parents overcome barriers, including actively assisting the parents in obtaining such services.²⁹⁵ The agency must find community resources, such as housing, financial, transportation, mental health, substance abuse, and peer support services, and actively assist the American Indian child’s parents or family in utilizing and accessing those resources.²⁹⁶

“Active efforts” is a higher, more meaningful standard than “reasonable efforts” because the former involves increased work and attention by state agencies (and other parties) before removing a child from parental care involuntarily and after the child has been removed to assist with reunification.²⁹⁷ All state courts that have considered the issue, except California,²⁹⁸ hold that “active efforts” requires a greater level of effort than “reasonable efforts” and a greater obligation on behalf of agencies than

293. 25 C.F.R. § 23.2 (2020); BUREAU OF INDIAN AFFS., GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT 39 (2016). Newly revised ICWA regulations were published in June 2016 by the Bureau of Indian Affairs (BIA). In December 2016, ICWA guidelines were released to provide additional information regarding ICWA compliance.

294. 25 C.F.R. § 23.2 (2020).

295. *Id.*

296. *Id.*

297. Leonard Edwards, *Defining Active Efforts in the Indian Child Welfare Act*, 41 THE GUARDIAN 1, 2-4 (2018), http://judgeleonardedwards.com/docs/guardian_2019_v41n01-icwa.pdf [https://perma.cc/WZ2A-98UF].

298. In 2006, the California legislature, while not explicitly stating that active efforts is a higher standard, made it clear that active efforts *is* different in the respect that it “takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child’s and tribe.” CAL. WELF. & INSTIT. CODE § 361.7 (West 2021). It also mandated that courts use all available resources of the Indian child’s extended family, tribe, tribal, and other Indian social service agencies. *Id.*

simply referring families to services and resources as part of the case plan.²⁹⁹

Courts also provide useful guidance on how to determine whether “active efforts” were satisfied. For example, the Colorado Supreme Court—which recently resolved a split in its court of appeals divisions by holding that “active efforts” is the more demanding standard—closely examined “active efforts.”³⁰⁰ The court posed the question: “[H]ow should courts measure ‘active efforts’ in a case?”³⁰¹ For guidance, it surveyed other states and concluded that agencies must actually help the parent through the steps of the case plan and with accessing or developing the resources necessary to satisfy the plan.³⁰²

Therefore, rather than simply drafting a case plan with directives to find a job, acquire new housing, and terminate a relationship with a boyfriend perceived to be a bad influence, “active efforts” requires that the caseworker help the parent develop the job and parenting skills necessary to fulfill the plan and retain custody of the child.³⁰³ Therefore, the increased standard ensures that parents are not simply provided with referrals, but are supported with the case plan.³⁰⁴ The caseworker must communicate with the family, take a proactive approach with clients, and actively help them comply with the service plan.³⁰⁵

299. *See e.g., In re. Dependency of A.L.K.*, 478 P.3d 63, 72 (Wash. 2020).

300. *People v. V.K.L.*, 512 P.3d 132, 142 (Colo. 2022). *Compare People ex rel. K.D.*, 155 P.3d 6354, 637 (Colo. App. 2007) (“‘Active efforts’ are equivalent to reasonable efforts to provide or offer a treatment plan in a non-ICWA case”), with *In re. T.E.R.*, 305 P.3d 414, 419 (Colo. App. 2013) (“The ICWA’s active efforts standard requires *more* than the ‘reasonable efforts’ standard . . . in non-ICWA cases”) (emphasis added).

301. *V.K.L.*, 512 P.3d at 142.

302. *Id.* at 142-43 (quoting *Demetria H. v. State, Dep’t of Health & Soc. Servs., Off. of Child.’s Servs.*, 433 P.3d 1064, 1071 (Alaska 2018)); *In re. Dependency of G.J.A.*, 489 P.3d 631, 643 (Wash. 2021)); *see In re Beers*, 926 N.W.2d 832 (Mich. App. 2018); *see also In re A.N.*, 106 P.3d 556, 560 (2005) (giving the parent a treatment plan and waiting for him to complete would constitute passive efforts).

