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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CALIFORNIA TRIBAL FAMILIES COALITION *et al.*, Plaintiffs, v. XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, *et al.*, Defendants.	Civil Action No. 3:20-cv-06018-MMC (LB) **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT** Hearing Date: December 3, 2021 Time: 9:00 a.m.

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NOTICE OF MOTION

PLEASE TAKE NOTICE that on December 3, 2021 at 9:00 a.m., or as soon thereafter as this matter may be heard by the Honorable Maxine M. Chesney, Senior United States District Judge of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, Defendants[1] will and hereby do move the Court for an order granting summary judgment as to all claims in Plaintiffs'[2] complaint ("(Complaint"), Dkt. No. 1, and denying Plaintiffs' motion for summary judgment, Dkt. No. 66. This motion is based on this notice, the supporting memorandum of points and authorities set forth below, all pleadings and papers on file with the Court, and all other matters properly before this Court.

RELIEF SOUGHT

Defendants seek an order granting summary judgment to Defendants as to all claims in the Complaint and denying Plaintiffs' motion for summary judgment.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Adoption and Foster Care Analysis and Reporting System ("AFCARS") is a data collection system for national adoption and foster care data authorized under the Social Security Act and administered by U.S. Department of Health and Human Services ("HHS") and HHS's Administration for Children and Families ("ACF"). In 2016, HHS issued a final rule updating the AFCARS regulations to add new data elements, including those related to sexual orientation and the Indian Child Welfare Act of 1978 ("ICWA"). HHS issued the 2016 AFCARS rule even though the state child welfare agencies tasked with collecting the data expressed concerns about the costs and burdens of that rule and the unreliability of certain data it sought to collect.

[1] Defendants are Xavier Becerra, in his official capacity as Secretary of Health and Human Services; JooYeun Chang, in her official capacity as Acting Assistant Secretary and Principal Deputy Assistant Secretary at the Administration for Children and Families; U.S. Department of Health and Human Services; and Administration for Children and Families. Pursuant to Federal Rule of Civil Procedure 25(d), Mr. Becerra and Ms. Chang are automatically substituted for Alex Azar and Lynn A. Johnson, respectively.

[2] Plaintiffs are California Tribal Families Coalition, Yurok Tribe, Cherokee Nation, Facing Foster Care in Alaska, Ark of Freedom Alliance, Ruth Ellis Center, and True Colors, Inc.

In 2017, under a new administration, HHS requested additional comments regarding these issues. Based on the comments it received, as well as other information, HHS determined that the sexual orientation and some of the ICWA-related data elements did not satisfy the statutory mandate that AFCARS avoid unnecessary diversion of resources from agencies and collect data that is reliable and consistent. In May 2020, HHS issued a new AFCARS rule that did not include these elements. Plaintiffs claim that, in doing so, Defendants acted in an arbitrary or capricious manner, and not in accordance with law, in violation of the Administrative Procedure Act ("APA"). Plaintiffs' contentions are without merit.

HHS is permitted to reconsider the wisdom of its policy on a continuing basis, whether in response to changed factual circumstances or a change in administrations. A court may not second guess HHS's reconsideration as long as it offered a reasoned explanation for the change. HHS's actions amply satisfy that standard. HHS gave due consideration to the comments received it and adequately explained why the sexual orientation and ICWA-related data elements did not satisfy the requirements of the AFCARS statute. Plaintiffs nevertheless argue that Defendants failed to respond to significant comments and failed to explain their actions sufficiently. But, as demonstrated below, Plaintiffs' contentions, at their core, merely reflect their disagreement with the wisdom of HHS's decision, which is not a cognizable basis for the Court to set aside the 2020 final rule.

Accordingly, the Court should find that the 2020 AFCARS final rule satisfies the APA, grant summary judgment to Defendants as to all of Plaintiffs' claims, and deny Plaintiffs' summary judgment motion. However, if the Court should find that the 2020 final rule violates the APA, the rule should not be set aside but remanded to HHS without vacatur.

II. STATEMENT OF ISSUES TO BE DECIDED

Whether, under 5 U.S.C. § 706(2)(A), the 2020 Final Rule was "not in accordance with law" because, by not requiring the collection of sexual orientation data, the 2020 Final Rule did not satisfy the statutory mandate for AFCARS, as set forth in 42 U.S.C. § 679.

Whether, under 5 U.S.C. § 706(2)(A), the 2020 Final Rule was arbitrary or capricious by not requiring the collection of sexual orientation data.

Whether, under 5 U.S.C. § 706(2)(A), the 2020 Final Rule was arbitrary or capricious by not

requiring the collection of certain data related to the Indian Child Welfare Act of 1978.

Whether, under 5 U.S.C. § 706(2)(A), the 2020 Final Rule should be set aside if it is determined to be arbitrary, capricious or not in accordance with law.

III. BACKGROUND

AFCARS is a data collection system for national adoption and foster care data authorized under Section 479 of the Social Security Act ("Act"), codified at 42 U.S.C. § 679. *Id.* Section 679(c) requires AFCARS to:

> (1) avoid unnecessary diversion of resources from agencies responsible for adoption and foster care; (2) assure that data collected is reliable and consistent over time and among jurisdictions through the use of uniform definitions and methodologies; (3) provide comprehensive national information with respect to — the demographic characteristics of adoptive and foster children and their biological and adoptive or foster parents . . . ; and (4) utilize appropriate requirements and incentives to ensure that the system functions reliably.

The data for AFCARS are collected and reported by state and tribal child welfare agencies, which are known as "Title IV-E agencies" because they receive funding under Title IV-E of the Act (as well as Title IV-B). Section 1102 of the Act instructs the Secretary of HHS to promulgate regulations necessary for the effective administration of the functions for which HHS is responsible under the Act.

A. 2016 Final Rule

On December 14, 2016, HHS issued a final rule ("2016 Final Rule") updating the AFCARS regulations, which were originally published in 1993 and had approximately 119 data elements. 81 Fed. Reg. 90,524; *see* AR 22 (noting 2016 Final Rule had 272 elements, 153 of which were new).[3] The 2016 Final Rule added 153 new data elements, including those related to sexual orientation, 81 Fed. Reg. at 90,524, and ICWA, *id.* at 90,527. The 2016 Final Rule provided for an implementation timeframe that required Title IV-E agencies to continue reporting AFCARS data in accordance with the existing regulations until September 30, 2019. *Id.* at 90,569.

1. Sexual Orientation Elements

The 2016 Final Rule required Title IV-E agencies to report the child's self-reported sexual orientation for youths age 14 and older. *Id.* at 90,534. The commenters who supported collecting

[3] On December 23, 2020, Defendants filed the certified administrative record ("AR"). Dkt. No. 52.

