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IN THE WASHINGTON SUPREME COURT

In re the Dependency of

G.J.A, A.R.A., S.S.A., J.J.A., and V.A.

AMICI BRIEF OF

THE ICWA LAW CENTER AND THE INDIAN LAW CLINIC
AT THE MICHIGAN STATE UNIVERSITY COLLEGE OF LAW

TARA URS
LA ROND BAKER
Local Counsel for Amici Curiae

KING COUNTY DEPARTMENT OF PUBLIC DEFENSE
Director's Office
710 Second Avenue, Suite 200
Seattle, WA 98104
Phone: (206) 477-8789
 tara.urs@kingcounty.gov
 lbaker@kingcounty.gov

MICHAEL BOULETTE
AARON LINDSTROM
ERIKA WEISS

BARNES & THORNBURG LLP
225 S. Sixth Street Suite 2800
Minneapolis, MN 55402
Phone: (612) 367- 8785
 aaron.lindstrom@btlaw.com
 erika.weiss@btlaw.com
 mboulette@btlaw.com

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I. INTRODUCTION

Congress requires courts to find that governmental agencies make “active efforts” to provide services designed to prevent the breakup of Indian families. Yet here, the efforts provided fell short of that standard, with months passing before the state provided even simple referrals. Amici submit this brief to explain the importance of timely active efforts, to highlight what true active efforts look like, and to explain why thinking about active efforts in terms of futility is inconsistent with Congress’s directions.

II. ISSUE PRESENTED FOR REVIEW

Did the Department fail to make “active efforts” to prevent the breakup of this Indian family?

III. INTERESTS OF AMICI CURIAE

As explained in the motion for leave to file this amici curiae brief, the ICWA Law Center in Minneapolis, Minnesota, and the Indian Law Clinic at Michigan State University College of Law both provide quality representation in cases involving the enforcement of ICWA by state courts protects Native children, families, and tribes. Amici are particularly concerned with the proper interpretation and application of ICWA’s “active efforts” requirement, which requires courts to ensure governmental agencies make “active efforts” to “provide remedial services and

rehabilitative programs designed to prevent the breakup of the Indian family[.]” 25 U.S.C. § 1912(d). Amici have extensive experience in the area of the Indian Child Welfare Act from both a national and local perspective. This brief provides specialized expertise in order to assist the Court.

IV. STATEMENT OF THE CASE

Amici rely on the statement of facts in the motion to modify the commissioner’s ruling.

V. ARGUMENT

A. ICWA’s Active-Efforts Requirement is Critical to Ensuring Continuing Contact for Parents and Effective Interventions.

For over four decades, the Indian Child Welfare Act (ICWA) sought to curtail the destruction of Indian families due to the “wholesale removal of Indian children from their homes.” *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013). As this Court has observed, ICWA, and its state-level counterpart, the Washington Indian Child Welfare Act (WICWA), were “enacted to remedy the historical and persistent state-sponsored destruction of Native families and communities[.]” *Matter of Dependency of Z.J.G.*, 196 Wn.2d 152, 157, 471 P.3d 853, 856 (2020)

To that end, ICWA “provides specific protections for Native children in child welfare proceedings and [is] aimed at preserving the

children’s relationships with their families, Native communities, and identities.” *Id.* Chief among these protections is the requirement that, before placing a child in foster care or terminating parental rights, the state must demonstrate that “active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family[.]” 25 U.S.C. § 1912(d). The active-efforts requirement is “designed primarily to ensure that services are provided that would permit the Indian child to remain or be reunited with her parents, whenever possible,” and it has come to represent “the ‘gold standard’ of what services should be provided in child-welfare proceedings.” 81 Fed. Reg. 38778-01, 38790 (June 14, 2016). In short, ICWA’s active-efforts requirement is a “vital part of ICWA’s statutory scheme.” *Id.* at 38814.