303. *In re. W.P.*, 516 P.3d 263, 269 (Okla. Civ. App. 2022).

304. *See In re Beers*, 926 N.W.2d at 832; *see also In re A.N.*, 106 P.3d at 560 (“[g]iving the parent a treatment plan and waiting for him to complete it would constitute passive efforts”).

305. MICH. DEP’T. OF HEALTH & HUMAN SERVICES, NAB 2018-001, NATIVE AM. AFF. POLICY MANUAL (2019).

State courts have applied different standards of proof when assessing whether “active efforts” were made to maintain families. Unlike other Indian Child Welfare Act provisions, the “active efforts” provision does not specify the applicable standard of proof. Some courts apply a beyond a reasonable doubt standard,³⁰⁶ but the majority of courts apply a clear and convincing standard.³⁰⁷

Despite differing standards of proof, appellate courts require that agencies do more than simply refer services and resources and expect active engagement with the family to promote reunification. For example, the Supreme Court of Washington acknowledged that the standard for providing active efforts to American Indian families in child welfare cases is separate and distinct from the standard providing “reasonable efforts” to non-American Indian families.³⁰⁸ It found that merely creating a service plan and providing a housing referral do not constitute active efforts to prevent the breakup of an Indian family; additional effort is required.³⁰⁹ The social welfare agency must design and tailor a plan that is specifically directed at helping the parent overcome the obstacles to reunification with their child.³¹⁰ This requires meeting in person to discuss the plan,

306. See *In re Welfare of M.S.S.*, 465 N.W.2d 412, 418 (Minn. Ct. App. 1991) (“If termination of parental rights of Indian parents to their children can be ordered only upon a factual basis shown beyond a reasonable doubt, and if termination cannot be effected without a showing of active efforts to prevent the breakup of the Indian family and a failure thereof, then the adequacy of efforts [predicating] termination, must likewise be established beyond a reasonable doubt.” (citations omitted)); see also *In re G.S.*, 59 P.3d 1063, 1071 (Mont. 2002) (“[G]iven the intent of Congress in preserving Indian families and this [s]tate’s commitment to preserving Indian culture, we conclude that the proper evidentiary standard for determining ‘active efforts’ under [25 U.S.C.] § 1912(d) is the same standard we apply to the underlying ICWA proceeding.”).

307. See *Valerie M. v. Ariz. Dep’t of Econ. Sec.*, 198 P.3d 1203, 1207 (Ariz. 2009); *In re Michael G.*, 74 Cal.Rptr.2d 642, 648 (Cal. Ct. App. 1998); *In re C.A.V.*, 787 N.W.2d 96, 100-01 (Iowa Ct. App. 2010); *In re JL*, 770 N.W.2d 853 (Mich. 2009); *In re Walter W.*, 744 N.W.2d 55, 60-61 (Neb. 2008); *In re R.L.A.*, 147 P.3d 306, 309 (Okla. Civ. App. 2006); *In re Vaughn R.*, 770 Wis.2d 795, 803 (Wis. Ct. App. 2009).

308. *In re G.J.A.*, 489 P.3d 631, 642 (Wash. 2021).

309. *In re A.L.K.*, 478 P.3d 63, 71 (Wash. 2020).