LGBTQ-related data (primarily advocacy organizations) asserted that LGBTQ children are over-represented in the child welfare system, but a full picture of their experiences in foster care does not exist. *Id.* Such youth often have unique service needs, are at an increased risk for poor outcomes, are more likely to be placed in group settings and experience more placements. *Id.* State commenters opposed the collection of sexual orientation data, questioning its reliability "because the youth would self-report which could result in an undercount of LGBTQ children in foster care." *Id.* States also expressed concerns over sexual identity data being in a government record and used in a discriminatory way and that collecting the data may "pose safety concerns because the LGBTQ community is still vulnerable to discrimination in many parts of the country." *Id.*

Based on the comments, HHS explained that it was persuaded to include a data element on a child's self-reported sexual orientation, which would require the child to self-identify as "straight or heterosexual," "gay or lesbian," "bisexual," "don't know," "something else," or "decline" if the child declined to report this information. *Id.* HHS addressed the state concerns by noting that the child may decline to report the information if they do not feel comfortable disclosing it and that such information would be protected by confidentiality requirements. *Id.* at 90,535.

2. ICWA-Related Elements

The 2016 Final Rule also required Title IV-E agencies to collect and report data elements relevant to Indian children, as defined in ICWA, who are in the state's placement and care responsibility and who exit to reunification, adoption or who are transferred to the custody of the Indian tribe. *Id.* at 90,527. Tribes and advocacy organization commenters believed that collecting ICWA-related data in AFCARS would: (1) provide data on core ICWA requirements as well as assess how the child welfare system is working for Indian children; (2) facilitate access to culturally-appropriate services and high quality placements for tribal children; (3) help address and reduce the disproportionality of American Indian/Alaska Native ("AI/AN") in foster care; and (4) provide avenues for collaboration between states and tribes, including improved policy development, technical assistance, training and resource allocation as a result of having reliable data available. *Id.*

While commenters from some states generally supported the overall goal and purpose of including ICWA-related data in AFCARS, they also reiterated concerns related to the implementation

period, penalties, timeline for submission, limited access to court records and the associated burden. *Id.* at 90,527-28. For example, many states noted that the burden of reporting ICWA-related information would be significantly higher than HHS's estimates because they would require significant upgrades to their case management system to be able to report the data. *Id.* at 90,566. They also cited the increased workload due to manually entering information from paper court orders or case narratives into the system for AFCARS reporting. *Id.* States commented that certain of the proposed ICWA-related information would not be easily captured in a single data field and may therefore be better assessed through qualitative case file review. *Id.* at 90,527. Several states said that they have a small number of AI/AN children in their AFCARS reporting population and they requested that federal funding be made available to the fullest extent possible to help prepare for the low-occurring event of reporting the ICWA-related information. *Id.* at 90,528-29.

Based on the comments, HHS determined that the benefits outweighed the burden associated with collecting and reporting the additional ICWA data. *Id.* at 90,528. But HHS directly acknowledged that it "received too few estimates to reference for calculating the cost and burden associated with this final rule." *Id.* at 90,566.

B. 2018 Advance Notice of Proposed Rulemaking

On February 24, 2017, the President issued Executive Order 13777, which directed federal agencies to establish task forces to make recommendations regarding their repeal, replacement, or modification of existing regulations to lower regulatory burdens on the American people. 82 Fed. Reg. 12,285. On March 15, 2018, HHS published an Advance Notice of Proposed Rulemaking ("2018 ANPRM") explaining that the HHS task force identified the 2016 Final Rule as one in which the reporting burden may impose costs that exceed benefits. 83 Fed. Reg. 11,449, 11,450. HHS noted that "[s]ome state title IV-E agencies provided in their previous comments specific information on compliance cost and burden estimates" but that HHS "received too few estimates to reference for calculating the cost and burden associated with this final rule." *Id.*

To that end, HHS solicited comments on the ICWA-related data elements added to AFCARS by the 2016 Final Rule and their associated burden. *Id.* In the 2018 ANPRM, HHS also explained that it "previously . . . received comments questioning the utility, reliability, and purpose of certain data

elements at the national level" and requested "specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information." *Id.* HHS also proposed extending the implementation timeframe for the 2016 Final Rule from October 1, 2019 to October 1, 2021, *id.*, which it later shortened to October 1, 2020, 83 Fed. Reg. 42,225, 42,226.

C. 2019 Notice of Proposed Rulemaking

On April 19, 2019, HHS published a Notice of Proposed Rulemaking ("2019 NPRM") proposing to reduce the data elements required by the AFCARS to from 272 to 183. 84 Fed. Reg. 16,572, 16,576. The 2019 NPRM proposed a final rule that did not include, among other things, data elements asking for information on sexual orientation and reduced the ICWA-related data elements.

1. Sexual Orientation Elements

HHS received 237 comments in response to the 2018 ANPRM, including from 38 states, 38 Indian tribes or consortiums, and 62 organizations representing various interests. *Id.* at 16,573. A third of the states recommended that the sexual orientation data elements be removed due to reliability concerns (youth self-reporting could result in undercounting) and the implications of having this private and sensitive information in a government record. *Id.* at 16,574. These states further noted that sexual orientation information would be in the case file if it is important to decisions affecting the child. *Id.* at 16,576. But if the child's sexual orientation is not pertinent to the child's wellbeing, asking for sexual orientation may be perceived as intrusive and worrisome to those who have experienced trauma and discrimination as a result of gender identity or sexual orientation. *Id.* Furthermore, the mandatory conversation required to obtain this information may be contraindicated based on a child's history of trauma and discrimination resulting from their sexual orientation. *Id.*

In addition to the comments responding to the 2018 ANPRM, HHS reviewed the 2016 document entitled "Current Measures of Sexual Orientation and Gender Identity in Federal Surveys" prepared by the Office of Management and Budget ("OMB") Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys. *Id.* The OMB paper identified issues for agencies to consider when choosing sexual orientation and gender identity ("SOGI") questions for inclusion in federal surveys and administrative databases. *Id.* The OMB paper advised that "new questions added to a survey or data base should be validated with qualitative

techniques and question validation efforts should include both the SOGI and non-SOGI groups." *Id.* The paper noted that "teenagers may be in the midst of developing their sexual orientation . . . and therefore they may be unsure of how to respond to SOGI questions" and that adolescents may use different terms to describe their sexual orientation than terms used by adults. *Id.* In addition, bullying related to sexual orientation may cause some adolescents to be reluctant to identify themselves with the AFCARS terms, which emphasized that respondents must be confident that their responses are private, anonymous, and confidential. *Id.* The OMB paper also admonished agencies to take into account cultural or racial/ethnic considerations and geography (for example, there may be regional differences in comfort with SOGI questions). *Id.*

Based on the comments and its review of the OMB paper, HHS determined that AFCARS was not the appropriate vehicle to collected sexual orientation information. *Id.* HHS explained that it was not feasible to test the validity or accuracy of adding questions related to sexual orientation across all title IV-E agencies. *Id.* Furthermore, it would be impossible to ensure that the child's response to the question on sexual orientation would remain confidential given that it would be in the case file and information on the child's case must be disclosed to courts and providers under specific circumstances, to assist the child and family. *Id.* Furthermore, information on sexual orientation is not appropriate to be included unless it is relevant to the child's needs. *Id.* HHS determined that the sexual orientation elements were more appropriately collected through a survey, which would allow for testing of the questions, training, and addressing the confidentiality issues raised by the OMB paper. *Id.* at 16,576-77.