Despite the centrality of ICWA’s active-efforts requirement, confusion arose among state courts as to “exactly what constitutes ‘active efforts’ under the ICWA and how this standard relates to the . . . reasonable efforts standard,” more commonly employed in child welfare matters. *State ex rel. C.D.*, 620 Utah Adv Rep 21, 2008 UT App 477, 200 P.3d 194, 205 (2008); *see also* Kurtis A. Kemper, *Construction and Application by State Courts of Indian Child Welfare Act of 1978 Requirement of Active Efforts to Provide Remedial Services*, (25 U.S.C.A. § 1912(d)), 61 A.L.R.6th 521 (originally published in 2011). Therefore, as part of binding federal

regulations adopted in 2016, the Bureau of Indian Affairs provided state courts additional guidance on ICWA's active-efforts mandate. According to the 2016 Rule, efforts to provide services designed to prevent the breakup of Native families must not only be "active," they must also be "affirmative, . . . thorough, and timely." 25 C.F.R. § 23.2. Where, as here, a state agency is involved, "active efforts *must* involve assisting the parent . . . through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan." *Id.* (emphasis added). Such efforts should also be "culturally appropriate" and pursued "in partnership" with the child, the parents, extended family, and the Tribe. *Id.*

While the active efforts ICWA contemplates must be "tailored to the facts and circumstances of the case," 25 C.F.R. § 23.2, the 2016 Rule provides examples, all of which illustrate the "heightened responsibility" ICWA imposes. *In re A.N.*, 325 Mont. 379, 384, 106 P.3d 556, 560, 2005 MT 19 (2005). The state should not simply "identif[y] appropriate services," it should "hel[p] the parents overcome barriers, including actively assisting the parents in obtaining those services." 25 C.F.R. § 23.2. Likewise, it is not enough to "identify community resources," like housing, financial-assistance, transportation, mental-health, and substance-abuse services. *Id.* Rather, the state should "actively assis[t]" the parents "in utilizing and accessing those services." *Id.* Taken together, the state cannot

simply provide a treatment plan or referrals and wait for the parent to complete them. *Matter of K.L.*, 397 Mont. 446, 461, 2019 MT 256, 451 P.3d 518, 527, (2019).

ICWA’s insistence on *active* efforts cannot be satisfied by mere passive steps. Hence, providing “instructions on how to get a phone” is merely a passive effort; ensuring a parent actually gets a phone is an active effort. *Matter of D.J.S.*, 12 Wn. App. 2d 1, 36, 456 P.3d 820, 839–40 (2020). Explaining the resources for low-income housing and shelters is a passive effort; accompanying a parent to complete the application is an active effort. *Id.* at 36, 456 P.3d at 839. Providing a referral for mental-health counseling is passive; assisting a parent in obtaining counseling is active. *Id.* at 36–37, 456 P.3d at 839–40.

Likewise, WICWA demands “timely and diligent efforts to provide and procure . . . services,” RCW 13.38.040(1)(a). WICWA specifies that such “active efforts” must include “actively work[ing] with the parent” based on existing orders, and an individual service plan “*beyond simply providing referrals to such services.*” RCW 13.38.040(a)(a)(ii) (emphasis added).

The efforts in this case were not active, because they were not timely, thorough, or diligent; court-ordered services were not provided at a time when the mother expressed a willingness to engage in those services

and the referrals, when they were eventually made, demonstrated only passive rather than active efforts. For example, the mother sought a referral for therapy in February and March of 2019, but she did not receive one until the end of May, without further follow-up. *See* Appellant’s Motion to Modify the Commissioner’s Ruling (hereafter “AP”) 7, 31–33, 59–62, 86, 155. Similarly, though mother and her attorney made several requests for contact with the children throughout January and February 2019, the social worker put off facilitating those visits, making only vague movement towards family therapy. *Id.* 8, 31-32, 50–52, 155. ICWA requires more.

As ICWA and its state counterparts emphasize, truly active efforts must be more than a standardized list of referrals. They must be individually tailored, culturally appropriate, and adapted to help parents overcome the barriers and resistance they face. 25 C.F.R. § 23.2. Critically, the efforts must also be timely. Active efforts, done well, save families, protect children, and represent the best of ICWA’s promise to preserve “children’s relationships with their families, Native communities, and identities.” *Z.J.G.*, 196 Wn.2d at 157, 471 P.3d at 856.