310. See *In re the Dependency of R.D.*, 532 P.3d 201 (2023).

meaningfully engaging with the parent to help them address the issues causing the removal of the child, and following up on any referrals.³¹¹

The Court of Appeals of Washington held that the “active efforts” standard was not satisfied in *In re the Dependency of R.D.*,³¹² because the social worker was obligated to meet with the mother in person despite her overall resistance and her insistence on the presence of her attorney during meetings.³¹³ It also found that making court-ordered referrals was insufficient for “active efforts,” as the social worker should have “gone further” to assist the mother by following up on the referrals, which may have included “providing transportation, helping the mother make phone calls, or filling out necessary paperwork.”³¹⁴ Finally, the court noted that although providing the mother with financial support with a prepaid cell phone and rental money was “undoubtedly helpful,” these resources were not tailored to help her overcome her barriers to reunification with her child, which included alcohol dependency and mental health concerns.³¹⁵

When reviewing whether “active efforts” have been made, courts carefully examine the agencies’ actions and do not apply a “one-size-fits-all formula.”³¹⁶ Rather they consider the totality of the circumstances and account “for all services and resources provided to a parent to ensure the completion of the entire treatment plan.”³¹⁷ Courts have noted that agencies must be provided with discretion in prioritizing “services or resources to address a family’s most pressing needs in a way that will assist the family’s overall completion of the treatment plan.”³¹⁸ These may include strategic decisions regarding how to prioritize more urgent plan objectives related to a child’s safety and well-being.

The Colorado Supreme Court provided this specific example:

[A]ddressing a parent’s sobriety will likely qualify as a top priority in order to provide stability and safety for the parent and child, as well as enable the parent’s meaningful engagement with the

311. *Id.*

312. *Id.* at 16.

313. *Id.* at 15.

314. *Id.* at 17.

315. *Id.*

316. *People v. V.K.L.*, 512 P.3d 132, 143 (Colo. 2022) (citing 25 C.F.R. § 23.2).

317. *Id.* (citing *Sylvia L. v. State, Dep’t of Health & Soc. Servs., Off. of Child’s Servs.*, 343 P.3d 425, 432 (Alaska 2015)).

318. *Id.*

services and resources necessary to address the other treatment plan objectives. While some parents may be able to work towards satisfying all treatment plan objectives simultaneously, others may struggle with a specific challenge that may require urgent, consistent, and thorough resources to reach a baseline of stability before tackling other objectives.³¹⁹

This careful analysis of the “active efforts” standard and sensitivity to the time required to complete treatment plans stands in stark contrast to judicial determinations concerning “reasonable efforts.” Moreover, courts are provided with significant guidance and helpful tools for making “active efforts” determinations. For example, the Oregon Indian Child Welfare Act Dependency Benchbook provides guidance on the level of intensive engagement with American Indian children and their parents and/or custodians that is required by “active efforts.”³²⁰ The benchbook also refers to a second resource, an *Active Efforts Principles and Expectations* guide, to help agencies and courts evaluate whether active efforts have been satisfied in ICWA cases.³²¹ The Oregon Department of Human Services, in collaboration with the federally recognized Tribes of Oregon, developed this manual which details the “more vigorous and higher level” of effort required by the “active efforts” standard:

(1) “Active efforts” requires going beyond referring services to arranging services and helping families engage in those services. Mere referrals and monetary expenditures for services are insufficient.³²²

(2) The standard requires going beyond minimally managing a case to “proactively engaging in diligent casework activity.”³²³ In arranging and helping families with services, frequent “face-to-face contact” with the family,³²⁴ child, and provider is expected because

319. *Id.*

320. OREGON INDIAN CHILD WELFARE ACT DEPENDENCY BENCHBOOK 15 (2022) (The Oregon Judicial Department Juvenile Court Improvement Program and Casey Family Programs collaborated to provide assistance to Oregon judges in applying the new Oregon Indian Child Welfare Act (ORICWA)).

321. *Id.* at 16.

322. ACTIVE EFFORTS PRINCIPLES AND EXPECTATIONS 3, 8 (2010).

323. *Id.*

324. *Id.* at 5, 8.

