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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.

Case No. 3:20-cv-6018-MMC

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Hearing Date: December 3, 2021
Time: 9:00 a.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES II

INTRODUCTION 1

ARGUMENT 1

I. The 2020 Final Rule Is Not in Accordance with Law 1

II. The 2020 Final Rule Is Arbitrary and Capricious 3

A. The 2020 Final Rule Is Arbitrary and Capricious as a Whole 3

B. The Elimination of the Sexual Orientation Elements Was Arbitrary and Capricious 7

C. The Elimination of the ICWA Elements Was Arbitrary and Capricious 11

III. The 2020 Final Rule Should Be Vacated 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Alaska v. Fed. Subsistence Bd.,
544 F.3d 1089 (9th Cir. 2008) 2

Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n,
988 F.2d 146 (D.C. Cir. 1993) 15, 17

Am. Acad. of Pediatrics v. FDA,
399 F. Supp. 3d 479 (D. Md. 2019) 19

Am. Great Lakes Port Ass'n v. Schultz,
962 F.3d 510 (D.C. Cir. 2020) 15, 18, 19

American Mining Congress v. EPA,
965 F.2d 759 (9th Cir. 1992) 6, 14

Amerijet Int'l, Inc. v. Pistole,
753 F.3d 1343 (D.C. Cir. 2014) 8

Animal Legal Def. Fund, Inc. v. Perdue,
872 F.3d 602 (D.C. Cir. 2017) 14

AquAlliance v. U.S. Bureau of Reclamation,
312 F. Supp. 3d 878 (E.D. Cal. 2018) 15, 17

Cal. Cmtys. Against Toxics v. EPA ("CCAT"),
688 F.3d 989 (9th Cir. 2012) 15, 17

California by & through Becerra v. U.S. Dep't of the Interior,
381 F. Supp. 3d 1153 (N.D. Cal. 2019) 8, 10, 17

California v. Bernhardt,
472 F. Supp. 3d 573 (N.D. Cal. 2020) 17, 18

California v. U.S. Bureau of Land Mgmt.,
277 F. Supp. 3d 1106 (N.D. Cal. 2017) 16, 17

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 1, 2

In re Clean Water Act Rulemaking,
No. 20-cv-4636, --- F. Supp. 3d ----, 2021 WL 4924844 16

Coal. for Gov't Procurement v. Fed. Prison Indus., Inc.,
365 F.3d 435 (6th Cir. 2004) 18

Consol. Coal. Co. v. Fed. Mine Safety & Health Rev. Comm'n,
824 F.2d 1071 (D.C. Cir. 1987) 2

Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.,
538 F.3d 1172 (9th Cir. 2008) 3, 4, 5

Ctr. for Biological Diversity v. Zinke,
900 F.3d 1053 (9th Cir. 2018) 6, 7, 9

Ctr. for Env't Health v. Vilsack,
No. 15-cv-1690, 2016 WL 3383954 (N.D. Cal. June 20, 2016) 16

District of Columbia v. USDA,
496 F. Supp. 3d 213 (D.C. Cir. 2020) 6

E. Bay Sanctuary Covenant v. Trump,
932 F.3d 742 (9th Cir. 2018) 6

Encino Motorcars, LLC v. Navarro,
136 S. Ct. 2117 (2016) 4, 8, 12

FCC v. Fox Tele. Stations, Inc.,
556 U.S. 502 (2009) 4

Gila River Indian Cmty. v. United States,
729 F.3d 1139 (9th Cir. 2013) 2

Gresham v. Azar,
950 F.3d 93 (D.C. Cir. 2020) 10

Idaho Farm Bureau Fed'n v. Babbitt,
58 F.3d 1392 (9th Cir. 1995) 15, 17

Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin. Nat'l Marine Fisheries Serv.,
109 F. Supp. 3d 1238 (N.D. Cal. 2015) 16, 17, 18

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) ..... *passim*

Nat'l Family Farm Coal. v. EPA,
960 F.3d 1120 (9th Cir. 2020) 1, 15, 16

Nat'l Parks Conservation Ass'n v. EPA,
788 F.3d 1134 (9th Cir. 2015) 14

Nehemiah Corp. of Am. v. Jackson,
546 F. Supp. 2d 830 (E.D. Cal. 2008) 6

Office of Commc'n of United Church of Christ v. FCC,
560 F.2d 529 (2d Cir. 1977) 8