Other state ICWA statutes similarly emphasize the importance of “a rigorous and concerted level of effort, that is ongoing throughout the involvement of the local social services agency,” to ensure children are not removed from their families, and if they are that they’re returned at the

earliest possible time. *See* Minn. Stat. Ann. § 260.755, subd. 1a; *see also* Cal. Welf. & Inst. Code § 224.1; Mich. Comp. Laws Ann. § 712B.3(a); Neb. Rev. Stat. Ann. § 43-1503(1); Wis. Stat. Ann. § 48.028. Similarly, other states recognize that, “active efforts require more than a referral to a service without actively engaging the Indian child and family.” Mich. Comp. Laws Ann. § 712B.3(a); *see also* Wis. Stat. Ann. § 48.028(g)(1)(f) (requiring offering community resources as well as “actively assist[ing] or offer[ing] active assistance in accessing those resources.”).

ICWA, the 2016 Rule, and their state-level counterparts all reflect Amici’s decades of experience that active efforts are the life blood of family preservation. When done properly, these efforts are precisely what has made ICWA the gold standard in child-welfare proceedings. The quality, timeliness, and thoroughness of active efforts often determines whether a child is reunited with her family.

To understand the importance of active efforts, courts should be mindful that child protection proceedings, even when required, are among the most traumatic experiences children and families may face. Removal and separation at the hands of the state creates unique difficulties and vulnerabilities, which are even more pronounced in Native families where government-sponsored family removal repeats across generations. *Z.J.G.*, 196 Wn.2d at 157, 471 P.3d at 856. Parents often struggle to trust child

welfare workers and may find themselves adrift in a legal system that seems impenetrable. In Amici's experience, these struggles only increase the longer a removal continues, and failure to actively assist and engage a parent early in the process sets a parent up for failure. For efforts to be truly "active," the efforts must start early and must be responsive to parent's requests for assistance, when the window for parental engagement is at its widest.

B. There is No Futility Exception to ICWA's Active-Efforts Requirement.

After a court finds that a child is dependent, parents rely on the court to hold the state to its burden of providing remedial services to help the family unit remain intact. Yet it is all too common for trial courts to excuse the state's failure to make efforts by laying blame on the parents for failure to engage, finding that efforts by the state would be futile. *See, e.g., Matter of D.J.S.*, 12 Wn. App. 2d at 24, 456 P.3d at 833 (noting "the rule that DSHS need not afford futile services."). The "futility" doctrine allows a court to determine that some parents are beyond help, and therefore, need not even be offered the services the state was court-ordered to provide in the dependency case. Such a rule has no place in an ICWA case.

In this case the trial court excused the social worker's failure to make a timely referral for family therapy because the court was "not

convinced anything would have come from the social worker clicking ‘submit’ on the family therapy referral.” *See* AP 164–65 (finding that making the referral would amount to “setting up the mother for likely failure.”). The state relies on that reasoning, Respondent’s Br. 31, and also suggests the social worker was excused from making additional calls to the mother because “there is no basis to believe [she] would have answered such an additional hypothetical call.” *Id.* at 34. Under this reasoning, the court held that the state was not even required to provide the services and supports the court itself had ordered because, the court surmised, to do so wouldn’t amount to anything.

Yet there is no “futility” exception to ICWA’s active efforts requirement. “Active efforts” requires the court to focus on the state’s actions, rather than on perceptions of the parents’ capabilities, and to hold the state to its burden of providing meaningful support. Both ICWA and WICWA place the statutory burden *on the government agency* to demonstrate the active efforts to assist the parent. Section 1912(d) of ICWA requires that a government agency must “satisfy the court that active efforts have been made” to provide assistance designed to prevent the breakup of the Indian family “and that these efforts have proved unsuccessful.” 25 U.S.C. § 1912(d); *see also* RCW 13.38.130(1). Efforts cannot “prove[] unsuccessful” if they have not yet been tried.

These statutes direct courts to look backward at whether the agency has provided active efforts and whether those efforts have proved unsuccessful; they do not allow courts to *predict* that active efforts *would be* futile and so need not be provided in the first place. This reasoning is inconsistent with the legislatures' purpose, as the very existence of these provisions shows that both Congress and the state legislature thought such active efforts might make a difference—that they might provide a parent with tools or resolve to change and to chart a new course.

This Court recently recognized that, at a termination trial, a superior court can “look to a parent’s unwillingness to participate in services” when making an “active efforts” determination. *In re Dependency of A.L.K., L.R.C.K.-S., and D.B.C.K.-S.*, No. 98487-5, (slip op) at 15. However, such evidence would be evidence that the Department’s efforts proved unsuccessful, not evidence that the Department, in fact, made active efforts.