BEYOND BRACKEEN

active efforts involve “intensive engagement” with Indian children and their parents and/or Indian custodians.³²⁵

(3) “Active efforts” requires going beyond merely meeting the minimum requirements to “creatively meeting the needs of children and families.”³²⁶ For example, if a waiting list prevents a parent or custodian from attending a class, the agency should “find another class, contract with a provider to make the service available, or use some other effective method to make the service available.”³²⁷

Another incredibly comprehensive guide to active efforts with detailed checklists was drafted by the Lummi Nation for state agencies and courts.³²⁸ To determine the active efforts needed in a particular case, it recommends a comprehensive baseline assessment that takes into consideration the unique circumstances, barriers, and obstacles faced by the family.³²⁹ Checklists detail specific active efforts with regard to many factors including safety, parent/family strengths, transportation access, communication access, financial obstacles, physical and mental health obstacles, cognitive obstacles, trauma history, residence stability/remoteness, and current and potential service providers.³³⁰ Additionally, checklists are provided for language obstacles, the family’s support system, childcare access, cultural connections, mental health, chemical dependency, and housing.³³¹

Lummi Child Welfare also provides guidance to ensure that services provided to American Indian children, parents, and families are culturally appropriate in accordance with ICWA. The Bureau of Indian Affairs regulations explain:

To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child’s Tribe and should be conducted in partnership with the

325. *Id.* at 8.

326. *Id.* at 3.

327. *Id.* at 5.

328. LUMMI CHILD WELFARE COMPREHENSIVE GUIDE TO ACTIVE EFFORTS (2021).

329. *Id.* at 103.

330. *Id.* at 104-13.

331. *Id.* at 114-23.

Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe.³³²

Indeed, "a cornerstone in the application of active efforts is active and early participation and consultation with the child's tribe in all case planning decisions."³³³ In addition, it is a requirement to be "cognizant of Indian families' mistrust of government actors due to centuries of abuse."³³⁴

To provide active efforts related to cultural connections, the *Lummi Child Welfare Comprehensive Guide to Active Efforts* recommends the following specific actions:

- (1) Asking parent, child, and family about their cultural background and what cultural involvement means to them and their family.
- (2) Asking parent, child, and family what cultural activities are important to them and their children.
- (3) Consulting with the Tribe to identify cultural activities and supports for the child and parent.
- (4) Asking Tribal . . . [Indian Child Welfare] program if a cultural mentor has been or can be identified for the child and parent.
- (5) Providing opportunities for the child to engage in cultural activities (specific to their tribes' cultures) on a regular basis.
- (6) Coordinating the scheduling of services, meetings, and hearings around the parent and child's cultural activities schedule.³³⁵

It also details actions that would fail to meet "active efforts" related to cultural connections:

- (1) Failing to make efforts on a regular basis for the child to maintain cultural connections.

332. 25 C.F.R. § 23.2 (2023).

333. 25 CFR 23.2; NATIONAL INDIAN CHILD WELFARE ASSOCIATION FREQUENTLY ASKED QUESTIONS 13, <https://www.nicwa.org/families-service-providers/> [<https://perma.cc/V23B-4B3B>].

334. *In re* Dependency of G.J.A, 438 P.3d 631, 650 (Wash. 2021).

335. LUMMI CHILD WELFARE COMPREHENSIVE GUIDE TO ACTIVE EFFORTS 30 (2021).

BEYOND BRACKEEN

(2) Making assumptions about the parent's cultural traditions or about what activities meet the cultural needs of the parent and child.

(3) Engaging the child in cultural activities which are not part of that child's tribal culture.

(4) Assuming that because the child has not maintained a certain level of cultural engagement/activity prior to a dependency case means that efforts to establish and maintain cultural connections/involvement are not as important as for children who have maintained a high level of cultural connections/involvement throughout their life.³³⁶

The level of involvement by tribes in dependency cases can vary based on annual resources and staff,³³⁷ but consultation with tribes should generally occur when court action is initiated, at periods between review hearings, and at decision-making stages involving reunification, permanency planning, termination of parental rights, and dependency case closures.³³⁸ Tribal consultation should also occur when assessing the risk of harm, obtaining background information on the child and parents' circumstances, identifying support systems for families, identifying potential placement options with relatives and tribal members, finding available services and resources, and helping with placement changes and short and long-term decision making.³³⁹