Based on support from commenters, HHS retained the data element concerning whether the child's sexual orientation, gender identity, or gender expression contributed to family conflict that resulted in the child's removal from the home. *Id.* at 16,577. Because the case worker would gather this information during the course of the investigation that resulted in the child's removal from the home, it did not require the worker to have a conversation in instances where it is not appropriate or not applicable to the child's wellbeing. *Id.* As HHS explained, such data would be appropriate for a national data set because it will provide insight into issues of potential discrimination, safety concerns, and homelessness experienced by youth. *Id.*

2. ICWA-Related Elements

Thirty-six of the 38 states supported streamlining the AFCARS rule, based their self-assessment of the cost and burden of compliance. *Id.* at 16,573. Specific to the ICWA-related data elements, half of the states expressed concern with the large number of and detailed questions asked related to ICWA's requirements, with five states expressly asking for no ICWA-related data elements in AFCARS. *Id.* at 16,574. Many states commented that certain of the elements were redundant, overly detailed, could be streamlined, or are too specific for a national data set and are better suited for a qualitative review. *Id.* Four states reported that ICWA-applicable children in their out-of-home care populations were well under one percent. *Id.* States with higher numbers of tribal children in their care supported including limited information related to ICWA to inform policy decisions and program management. *Id.*

The 38 tribes and tribal interest commenters opposed streamlining the ICWA-related data elements. *Id.* These commenters expressed that the state burden of collection was outweighed by the benefits, which included allowing for more in-depth data and limited federal oversight regarding ICWA, insights into state compliance with ICWA's requirements, that national data would inform policy changes, and enhanced identification of Indian children in state custody. *Id.*

Based on these comments, which include more detailed cost/burden estimates than Defendants had in issuing the 2016 Final Rule, HHS determined that streamlining of the ICWA data elements was warranted. Taking into account the statutory mandate that AFCAR avoid unnecessary diversion of resources from agencies, HHS found that requiring every state to modify its systems to report on a large number of data elements when the foster care population does not reflect that the data elements will be applicable to a majority of their children does not meet this mandate. *Id.* at 16,575. HHS pointed to AFCARS data from September 2016 showing that, in 33 states, children who have a reported race as AI/AN made up less than one percent of the children in foster care. *Id.*

HHS also addressed the comments in support of retaining the excluded elements, which, in large part, stated that they were necessary for policy making purposes and that the benefits of more data outweigh the burden to report it. *Id.* First, the commenters that opposed streamlining are not required to report AFCARS data. *Id.* Second, the commenters did not identify any specific policies that required this data and why AFCARS specifically is the best means for collecting it. *Id.* HHS noted that

Congress, despite not having the additional data from the 2016 Final Rule, managed to pass 24 laws amending federal child welfare programs since AFCARS became effective. *Id.*

HHS also explained that, through HHS's Court Improvement Program ("CIP"), state courts will be encouraged to use CIP grant funds to assess their courts' ICWA practice, support the courts' data infrastructure, and train key court personnel on the importance of monitoring ICWA.[4] *Id.* at 16,575. Specifically, CIP grantees will be encouraged and supported to collect and monitor data on court inquiries, orders and findings related to identification of Indian children as defined in ICWA, notice to Indian tribes, tribal participation as parties in hearings involving Indian children, tribal intervention in dependency cases, transfer of ICWA cases to tribal courts, and placement of Indian children according to tribal preferences. *Id.*

Based on its assessment of the comments received, HHS proposed to remove data elements that were based on U.S. Department of Interior ("DOI") regulations, qualitative in nature, or requirements of the courts.[5] However, HHS did not propose to exclude all the ICWA-related elements that were in the 2016 Final Rule. HHS maintained the data elements that tribes had identified as the most important, from a national perspective, which included elements related to the tribal membership of children in foster care and their foster care/adoptive placements, whether ICWA applies to the child, and notification of proceedings per ICWA requirement. *Id.* at 16,577-78.

D. 2020 Final Rule

In response to the 2019 NPRM, HHS received 150 comments, including from 24 states and local child welfare agencies; 33 Indian tribes, tribal organizations or consortiums; 10 organizations representing tribal interests; and a number of national advocacy groups and other commenters. 85 Fed.

[4] Section 438(b)(1)(C) of the Act, , codified at 42 U.S.C. § 629h(b)(1)(C), requires grantees to demonstrate "meaningful and ongoing collaboration among the courts in the State . . . and, where applicable, Indian tribes."

[5] The ICWA-related data elements from the 2016 Final Rule that HHS proposed to remove are request to transfer to tribal court, denial of transfer, court findings related to involuntary and voluntary termination of parental rights, including good cause findings, qualified expert witness testimony, whether active efforts were made prior to the termination/modification, removals under ICWA, available ICWA foster care/pre-adoptive placement preferences, adoption/guardianship placement preferences under ICWA, good cause and basis for good cause under ICWA, and information on active efforts. 84 Fed. Reg. at 16,577.

Reg. at 28,411. The overwhelming majority of state and local agencies supported streamlining the data elements as proposed in the 2019 NPRM. *Id.* Based on this feedback, and its review of the need for and utility of the data elements, HHS issued the 2020 Final Rule. The 2020 Final Rule excluded approximately one-third of the data elements from the 2016 Final Rule (from 272 to 183), which was still a net increase of 64 data elements from the 119 elements that were in the AFCARS regulations that existed prior to the 2016 Final Rule. *Id.* at 28,410. The 2020 Final Rule did not include the sexual orientation data elements and reduced the ICWA-related data elements. *Id.*

1. Sexual Orientation Elements

Half of the state and local child welfare agencies specifically commented on the proposal to remove the sexual orientation data elements. *Id.* Of those, the majority agreed with the proposal, expressing that AFCARS is not the appropriate vehicle to collect this information, that it was unclear how this information in a federal database will result in support services for children, and that this information should be tracked separately from AFCARS. *Id.*

The majority of the national advocacy organizations and other commenters supported continued inclusion of the sexual orientation elements on grounds that the data would "would (1) enhance recruitment of foster homes; (2) aid permanency and case decision-making; (3) promote visibility for marginalized groups; (4) help to analyze youth outcomes; (5) address disparities; and (6) enable Congress to legislate appropriately at the national-level." *Id.* at 28,413. Some commenters also pointed to 2013 professional guidelines addressing the need to collect sexual orientation information for such purposes as developing case plans and tracking individual case outcomes in support of their recommendation. *Id.*

However, as HHS noted, Title IV-E agencies explained that reporting sexual orientation to a national database would not enhance their work because, if it was relevant to the circumstances of the child, it would be captured by their casework and already documented in the case file. *Id.* Thus, the 2013 professional guidelines were not relevant to a federal collection because they were largely a set of best practices for how to interact with clients, and gather and manage SOGI information at the case, local, and state level. *Id.* HHS explained that would continue to rely on the OMB paper because it provides direction for federal agencies to consider before requiring SOGI information in surveys and

administrative databases. *Id.* (citing 2019 NPRM, 84 Fed. Reg. at 16,576)

HHS emphasized that these elements were removed because they "would not meet the requirements for reliability and consistency, thus are ineffective at providing a national picture of children placed in out-of-home care." *Id.* at 28,419.