The Michigan Supreme Court recognized this distinction in *In re JL*, 483 Mich. 300, 326, 770 N.W. 2d 853, 867 (2009), where that court “decline[d] to adopt a futility test.” While accepting the idea that “[t]he ICWA obviously does not require the provision of *endless* active efforts” and that “there comes a time when the DHS or the tribe may justifiably pursue termination without providing additional services,” the Michigan Supreme Court recognized that “[a] futility test does not capture this

concept.” *Id.* at 327, 770 N.W. 2d at 867. Indeed, because a futility test focuses on the actions of the parent, rather than on the government agency, a court relying on that test “may altogether avoid applying [25 U.S.C. § 1912(d)] by simply deciding that additional services would be ‘futile.’” *In re JL*, 483 Mich. at 327, 770 N.W. 2d at 867.

Accordingly, this Court should clarify that active efforts may not be bypassed based on a prediction that they will be futile; instead, agencies seeking termination of parental rights must make active efforts until it becomes apparent that the efforts have “proved unsuccessful.” 25 U.S.C. § 1912(d). People can change, and no matter the depth of the pain and trauma a parent is attempting to overcome, no parent should be written off.

C. Active Efforts Should Include Overcoming Distrust of the System.

The effects of hundreds of years of federal policies towards Native American people, together with the disproportionate effect of the child welfare system on Native American families, has created significant distrust towards the government and those who work for the government. Accordingly, to have meaning, the provision of active efforts must acknowledge the need to overcome that distrust, rather than relying on manifestations of that distrust to deny parents additional support.

“As child welfare systems work with tribal communities, it is important to consider that these systems have perpetrated historical trauma” Maegan Rides At The Door and Ashley Trautman, *Considerations For Implementing Culturally Grounded Trauma-Informed Child Welfare Services: Recommendations For Working With American Indian/Alaska Native Populations*, 13.3 *Journal of Public Child Welfare* 368 (2019), at 371 (hereafter “Rides At The Door 2019”) (Appendix A). Institutional racism, including the overrepresentation of Indian children in the child welfare system, contributes to both historical and contemporary trauma. *Id.* at 372; see also Christopher J. Graham, *2019 Washington State Child Welfare Racial Disparity Indices Report* (2020) (available at <https://bit.ly/3o0clUV>) (demonstrating that, in Washington, Native American families are still more likely to have an intake called in, more likely to have that intake screened in, more likely to have children placed in out of home care, and more likely for the children to remain out of home for longer than one year).

This “remembered history” shapes the attitudes of Native American people towards child welfare agencies, social workers, and other professionals. Charles Horejsi et al., *Reactions by Native American Parents to Child Protection Agencies: Cultural and Community Factors*, *Child Welfare League of America*, 1992 (hereafter “Horejsi1992”) (available at <https://bit.ly/2WK5Vx6>). “When parents, who already feel helpless, are

confronted by a CPS agency, they may feel completely overwhelmed and the intensity of that feeling may lead to extreme and inappropriate behavior.” *Id.* (recognizing that Native American people also disproportionately live in extreme poverty and that “[a] life of grinding poverty often gives rise to feelings of hopelessness and a belief that one is helpless to control or influence one’s life and its circumstances.”).

In a dependency case, parents of Indian children are required to accept services and meet the standards of a system statistically stacked against them, or risk losing their children forever. “A personal history of frequent loss and incomplete grieving can affect how some parents respond to a CPS worker who has the power to place their child in foster care and thereby inflict still another loss.” *Id.*

Recognizing this trauma-based context is one aspect of “active efforts.” Research suggests the benefits of adopting a trauma-informed lens—which means moving from an analysis that asks “what is wrong” with a parent to one that asks “what happened” to this parent? *See Rides At The Door* 2019 at 371. The state’s brief in this case, which notes the mother’s “meth binge,” implicitly asks, what is wrong with her? (Resp. Supp. Br. at 47.) But that analysis is devoid of any context about what may have happened to her that brought her so low, including whether the inability to see her children, even when she was in compliance with the state’s

demands, contributed to her loss. By pointing to the mother's failings, rather than describing the state's efforts to understand and address the reasons for her struggles, the state demonstrates they were not, in fact, engaged in active efforts.