In determining if culturally appropriate interventions have occurred, courts look to whether the agency worked with the tribe, whether the prescribed service providers have experience working with Native families, or, at the very least, whether the agency attempted to procure services that connect to and support the family's Native values and beliefs.³⁴⁰

In *Matter of Dependency of G.J.A.*, the Supreme Court of Washington found that that an agency failed to engage with the Blackfeet Nation to provide an Indian family with culturally appropriate services.³⁴¹ It noted that the record showed no evidence of services "connected to" and

336. *Id.*

337. *Id.* at 77.

338. *Id.* at 78.

339. *Id.* at 78-79.

340. *In re Dependency of G.J.A.*, 438 P.3d at 647.

341. *Id.*

supportive of “the family’s Native values and beliefs”³⁴² or that the referred professionals “had experience working with Native families or that the Department made any effort to procure such services.”³⁴³ The court stated that “[b]ased on the record before us and the Department’s lack of engagement, one would think that the children were not Native” and that ICWA was inapplicable to the children.³⁴⁴

The “active efforts” standard is well-defined, enabling social service agencies to understand what is expected and judges to properly assess whether the agencies fulfilled their duties. Caselaw consistently describes “active efforts” parameters, including that agencies identify the appropriate services, make them available to parents, and assist parents in accessing the services.³⁴⁵

Furthermore, the federal regulations include a non-exhaustive list of examples illustrating “active efforts” that could be modified to include all children. The left side of the chart below includes the existing ICWA “active efforts” guidelines. The right side of the chart demonstrates how the guidelines could be easily modified to apply an “active efforts” standard to all children:

Existing ICWA “Active Efforts” Guidelines	Potential “Active Efforts” Guidelines Applicable to All Children
(1) Conducting a comprehensive assessment of the circumstances of the Indian child’s family, with a focus	(1) Conducting an assessment of the circumstances of the child’s family, with a focus on safe

342. *Id.* at 644.

343. *Id.*

344. *Id.* at 647.

345. *See e.g., In re Beers*, 926 N.W.2d 832, 846-47 (Mich. App. 2018) (explaining that, as opposed to passive efforts such as simply developing a plan for the parent to follow, “active efforts” means that the caseworker takes the client through the steps of the plan); *Clark J. v. Dep’t of Health & Soc. Servs., Off. of Children’s Servs.*, 483 P.3d 896, 901 (Alaska 2021) (concluding that efforts are not active “where a plan is drawn up and the client must develop his or her own resources towards bringing it to fruition,” but rather where the “caseworker takes the client through the steps of the plan”); *In re J.S.*, 321 P.3d 103, 110 (Mont. 2014) (demonstrating that state courts have found that active efforts requires more than giving a parent a treatment plan and waiting).

BEYOND BRACKEEN

<p>on safe reunification as the most desirable goal;</p> <p>(2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;</p> <p>(3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;</p> <p>(4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;</p> <p>(5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;</p> <p>(6) Taking steps to keep siblings together whenever possible;</p> <p>(7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure</p>	<p>reunification as the most desirable goal;</p> <p>(2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;</p> <p>(3) Identifying, notifying, and inviting family members to participate in providing support and services to the family in permanency planning and resolution of placement issues;</p> <p>(4) Taking steps to keep siblings together whenever possible;</p> <p>(5) Supporting regular visits with parents... in the most natural setting possible as well as trial home visits of the child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;</p> <p>(6) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;</p> <p>(7) Monitoring progress and participation in services;</p> <p>(8) Considering alternative ways to address the needs of the child's parents... if the</p>
---	--

<p>the health, safety, and welfare of the child;</p> <p>(8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;</p> <p>(9) Monitoring progress and participation in services; December 2016 – Guidelines for Implementing the Indian Child Welfare Act;</p> <p>(10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;</p> <p>(11) Providing post-reunification services and monitoring.³⁴⁶</p>	<p>optimum services do not exist or are not available;</p> <p>(9) Providing post-reunification services and monitoring.</p>
--	---