2. ICWA-Related Elements

Eleven state and local child welfare agencies commented on the simplification of the ICWA-related data elements, the overwhelming majority of which were in favor of the proposal. *Id.* at 28,411. These commenters agreed with keeping the data elements that are essential to understanding nationally the ICWA-applicable population of children in foster care, while removing those that were based on DOI regulations, qualitative in nature, or requirements of the courts. *Id.* Further reduction in these data elements was also recommended due to an extremely low population of AI/AN children in foster care in certain states. *Id.*

Comments from tribes and other commenters opposed the streamlining on grounds that (1) the information is needed to assess compliance with ICWA, (1) Section 422(b)(9) in Title IV-B of the Act includes processes regarding ICWA;[6] and (3) unlike DOI, ACF has established relationships with states and AFCARS is already in place to receive data on Native American children in state foster care systems, and therefore is better positioned to collect ICWA-related data. *Id.* at 28,412.

Defendants explained that, in publishing the 2020 Final Rule, it was attempting to correct any confusion or misperception created by justifying the ICWA-related data elements in the 2016 Final Rule on the basis of consistency with DOI's final rule on ICWA. *Id.* at 28,412-13 (discussing 2016 Final Rule, 81 Fed. Reg. at 38,778). HHS noted that DOI is the lead agency for ICWA compliance and that retaining all the ICWA-related data elements in 2016 Final Rule would have put HHS in the position of interpreting various ICWA requirements. *Id.* at 28,412. However, HHS only has authority for the collection of data elements that are used for functions and oversight under HHS authority, namely the Title IV-B and IV-E child welfare programs. *Id.*

[6] Section 422(b)(9) of the Act, codified at 42 U.S.C. § 622(b)(9), provides that "[e]ach plan for child welfare services . . . shall . . . contain a description, developed after consultation with tribal organizations . . . in the State, of the specific measures taken by the State to comply with the Indian Child Welfare Act."

Defendants also clarified that section 422(b)(9) of the Act does not provide the legal authority for HHS to collect ICWA-related data in AFCARS or for HHS to determine state compliance with ICWA. *Id.* Nor does it provide authority for HHS to require states to report specific details on ICWA's requirements in AFCARS to be used for ICWA compliance, which was mischaracterized in the 2016 final rule. *Id.* HHS explained that the AFCARS authority did allow it to collect ICWA-related data elements regarding whether a child's connections with his or her family, heritage, and community are preserved, which would provide context for other Title IV-B and IV-E monitoring. *Id.* HHS also explained that the ICWA-related data elements in the 2016 Final Rule would not be available for ICWA compliance purposes because ACF is unable to release information, other than to the child's tribe, for confidentiality reasons. *Id.*

HHS also pointed out its view that the Title IV-E agencies that opposed streamlining due to a perceived ''need'' for the data, misunderstand AFCARS and its functionality. *Id.* The information reported to AFCARS is "aggregated and de-identified at the national level, meaning it does not include names, numbers, or other information." *Id.* As Defendants explained, AFCARS is designed to have a few response options that must be broad enough to capture a range of experiences across the country, which is what is appropriate for a national dataset. *Id.*

HHS also stated that the comments it received in response to the 2018 ANPRM comments showed that the burden estimate for the 2016 Final Rule was too low. *Id.* at 28,420. Through the comments process HHS was able to provide a more grounded burden estimate based on state estimated hours and costs. *Id.* In addition to re-examining the legal rationale, as discussed, HHS weighed this significant burden against the possible benefits of collecting the additional ICWA-related data at issue here, and concluded that as a policy matter such collection under AFCARS was inconsistent with HHS's focus upon improving quality of services and achieving positive outcomes for children and families. *Id.* at 28,411. HHS was not persuaded that these commenters provided ample justification or a rational basis for why AFCARS is the most effective vehicle for collecting the information required under the 2016 Final Rule that the agency proposed to remove, which in large part was qualitative data. *Id.* at 28,412. Nor did commenters explain adequately how the data would help their specific work with children and families served by the Title IV-E agency. *Id.* According to HHS, "[t]his final rule will

provide ample data for analysis via a combination of information from the data elements and will provide more robust national information on children in foster care not available in the current AFCARS." *Id.* at 28,411.

E. Procedural History

Plaintiffs are two Indian tribes and five nonprofits. *See* Compl. ¶¶ 18-47. Several of the nonprofits focus on tribal interests, while others serve LGBTQ+ children. *Id.* Plaintiffs are challenging HHS's decision in the 2020 Final Rule to remove certain ICWA-related and sexual orientation elements added by the 2016 Final Rule, alleging that Defendants' actions were arbitrary, capricious and not in accordance with law, in violation of Section 706(2)(A) of the APA. *See id.* On December 23, 2020, Defendants answered the Complaint, denying liability, and filed the certified administrative record. Dkt. Nos. 52, 53. On May 17, 2021, Plaintiffs filed their motion for summary judgment. Dkt. No. 66. On September 3, 2021, Defendants requested a stay of summary judgment briefing (which Plaintiffs opposed) so that the Court could first consider their planned motion for voluntary remand without vacatur. Dkt. No. 96. Defendants' request remains pending before the Court. On October 15, 2021, Defendant filed their motion for voluntary remand without vacatur. Dkt. 102.

IV. LEGAL STANDARD

A. Motion for Summary Judgment

"A court shall grant summary judgment when the pleadings and evidence demonstrate "that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party seeking summary judgment bears the burden of demonstrating the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 322. A genuine issue of material fact is one that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether a genuine issue of material fact exists, the court must view all facts, and reasonable inferences drawn therefrom, in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 891 (9th Cir. 2005). Once the moving party has met its burden, the nonmoving party "may not rest upon

mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256.

B. Review Under the Administrative Procedure Act

"Pursuant to the Administrative Procedure Act, a court may set aside the decision of an administrative agency . . . only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1132 (9th Cir. 2006) (quoting 5 U.S.C. § 706(2)(A)). "An agency's action is arbitrary and capricious if the agency fails to consider an important aspect of a problem, if the agency offers an explanation for the decision that is contrary to the evidence, if the agency's decision is so implausible that it could not be ascribed to a difference in view or be the product of agency expertise, or if the agency's decision is contrary to the governing law." *Id.* (quoting *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005)). Courts "will sustain an agency action if the agency has articulated a rational connection between the facts found and the conclusions made." *Pac. Coast Fed'n of Fishermen's Ass'ns v. United States Bureau of Reclamation*, 426 F.3d 1082, 1090 (9th Cir. 2005) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

"Review under this standard is narrow, and the reviewing court may not substitute its judgment for that of the agency." *Earth Island Inst. v. United States Forest Serv.*, 442 F.3d 1147, 1156 (9th Cir. 2006) (citing *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 6-7 (2001)). "Even when an agency explains its decision with 'less than ideal clarity,' a reviewing court will not upset the decision on that account 'if the agency's path may reasonably be discerned.'" *Pac. Coast Fed'n of Fishermen's Ass'ns*, 426 F.3d at 1090 (quoting *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004)).