Indeed, active efforts requires a level of engagement that can help parents of Indian children overcome distrust of the system. For example, the practices of the Denver Indian Family Resource Center ("DIFRC") demonstrates the importance of collaboration as an aspect of "active efforts." From a case's beginning, the DIFRC takes a collaborative approach, meeting with the family, their support persons, services providers, CPS representatives, family preservation workers, and other appropriate parties, which include tribal representatives or case workers, to identify *family strengths* and challenges and develop an initial plan. Nancy Lucero and Marian Bussey, *A Collaborative and Trauma-Informed Practice Model*, 91(3) Child Welfare (2012), at 94 (hereafter "Lucero 2012") (available at <https://tinyurl.com/y7cn4urh>).

The DIFRC also recognizes the need for those working with Indian families to understand the historical context in which many are entering the child welfare system. Therefore, not only does DIFRC provide mental-health intervention by Native American psychologists, they also educate their family preservation workers on a regular basis about trauma responses

frequently seen among Native people and encourages them to recognize and assess ways in which those trauma responses are creating barriers to fulfilling various family service plan components. *Id.* at 95.

This training assists family preservation workers in discussions with CPS workers about the role that trauma may be playing in a family's behaviors or responses. *Id.* at 95. The DIFRC also offers training directly to CPS workers to help them understand Native American "cultures and families, and to provide skills that increase workers' engagement with the families' awareness of both their resources and their cultural needs." *Id.*

State collaboration with tribes, case workers, and service providers who understand the trauma behind behavioral responses to services and recommendations helps break down the walls built by years of government mistrust on the part of Indian families. When a case worker is able to recognize that a specific response, or lack thereof, from a parent in an Indian child welfare case is driven by emotional and historical traumas rather than unwillingness to change, the active efforts being provided to parents can be specifically tailored to address those responses.

D. Active Efforts Should be Individually Tailored and Culturally Appropriate.

Providing parents of Indian children, many of whom once suffered themselves, with culturally appropriate services to help reunify with their

children is another vital aspect of ICWA's active efforts requirement. ICWA was passed in an effort to combat the historical trauma associated with federal and state assimilation policies and with the stripping of Indian children's cultural identities. 25 C.F.R. § 23.3. In doing so, ICWA, when properly complied with, maintains, and in some cases reestablishes, ties between Indian children and their tribal communities, practices, and cultures by encouraging the state child welfare system to respect the historical traditions and customs practiced by Indian people and their tribal communities.

Historically, Indian tribes and their communities relied on customary practices and tradition to provide for their needs of their children. See National Indian Child Welfare Association, *The Indian Child Welfare Act: A Family's Guide* (2017) (available at <https://bit.ly/2JgFJH6>). A significant number of studies have been done on the impact that the loss of cultural identity has on youth, particularly Indian children.

One early study on the effects of Indian child removal from tribal communities, the Split Feather study, highlighted the emotional, psychological, and spiritual issues faced by Indian children whose ties with their tribal communities and families has been severed, and revealed that Indian children suffer lifetime psychological and emotional trauma as a direct result of their loss of cultural experiences and transmission of a

cultural identity. Carol Locust, *Split Feathers: Adult American Indians Who Were Placed in Non-Indian Families as Children*, 44 Ontario Ass'n Child Aid Soc'y J. 11 (2000) (Appendix B). The results of the Split Feather study were reaffirmed in 2017, where quantitative research demonstrated that Indian children adoptees were more vulnerable to problems such as alcohol addiction, drug addiction, eating disorders, self-injury and suicide attempts compared their white counterparts. Ashley Landers et al., *American Indian and White Adoptees: Are There Mental Health Differences?*, 24 Am. Indian & Alaska Native Mental Health Res., no. 2 (2017) at 54, 69 (available at <https://bit.ly/3hkbziL>).

Another study indicated the importance of Indian cultural identification for youth well-being and resilience, especially in the face of stressors. The study found that those Indian youth that participated in traditional and spiritual activities and identified with their Indian culture had increased well-being and resilience. Teresa LaFromboise et al., *Family, Community, and School Influences on Resilience among American Indian Adolescents in the Upper Midwest*, 34(2) Journal of Community Psychology 193 (2006) (available at <https://bit.ly/3mMmjrp>). Yet another study suggests that the relationship between youth well-being and cultural identity may, in part, be mediated by family, peer, and social support influences. Julie Baldwin et al., *Culture and Context: Buffering the*

Relationship between Stressful Life Events and Risky Behaviors in American Indian Youth, 46 (11) Substance Use & Misuse 1380 (2011) (available at <https://bit.ly/3aEJcKR>).