Although a more stringent “active efforts” standard could be applied to all children, it is certainly not infallible. First, as previously discussed, the requirement was limited in *Adoptive Couple v. Baby Girl*, so that the standard does not apply to involuntary termination actions against parents who never had legal or physical custody of the child prior to a child custody proceeding. Second, adherence to the “active efforts” standard is difficult to evaluate because the federal government is not required to track ICWA compliance.³⁴⁷ The Adoption and Foster Care Analysis and Reporting

346. 25 C.F.R. § 23.2 (2020); BUREAU OF INDIAN AFFS., GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT 39 (2016).

347. Alicia Summers & Kathy Deserly, *The Importance of Measuring Case Outcomes in Indian Child Welfare Cases*, 36 CHILD L. PRAC. 22 (2017).

BEYOND BRACKEEN

System, the only national dataset that describes child welfare outcomes, captures only whether a state identified a child as being American Indian or Alaska Native, but not whether a child's case was governed by ICWA,³⁴⁸ so measuring compliance with the law and its "active efforts" requirement is challenging.

Indeed, there is evidence that the "active efforts" standard is inconsistently applied throughout the United States because American Indian children remain disproportionately represented in the child welfare system as a whole, and in some states, the percentage of disproportionality is significantly higher.³⁴⁹ Nationwide, American Indian and Alaskan Native children are overrepresented in foster care at a rate 2.6 times greater than their proportion in the general population.³⁵⁰ An examination of individual state data shows that some states, including Minnesota, Missouri, North Dakota, and South Dakota have much larger disproportionality rates for Native American and Alaskan Native children.³⁵¹

In addition, there are indications that "active efforts" and other ICWA protections do not sufficiently protect American Indian children, families, and tribes from systemic bias and discrimination in the child welfare system. The representation of American Indian children in foster care often starts with reports of abuse and neglect at rates proportionate to the overall American Indian/Alaskan Native population numbers but increases at each major decision point from investigation to placement, culminating in their overrepresentation in placements outside the home.³⁵²

348. Casey Family Programs, *Native American and Alaska Native children 2020 Data Overview* (2022), <https://www.casey.org/media/ICWA-data.pdf> [<https://perma.cc/NF55-2PBK>].

349. NATIONAL INDIAN CHILD WELFARE ASS'N (NICWA 2019) (citing Hill, R. B. *Casey-Center for the Study of Social Policy Alliance for Racial Equity in Child Welfare, Race Matters Consortium Westat*. (2007) (An analysis of racial/ethnic disproportionality and disparity at the national, state, and county levels. Seattle, WA: Casey Family Programs); National Ctr. for Juvenile Justice, *Disproportionality Rates for Children of Color in Foster Care Dashboard* (2019), http://www.ncjj.org/AFCARS/Disproportionality_Dashboard.aspx [<https://perma.cc/NRE4-NXXN>]

350. National Ctr. for Juvenile Justice, *supra* note 349.

351. *Id.*

352. *Id.* (noting that one study found that due in large part to systematic bias, in cases where abuse has been reported, American Indian/Alaskan Native children are two times more likely to be investigated, two times more likely

However, there is also evidence that when ICWA's "active efforts" provision is adhered to, child welfare outcomes improve.³⁵³ For example, in Arizona, data collected by the Pascua Yaqui Tribe shows that ICWA has led to positive outcomes for Indian families.³⁵⁴ The Tribe began to intervene in state dependency cases in 1981 and changed from contract representation to in-house representation for ICWA cases in 1999. In 2006, when the Tribe began collecting ICWA-related data, only 13 percent of ICWA cases resulted in reunification.³⁵⁵ Due to the Tribe's involvement and dedication to ICWA compliance, 40 percent of ICWA cases resulted in parent reunification in 2015, and 36 percent of cases resulted in reunification in 2021.³⁵⁶