V. ARGUMENT

A. The 2020 Final Rule Is in Accordance With Law

Plaintiffs contend that the 2020 Final Rule is "not in accordance with law" (5 U.S.C. § 706(2)(A)) and must be set aside. Plaintiffs argue that the AFCARS statute obligates Defendants to collect demographic data and that by eliminating demographic questions regarding sexual orientation from AFCARS, Defendants acted contrary to the statute. Dkt. No. 66, Plaintiffs' Motion for Summary Judgment ("Pls' MSJ") at 20. Plaintiffs' contentions are without merit.

Plaintiffs' assertions are governed by *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under this standard, a court first asks, "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If the answer is yes, the court must give effect to Congress's intent. If the answer is no—that is, if the statute is ambiguous—"the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 844.

Applying *Chevron* step one, Congress has not spoken to the precise issue in this case. The AFCARS statute does not define "demographics" and does not otherwise attend to the precise question whether the statue requires the collection of sexual orientation data by AFCARS. *See generally* 42 U.S.C. § 679; *see also* 42 U.S.C. § 675 ("Definitions"). The dictionary definition of "demographics" is extraordinary broad and, thus, offers little guidance. *See Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 52 (2011) (applying a dictionary definition at step one). Per *Merriam-Webster*, "demographics" means "the statistical characteristics of human populations (such as age or income) used especially to identify markets," without any mention of sexual orientation. https://www.merriam-webster.com/dictionary/demographics (last visited October 15, 2021). Therefore, because the plain text of the statute does not "speak[ ] with the precision necessary to say definitively whether [the statute] applies to" the collection of sexual orientation data, analysis is required under *Chevron* step two. *Mayo Found. for Med. Educ. & Research*, 562 U.S. at 53 (second alteration in original) (quoting *United States v. Eurodif S.A.*, 555 U.S. 305, 319 (2009)).

"At step two of Chevron, [courts] must 'accept the agency's construction of the statute' so long as that reading is reasonable, 'even if the agency's reading differs from what the court believes is the best statutory interpretation.'" *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1079 (9th Cir. 2016) (quoting *Nat'l Cable and Telecomms. Ass'n v. Brand-X Internet Servs.*, 545 U.S. 967, 980 (2005)). For the following reasons, the 2020 Final Rule is a permissible and reasonable interpretation of the statute.

First, "*Chevron* deference is appropriate 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *Mayo Found. for Med. Educ. & Research*, 562 U.S. at 53 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). That is the case

here. Congress has granted broad authority to the Secretary of HHS to "make and publish such rules and regulations, not inconsistent with th[e] Act." 42 U.S.C. § 1302(a).

Second, while mandating the collection of demographic data, the statute also requires that AFCARS "avoid unnecessary diversion of resources from agencies" and that "the data collected is reliable and consistent." 42 U.S.C. § 679(c)(1), (2). Consistent with the statute's admonitions, HHS, while recognizing the value of collecting the sexual orientation elements, determined that they should be excluded from the 2020 Final Rule due to concerns about their reliability. 2019 NPRM, 84 Fed. Reg. at 16,577 ("While we understand the importance of collecting sexual orientation data and appreciate the comments that supported keeping the data elements, we must balance this with the need to collect accurate data per the statue and in a manner that is consistent with children's treatment needs."), 16,574 (acknowledging concerns that sexual orientation data elements "will not be reliable because youth would self-report, which could result in an undercount"). Plaintiffs make no attempt to reconcile the statute's express requirement that HHS take a calibrated approach to data collection with their argument that the statute *requires* AFCARS to collect sexual orientation data. Indeed, Plaintiffs' theory of statutory construction, when taken to its logical conclusion, would require Defendants to issue an AFCARS rule that collects any and every data element that can be reasonably construed as demographic in nature. That is not, and cannot be, a reasonable interpretation of the statute.

Third, while the 2020 Final Rule excludes sexual orientation, it does include many other demographic data elements related to adoptive and foster children and their biological and adoptive or foster parents (e.g., date of birth, sex, race and ethnicity), all of which fall comfortably within the definition of "demographics."

For the foregoing reasons, HHS's determination to include some demographic data elements, while excluding others, is based on a reasonable and permissible interpretation of the AFCARS statute and, thus, is not contrary to law.

B. The Removal of the Sexual Orientation Data Elements from the 2020 Final Rule Was Not Arbitrary or Capricious

HHS is permitted to "consider varying interpretations and the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in

administrations." *Nat'l Cable & Telecomm. Ass'n*, 545 U.S. at 981 (internal citation omitted). As the Supreme Court has explained, there is no "heightened scrutiny" when an agency changes its policy. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 525 (2009). While the agency must provide a "reasoned explanation" for its new policy, "it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *Fox Television*, 556 U.S. at 515. "[I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Id.*

Here, the 2020 Final Rule offers a reasoned explanation for excluding the sexual orientation data elements, namely that the sexual orientation questions would not result in a reliable and consistent data collection, as required by the AFCARS statute. Regarding the 2016 Final Rule, state commenters expressed such concerns over the sexual orientation element. Specifically, states commented that the number of AFCARS children in foster care would be underreported because the information would need to be self-reported to a case worker. 2016 Final Rule, 81 Fed. Reg. at 90,534. While Defendants generally acknowledged the concerns expressed by the state commenters, they did not specifically discuss the reliability issue. *See generally id.* at 90,534-35. However, when HHS later reviewed the AFCARS regulations in 2018, it noted that it had received comments questioning the reliability of certain data elements and asked for specific recommendations for data elements to be removed because they would not yield reliable national information. 2018 ANPRM, 83 Fed. Reg. at 11,450.

In response to 2018 ANPRM, the state commentators again raised the issue of unreliability due to self-reporting. 2019 NPRM, 84 Fed. Reg. at 16,573. Defendants also availed itself of an OMB working paper, which provided guidance to federal agencies when choosing SOGI questions for inclusion in administrative databases. *Id.* at 16,574. HHS took into consideration OMB's recommendation that even validated questions be tested for new settings with a different audience. AR 187. Therefore, while the 2016 Final Rule used the language from a pre-existing survey, Youth Risk Behavior Surveillance System ("YRBSS"), contrary to Plaintiffs' arguments that it was used "in an indistinguishable setting" (*see* Pls' MSJ at 259-22), there is no indication in the record that the YRBSS question was validated with children in foster homes, who have unique considerations and would need

to be asked the sensitive sexual orientation questions by a case worker (2016 Final Rule, 81 Fed. Reg. at 90,535) and thus could not remain anonymous. Indeed, the YRBSS is self-administered in schools, which means that the child answers the questions on paper without identifying themselves. AR 179. Furthermore, nothing in the record suggests the YRBSS question was tested for purposes of a national database, which would be important given that OMB cautioned that the reported prevalence of SOGI populations may be lower due to regional differences in comfort levels with SOGI questions. 2019 NPRM, 84 Fed. Reg. at 16,576; AR 188.