By providing services that connect children and parents—families—directly with values and beliefs common amongst tribal communities, parents can draw from a sense of attachment to their respective tribal communities that will help nurture their own cultural identities and provide a sense of empowerment, hope, and community support. Culturally sensitive services enable parents to reunify with their Indian children and to provide both a sense of cultural connectivity and a safe environment to raise their children.

Examples of what culturally appropriate services look like are not hard to find. For example, the DIFRC created a practice model and framework for culturally appropriate services for Indian families. The DIFRC model uses direct practice interventions with Indian families, concentrated on collaborative family-focused case management services. Lucero 2012 at 93. Throughout a family’s time in the child welfare system, the DIFRC works with CPS to conduct a series of strength-based, culturally appropriate, and trauma-informed assessments. *Id.* at 94. The services then provided are individualized for each family based on the results of the assessments and may include referrals for medical, substance-abuse, and

mental-health issues. The assessments take into account the reality of Indian life and the importance of many tribal traditions. *Id.* at 99. For example, the DIFRC recognizes the importance to many families of practicing their tribe's traditional spirituality, and so referrals or references to specific religious organizations that are at odds with traditional spiritual practices are limited or forgone all together. *Id.* Another DIFRC example is the creation of an empowerment group for young Indian women that incorporates "cultural values and pride to help women build inner strength and thus model that strength for their own young children," rather than just training to avoid domestic violence. *Id.* at 103.

The culturally appropriate approach used by DIFRC has proven to be successful in helping reunify and preserve the Indian family. In one project, 96% of families were preserved with the help of the DIFRC model, with children either at home with parents or with extended family members. *Id.* at 102. The DIFRC's success demonstrates the importance of offering Indian families culturally appropriate services and should serve as a model for others in their approach to ICWA cases. See Angelique Day and Angelina Callis, *Evidenced-Based Tribal Child Welfare Programs in Washington State: A Systemic Review*, Indigenous Wellness Research Institute (May 2020) (available at <https://bit.ly/3hg8uAd>) (discussing

additional programs focused on culturally appropriate services that, although effective, are not consistently offered in Washington).

VI. CONCLUSION

ICWA's active efforts requirement provides a key protection for Indian children. The state should be held to the high standard required by the law to provide active efforts to prevent the breakup of Indian families.

DATED this 28th day of December 2020.

Respectfully submitted,

s/Tara Urs

Tara Urs, WSBA No. 48335
La Rond Baker, WSBA No. 43610
Local Counsel for Amici
King County Department of Public
Defense
Director's Office
710 Second Avenue, Suite 200
Seattle, WA 98104
Telephone: (206) 477-8789
Fax: (206) 296-0587
Email: tara.urs@kingcounty.gov
Email: lbaker@kingcounty.gov

Michael Boulette
Aaron Lindstrom
Erika Weiss
Barnes & Thornburg Llp
225 S. Sixth Street Suite 2800
Minneapolis, MN 55402
Phone: (612) 367- 8785
aaron.lindstrom@btlaw.com
erika.weiss@btlaw.com
mboulette@btlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2020, I served by email one copy of the foregoing pleading on the following:

Jodi Backlund – Email: backlundmistry1@gmail.com
Manek Mistry – Email: backlundmistry@gmail.com
Chris Jordan – Email: chris.jordan@atg.wa.gov
Marcie. Bergman – Email: marcie.bergman@atg.wa.gov
Rachel Brehm King – Email: rachel.king@atg.wa.gov
Michael Boulette – Email: mboulette@btlaw.com
Aaron Lindstrom – Email: aaron.lindstrom@btlaw.com
Erika Weiss – Email: erika.weiss@btlaw.com
Shannon Smith – Email: shannon@icwlc.org
Kathryn Fort – Email: fort@law.msu.edu

s/Tara Urs

Tara Urs, WSBA No. 48335
King County Department of Public
Defense
Director's Office
710 Second Avenue, Suite 200
Seattle, WA 98104
Telephone: (206) 477-8789
Fax: (206) 296-0587
Email: tara.urs@kingcounty.gov