Furthermore, although systemic bias remains within the system and improvements have been gradual, Native American/Alaska Native children are being placed more frequently with people who have familial and tribal connections to the child. The percentage of Native American/Alaska Native children in foster care who are placed with relatives has increased from 27 percent in 2010 to 38 percent in 2020. Also significant, the rate of Native American/Alaska Native children being placed into foster care has been on the decline the past few years, from a peak of 15.9 children per 1000 in 2017, to 15.0 per 1000 in 2020.³⁵⁷

Therefore, while the "active efforts" standard is not without flaws and cannot cure the ills of child welfare, it would significantly help families receive higher levels of support in preventing child removal and in preserving their families, without the imposition of significant time constraints and an emphasis on permanency through speedy adoption.

to have allegations of abuse substantiated, and four times more likely to be placed in foster care than White children).

353. Tara Hubbard & Fred Urbina, *ICWA - The Gold Standard: Golden Nuggets of Evidence from Arizona*, 58 ARIZ. ATT'Y 32, 33 (2022) ("One critical provision of ICWA that has led to increased positive outcomes for Indian families is the active efforts requirement in 25 U.S.C. § 1912(d).").

354. *Id.* at 17.

355. *Id.* at 17-18 (citing ICWA Data Report, Pascua Yaqui Attorney General's Office (2016)).

356. *Id.* (explaining that the 2021 reduction in percentage points is attributed to the COVID-19 pandemic and related stressors).

357. Casey Family Programs, *Native American and Alaska Native children 2020 Data Overview 2* (2022) (citing CHILD.'S BUREAU, AFCARS REPORT NO. 28 (2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport28.pdf> [<https://perma.cc/SW4Z-RALQ>]).

CONCLUSION

The “active efforts” standard, one of ICWA’s most important safeguards, has been recognized as a viable and effective standard that can help American Indian children retain connections to their families. On the other hand, the standard of “reasonable efforts” utilized in child welfare proceedings under the Adoption and Safe Families Act is ineffectual; it should be changed to “active efforts” so that all families—who can benefit from remedial services and rehabilitative programs to prevent the removal of their children or enable them to be reunified with them—are legitimately provided with this support.

Heightening the standard better aligns with the original federal child welfare policy goals for non-American Indian children under the Adoption Assistance and Child Welfare Act, legislation that chiefly focused on family preservation. This objective shifted prematurely to permanent placement through speedy adoption based on racist assumptions disguised as safety concerns. By focusing on a small subset of the foster care population for whom safety concerns existed and failing to effectively analyze systemic problems in the child welfare system, the needs of the larger population of children in the foster care system were ignored.

Most children who enter foster care are not abused but rather are neglected due to poverty and homelessness, which can and should be addressed through supportive services and programs—not by disbanding the family unit. Moving to an “active efforts” standard will help families in the foster care system establish attainable goals and receive the level of support needed to maintain bonds with their children.

An “active efforts” standard will also provide clear guidelines regarding the actions necessary to effectively assist families in the child welfare system. While “reasonable efforts” remains nebulous in federal and state jurisprudence, “active efforts” under the Indian Child Welfare Act is clearly defined. Therefore, applying an active efforts standard will guide social service agencies in the performance of their duties and assist state courts in making judicial determinations as to whether “active efforts” were made.

The child welfare system’s goal of protecting children would be better accomplished if “active efforts” were used to assist all families who could remain intact with remedial services and rehabilitative programs. This requires legislation to increase the standard from reasonable to active efforts, supplemental actions by social welfare agencies to improve family preservation prospects, judicial determinations about whether active efforts were made by social service agencies, and continued funding and reallocation of funds for services and programs that promote family preservation and reunification.

Congress should use the ICWA standard as a model and apply the “active efforts” standard to all children in the child welfare system so that children are protected against unwarranted removals from their homes and families are provided with the appropriate level of services necessary to retain or regain custody of their children.