OMB also noted that "[t]he use of nonresponse categories (Don't Know / Refused / Other / Something else) may reduce the number of SOGI respondents who identify themselves as such, without yielding usable data." AR 189. This is because "[t]hese categories may also indicate confusion with the question or response category wording, rather than the SOGI status of respondents." *Id.* That the YRBSS question includes three non-response categories ("don't know," "something else," or "decline"), 2016 Final Rule 81 Fed. Reg. at 90534, further reinforces that the sexual orientation question in the 2016 Final Rule was not reasonably designed to collect reliable data. This is especially true given the uncertainties related to collecting such data from adolescents, who may not have finished developing, or may use different terms to describe, their sexual orientation. 2019 NPRM, 84 Fed. Reg. at 16,576. In light of the foregoing, it was reasonable for HHS to conclude that the sexual orientation question would need testing and that it was not feasible to do it on a nationwide basis. *Id.*

Plaintiffs' argument regarding the 2013 professional guidelines misconstrues Defendants' reasoning for deeming the guidelines to be irrelevant. Contrary to Plaintiffs' contentions (Pls' MSJ at 26:1-3), commenters did not cite the guidelines for purposes of mitigating any sensitivity and confidentiality concerns. Rather, commenters brought those guidelines to the attention of HHS on grounds that they were developed "to address the need to collect sexual orientation information for such purposes as developing case plans and tracking individual case outcomes in support of their recommendation." 2020 Final Rule, 85 Fed. Reg. at 28,413, *see also* AR 2340. However, as Title IV-E agencies had commented, reporting sexual orientation of a youth or provider to a national database would not enhance their work with LGBTQ+ youth because, if that information was relevant to the circumstances of the child or a family, it would be captured by their casework and already documented

in the case file. *Id.* Accordingly, it was reasonable for Defendants to determine that the 2013 guidelines, which concerned collection of data at the state and local level, were not relevant to collecting data at the federal level. *Id.*

Plaintiffs also complain that HHS did not adequately address significant comments, including that excluding the sexual orientation question would make it more difficult to address the overrepresentation of LGBTQ+ youth in care and the litany of poor outcomes for those youth. Pls' MSJ at 27:5-9. This argument is without merit for two reasons. First, as Plaintiffs' acknowledge (*id.* at 27:10-11), Defendants addressed these comments expressly, explaining that reporting sexual orientation at the national level would not enhance the work of Title IV-E agencies with LGBTQ+ youth (2020 Final Rule, 85 Fed. Reg. at 28,413). Second, even if Defendants had not done so, Defendants were not required to expressly address these comments because, under Ninth Circuit precedent, they are not "significant." Comments are only "significant" if they "raise relevant points and which, if adopted, would require a change in the agency's proposed rule." *Am. Mining Cong. v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992) (citing *Home Box Office v. FCC*, 567 F.2d 9, 35 & n.58 (D.C. Cir. 1977)); *see also Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 63 (D.C. Cir. 2011) (holding that where agency adequately explained its decision, its failure to expressly address comments proposing alternatives was neither arbitrary nor capricious). In addition to not assisting Title IV-E agencies with their work with LGBTQ+ youth, the sexual orientation information could be unreliable due to undercounting resulting from self-reporting and the issues identified in the OMB paper. For these reasons, the sexual orientation question did not satisfy the statutory requirements that AFCARS avoid unnecessary diversion of resources from Title IV-E agencies and collect reliable data. Because Defendants are not at liberty to ignore these express statutory mandates, the specific comments identified by Plaintiffs, even if adopted, would not have *required* Defendants to retain the sexual orientation elements in the 2020 Final Rule. Therefore, these comments are not "significant" and did not need to be expressly addressed by Defendants (as discussed, Defendants did respond to them).

Plaintiffs also take issue with Defendants' change of course on the issues of confidentiality and privacy. Plaintiffs contend that HHS had previously considered these exact concerns and resolved them on grounds the respondent could decline to answer the questions and all child welfare databases are

subject to confidentiality requirements. Pls' MSJ at 26:22-26. However, Defendants are permitted to reconsider their position on these questions. *Nat'l Cable & Telecomm. Ass'n*, 545 U.S. at 981. In response to the 2018 ANPRM, commenters, for the first time, noted that simply asking the sexual orientation question, if not done in relation to addressing the child's wellbeing, could be perceived as intrusive and worrisome to those who have experienced trauma and discrimination as a result of gender identity or sexual orientation. 2019 NPRM, 84 Fed. Reg. at 16,576. Furthermore, a mandatory conversation may be contraindicated based on the child's history of abuse or neglect. *Id.* In addition, while information in case files is kept confidential, Defendants recognized that it is impossible to ensure that a child's response to a question on sexual orientation would be kept private, anonymous or confidential. *Id.* Due to the child being in the custody of a Title IV-E agency, information regarding the child's sexual orientation may need to be disclosed to courts and providers under specific circumstances. *Id.* Accordingly, Defendants provided a reasoned explanation for the change in policy. *Fox Television*, 556 U.S. at 515. The law requires no more. While Plaintiffs may disagree with this explanation, Defendants need not demonstrate that the reasons for the sexual orientation policies reflected in the 2020 Final Rule are better than the reasons undergirding the policies reflected in the 2016 Final Rule. *Id.*

For the foregoing reasons, the removal of the sexual orientation data elements from the 2020 Final Rule was not arbitrary or capricious.

C. The Removal of Certain ICWA-Related Data Elements from the 2020 Final Rule Was Not Arbitrary or Capricious

HHS also adequately explained its reasons for excluding from the 2020 Final Rule certain of the ICWA-related data elements that were in the 2016 Final Rule, consistent with the statutory requirement that AFCARS avoid unnecessary diversion of resources from agencies.

In issuing the 2016 Final Rule, HHS acknowledged that it "received too few estimates to reference for calculating the cost and burden associated with this final rule." 2016 Final Rule, 81 Fed. Reg. at 90,566. The comments responding to the 2018 ANPRM and the 2019 NPRM provided HHS with new evidence that its burden estimate for the 2016 Final Rule was too low. 2020 Final Rule, 85 Fed. Reg. at 48,420. Furthermore, an overwhelming majority of the states (36 out of 38) that provided comments to 2018 ANPRM supported streamlining the AFCARS rule, with half of the states expressing

concerns specific to the ICWA data elements. HHS also observed that data from September 2016 showed that, in 33 states, less than one percent of the children in foster care were reported as AI/AN. 2019 NPRM, 84 Fed. Reg. 16,573. Thus, it was reasonable for Defendants to conclude that it would be inconsistent with their statutory mandate to require every state to modify its systems to report data that is virtually inapplicable to two-thirds of the states.

In the 2020 Final Rule, Defendants also addressed comments supporting the retention of all the ICWA-related elements in the 2016 Final Rule that Defendants proposed to remove or simplify. For example, Defendants noted that while the commenters, who were (for the most part) not Title IV-E agencies actually responsible for reporting data to AFCARS, expressed their desire to have the data for policymaking purposes, as they had earlier articulated in response to the 2018 ANPRM, they did not identify any additional evidence that required this data for policymaking on a federal level or why AFCARS specifically is the best means for collecting it. 2020 Final Rule, 85 Fed. Reg. 28,412.

Defendants also explained that they would foster the Court Improvement Plan as an alternative means of collecting data about Indian children in out of home care. *Id.* at 28,424; *see also* 2019 NPRM, 84 Fed. Reg. at 16,578. Defendants also addressed the comments citing the benefit of collecting data to assess ICWA compliance by the states. In addition to the policy-based rationale for removing certain ICWA data elements, Defendants explained their legal interpretation that AFCARS authority permitted HHS to collect ICWA-related data regarding whether a child's connections with his or her family, heritage, and community are preserved, but did not authorize HHS to require states to report specific details on ICWA's requirements in AFCARS to be used for ICWA compliance. 2020 Final Rule, 85 Fed. Reg. at 28,412-13. HHS also explained that the ICWA-related data elements in the 2016 Final Rule would not be available for ICWA compliance purposes because ACF is unable to release information, other than to the child's tribe, for confidentiality reasons. *Id.* at 28,413; *see also* 2019 NPRM, 84 Fed. Reg. at 16,578.

Plaintiffs argue that HHS should have required these states to collect these data elements notwithstanding the burden. First, Plaintiffs argued Defendants overvalued the costs because agencies would be required to collect all the data elements in only two percent of cases. This argument does not recognize that HHS was evaluating the burden to include implementing a data system, developing

materials for collecting data, training and other costs and burdens that states would need to assume simply to develop the systems and protocols to collect the data. *Id.* at 28,420-23. Furthermore, Plaintiffs' argument, at its core, merely reflects their disagreement with how much weight to assign to the burden of collecting the removed ICWA-related elements; however, the Court may not substitute its (or Plaintiffs') judgment for that of HHS. *California v. Azar* , 950 F.3d 1067, 1096 (9th Cir. 2020) ("We are also prohibited from 'second-guessing the [agency]'s weighing of risks and benefits and penalizing [it] for departing from the . . . inferences and assumptions' of others." (quoting *DOC v. New York*, 139 S. Ct. 2551, 2571 (2019) (alterations in original))).

Second, Plaintiffs argue that Defendants failed to respond meaningfully to significant comments about the burden, citing comments that states should have already begun the process of implementing the 2016 Final Rule (AR 761), that there would be a burden to states to upgrade their systems even without the ICWA data elements (AR 988), that Title IV-E agencies would need to answer only three ICWA-related questions in 98 percent of cases (AR 2781, 2898), and that the justification that ICWA data elements are better suited to qualitative assessments is not warranted because the ICWA data elements were answerable in a yes/no format (AR 2396-97). However, HHS had already received burden estimates from states that estimated that they would incur costs for upgrading systems and modifying protocols to collect new elements. Indeed, in response to the 2018 ANPRM, states estimated it would take between "200 to 25,000 hours to accomplish tasks related to the ICWA-related data elements." 84 Fed. Reg. at 16,573. States reported that their tasks would include: "Developing or modifying policies, procedures, rules, case management systems, and electronic case records to comply with the AFCARS requirements, Searching for and gathering the information required to be reported for the data elements, Entering the information into the system, and Training staff on the requirements and changes." *Id.*

Moreover, these comments are not significant. Even assuming their truth and that Defendants adopted them, it was still reasonable for HHS to determine that requiring two-thirds of the nation to implement a data system that will collect no useful data more than 99% of the time is fundamentally inconsistent with the statutory mandate that AFCARS avoid unnecessary diversion of resources from agencies. Therefore, because the comments did not require Defendants to change their position on

removing the ICWA-related elements, and Defendants offered a reasoned explained for their decision, Defendants were free to disregard these comments.

Plaintiffs also claim that Defendants failed to respond to a comment that collecting the information through alternative methods, such as the CIP, seemed unlikely to be successful as such methods would require states to voluntarily prioritize ICWA data collection (AR 2649-50; *see also, e.g.,* AR 2399). Plaintiffs' argument fails to consider Ninth Circuit precedent that requires the Court to give "particularly deferential review" to Defendants' predictive judgment areas within its field of discretion and expertise. *California*, 950 F.3d at 1096 (citations omitted). Here, HHS's predictions about the availability of data through the CIP (which HHS administers) concern matters squarely within HHS's area of discretion and expertise, and are entitled to deference because HHS is best positioned to anticipate the behavior of the CIP grantees. *Id.* at 1100. In light of this deference, and that nothing about this comment, even if adopted, would require a change in position, the comment was not significant and did not require a specific response.

Plaintiffs also argue that Defendants misunderstood the purpose of collecting ICWA data because such data was intended for use to inform policy-driven activities, not to assess or enforce ICWA compliance in a specific case. Pls' MSJ at 28:13-18. But even if Plaintiffs are correct, Defendants explained their policy judgment that the benefit of having the data for policymaking purposes was overstated. The commenters did not identify any specific policies that required this data or why AFCARS specifically is the best means for collecting it, and ignored the fact that Congress has passed numerous federal child welfare programs despite not having this data. In any case, the Court should decline Plaintiffs' invitation to weigh costs and benefits, and, in doing so, substitute its judgment for that of HHS.

Plaintiffs' contention that Defendants engaged in internally inconsistent analysis with respect to HHS's authority to collect ICWA-related data under AFCARS is also without merit because it relies on statements taken out of context. Contrary to Plaintiffs' assertions, HHS never stated that it lacked 'legal authority . . . to collect ICWA-related data in AFCARS.'" Pls' Mot. at 28:7-8. Rather, HHS explained: "Retaining all of the 2016 final rule ICWA-related data elements would put HHS in the position of interpreting various ICWA requirements. We have authority only for the collection of data elements that

are used for functions and oversight under HHS authority, namely the title IV–B and IV–E programs." 2020 Final Rule, 85 Fed. Reg. at 28,412. Further, HHS expressly noted that DOI, not HHS, is the "cognizant authority over implementing, overseeing, or assessing compliance with ICWA." *Id.* "The AFCARS authority allows us to collect ICWA-related data elements in this final rule to inform us whether a child's connections with his or her family, heritage, and community are preserved and will provide context for other title IV-B and IV-E monitoring," *id.* at 28,412-13. Moreover, HHS, in responding to a comment, clarified that "*section 422(b)(9) of the Act* does not provide the legal authority for HHS to collect ICWA-related data in AFCARS or for HHS to determine state compliance with ICWA. Rather, it simply requires a description of the specific measures taken by the state to comply with ICWA. HHS is not authorized to determine compliance with ICWA and/or penalize states for failure to comply with ICWA through this requirement." *Id.* at 28,412 (emphasis added). In any case, even if the Court were to disagree that HHS's legal analysis is permissible under *Chevron*—that HHS lacked authority to collect certain ICWA-specific compliance elements under AFCARS, while remaining able to collect ICWA-related elements that bear on the care provided under Titles IV-B and IV-E—the agency's policy rationale on burdens and costs on states is more than sufficient to sustain the 2020 Final Rule.

For the forgoing reasons, the 2020 Final Rule is not arbitrary or capricious as it relates to the ICWA-related elements.

D. Even if Plaintiffs Prevail, the 2020 Final Rule Should Not Be Set Aside

The 2020 Final Rule is not arbitrary or capricious. Nor was it not issued in accordance with law. But if the Court should hold otherwise, the 2020 Final Rule should not be set aside. Rather, it should be remanded without vacatur. "Whether agency action should be vacated depends on how serious the agency's errors are 'and the disruptive consequences of an interim change that may itself be changed.'" *Cal. Cmtys. Against Toxics v. EPA (CCAT)*, 688 F.3d 989, 992 (9th Cir. 2012) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). "A flawed rule need not be vacated. Indeed, when equity demands, a regulation can be left in place while the agency follows the necessary procedures to correct its action." *Id.* at 991; *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 840 F. App'x 134, 137 (9th Cir. 2020) ("Although the reasoning underlying the Board's rule in this case

was inadequate, and must be addressed by the Board upon remand, it does not necessarily follow that the Board's rule must be vacated." (citing *CCAT*, 688 F.3d at 992)).

"The first *Allied-Signal* factor deals with the likelihood that a rule's deficiencies can be redressed on remand . . . ." *See Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (citing *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013)); *see also United States Sugar Corp. v. Envtl. Prot. Agency*, 830 F.3d 579, 630, (D.C. Cir. 2016) (characterizing factor as "likelihood of cure on remand"). As explained in Defendants' motion for voluntary remand filed with this Court on October 15, 2021, and the declarations of Aysha Schomburg and Joseph Kracke-Bock filed therewith, all of which Defendants incorporate herein by reference, Defendants intend to reconsider the 2020 Final Rule in light of a change in administration and the attendant change in policies. In doing so, Defendants are initiating a rulemaking process that would propose to collect, under AFCARS or an alternate legal authority, the sexual orientation and ICWA-related data that are the subject of Plaintiffs' challenge. Therefore, the purported errors raised by Plaintiffs are not sufficiently serious to warrant vacatur because any such errors, assuming they exist, can be addressed on remand. *See Allied-Signal*, 988 F.2d at 150-51 (finding that the deficiencies were the failure of the agency to adequately state its reasoning, and thus not "serious" because the agency, on remand, might be able to easily provide the necessary explanation). Furthermore, the alleged errors identified by Plaintiffs, which almost all focus on perceived failures to provide an adequate explanation or adequately consider comments, are the types of errors that can be addressed by further rulemaking.

Regarding the second *Allied-Signal* factor, Defendants' motion for voluntary remand also explains in detail why vacatur would be extraordinarily disruptive. AFCARS is a nationwide system that requires Title IV-E agencies from all 50 states and numerous tribes to collect and submit data to HHS. Vacating the 2020 Final Rule and reinstating the 2016 Final Rule would require HHS, all 50 states, and tribal title IV-E agencies to modify and, in some cases, unwind the implementation work for the 2020 Final Rule at great expense and burden. *Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 519 (2020) ("Under our precedents, a quintessential disruptive consequence arises when an agency cannot easily unravel a past transaction in order to impose a new outcome. We have rejected [such] approaches . . . as 'an invitation to chaos.'" (quoting *Sugar Cane Growers v. Veneman*, 289 F.3d 89, 97

(D.C. Cir. 2002))). Any changes would also divert the attention and resources of Title IV-E agencies from their current obligations, including mandated federal reporting for other Title IV-B and Title IV-E programs, thereby potentially disrupting the flow of billions of dollars in federal funding.

Vacating the 2020 Final Rule would also delay HHS from receiving updated data and comprehensive historical information on key data elements included in the 2020 Final Rule. It would not serve the interests of anyone, including the foster care population, to prevent the implementation of the 2020 Final Rule, which has 64 more data elements than the 1993 regulations currently in effect. *See CCAT*, 688 F.3d at 993-94 (finding that vacatur could stall the construction of a much needed power plant and result in blackouts, thereby "necessitat[ing] the use of diesel generators that pollute the air, the very danger the Clean Air Act aims to prevent"). Reverting to the 2016 Final Rule would also be a waste of federal, state and tribal resources because some of data elements that were carried over from 2016 Final Rule to the 2020 Final Rule were modified and thus, while similar, are not identical. Therefore, Title IV-E agencies would need to implement additional system modifications to revert even partially to the 2016 Final Rule and collect the ICWA and sexual orientation data elements removed from the 2020 Final Rule. Moreover, reverting to the 2016 Final Rule would entail HHS and Title IV-E agencies collecting the data elements that are not the subject of Plaintiffs' challenge. It is difficult to imagine anything more wasteful, and contrary to the statutory admonition that AFCARS avoid unnecessary diversion of resources from Title IV-E agencies, than reinstating data elements that neither side is seeking to collect.

Plaintiffs' allegations of harm from keeping the 2020 Final Rule in place are too speculative and amorphous to outweigh the disruptive consequences of vacatur. For example, Plaintiffs assert that not having the data elements forces them to divert resources to address harms to their mission-driven activities and impairs their ability to obtain funding. But Plaintiffs do not attempt to quantify these amounts or how they compare to the costs that would be incurred by HHS and Title IV-E agencies in reverting back to the 2016 Final Rule. *See Neighbors Against Bison Slaughter v. Nat'l Park Serv.*, No. CV 19-128-BLG-SPW, 2021 U.S. Dist. LEXIS 22584, at *6-11 (D. Mont. Feb. 4, 2021) (remanding without vacatur where agencies, without confessing error, sought to reconsider bison management plan because harm alleged was too attenuated and loss of monetary value to local business did not outweigh

disruption of collaborative bison management goals and would result in confusion about the management framework for bison); *Am. Forest Res. Council*, 946 F. Supp. 2d at 43-44 (finding the "administrative and economic costs of remand without vacatur are too abstract and speculative to clearly outweigh its benefits" where plaintiff "ha[d] not attempted to quantify these costs . . . [or] provided any concrete examples of projects impacted by the consultation requirement or additional timber that could be harvested in the next three years if the rule were vacated"). Nor do Plaintiffs assert that they cannot continue their advocacy efforts without this data.

Accordingly, even if the Court finds for Plaintiffs, the 2020 Final Rule should be remanded without vacatur.

VI. CONCLUSION

For all the foregoing reasons, the Court should grant the Defendants' motion for summary judgment and deny Plaintiff's motion for summary judgment. If the Court finds for Plaintiff, it should not set aside the 2020 Final Rule but remand it back to HHS without vacatur.

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Respectfully submitted,

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