Perez v. Mortg. Bankers Ass'n,
575 U.S. 92 (2015) 6

Pollinator Stewardship Council v. EPA,
806 F.3d 520 (9th Cir. 2015) 15, 16

Vill. of Barrington v. Surface Transp. Bd.,
636 F.3d 650 (D.C. Cir. 2011) 2

Statutes

42 U.S.C. § 671(e)(5)(B)(vii) 13

42 U.S.C. § 679(c) 1, 2, 3, 8

Other Authorities

81 Fed. Reg. 90,524 (Dec. 14, 2016) ..... *passim*

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Reliability, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/reliability (last accessed Nov. 2, 2021) 9

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INTRODUCTION

In the 2020 Final Rule, Defendants eviscerated a rule issued just four years earlier, basing their reversal on a cost-benefit analysis that omitted all benefits, a burden estimate that silently changed its methodology to inflate the apparent costs, unexplained and unacknowledged reversals of the agency's prior analysis, willful refusal to consider adverse comments, and myriad conclusory assertions. Now, Defendants attempt to rehabilitate the 2020 Final Rule with *post hoc* rationalizations found nowhere in the actual rulemaking, combined with rote recitations of the conclusory and incorrect assertions that Plaintiffs challenge. This cannot save the Rule, which is arbitrary and capricious and not in accordance with law and therefore must be set aside.

Defendants also ask the Court to leave the 2020 Final Rule in place even if it finds it to be unlawful. This remarkable request should be rejected. As explained in Plaintiffs' opposition to Defendants' motion for voluntary remand, courts withhold vacatur only in exceptional, limited circumstances, which Defendants have not shown and cannot show. Indeed, Defendants' arguments for remand without vacatur turn the governing test on its head: whereas the actual test requires vacatur if an agency is unlikely to adopt the same rule on remand, *see Nat'l Family Farm Coal. v. EPA*, 960 F.3d 1120, 1144 (9th Cir. 2020), Defendants urge the Court to leave the unlawful Rule in place *because* they are unlikely to re-adopt it on remand. This inverted argument should be rejected, and the Court should vacate the 2020 Final Rule.

ARGUMENT

I. The 2020 Final Rule Is Not in Accordance with Law

As explained in Plaintiffs' opening brief, Defendants failed to consider whether sexual orientation is a "demographic characteristic[]," 42 U.S.C. § 679(c)(3)(A), and their decision to eliminate demographic data regarding the sexual orientation of adoptive and foster children and their adoptive or foster parents violated Congress's statutory command. *See* Pls.' Mot. and Mem. for Summ. J. at 20, ECF No. 66 ("Pls.' MSJ Mem."). Defendants' main response is that they are entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *See* Defs.' Opp'n to Pls.' Mot. for Summ. J. at 14-16, ECF No. 103 ("Defs.' Opp'n"). However, an agency is not entitled to *Chevron* deference when it did not

provide "an explanation of the agency's reasons" for its interpretation during the rulemaking, *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1150 (9th Cir. 2013)—much less when it did not interpret the statute at all, as happened here.

Neither the 2020 Final Rule nor the notices preceding it analyzed whether sexual orientation is a "demographic characteristic" under 42 U.S.C. § 679(c)(3), despite the fact that the evidence in the administrative record repeatedly described sexual orientation as demographic information. Pls.' MSJ Mem. at 20 (citing AR 180, 494, 505, 2937). Nor does anything in the administrative record suggest that the agency ever considered this core statutory question. Defendants' plea for deference must therefore be rejected. "Without an explanation of the agency's reasons, it is impossible to know whether the agency employed its expertise or 'simply pick[ed] a permissible interpretation out of the hat.'" *Gila River*, 729 F.3d at 1150 (quoting *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011)); *see also, e.g.*, *Vill. of Barrington*, 636 F.3d at 660 ("At *Chevron* step two we defer to the agency's permissible interpretation . . . only if the agency has offered a reasoned explanation for why it chose that interpretation."); *Consol. Coal. Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 824 F.2d 1071, 1080 n.8 (D.C. Cir. 1987) ("The [Supreme] Court made clear in *Chevron* . . . that deference to an agency's statutory interpretation is required only *after* the agency has actually interpreted the statute."). An agency that is silent about its supposed interpretation during the rulemaking process cannot save itself by arguing in court that it *could* have interpreted the statute thusly. *See, e.g.*, *Alaska v. Fed. Subsistence Bd.*, 544 F.3d 1089, 1095 (9th Cir. 2008) ("We do not afford *Chevron* or *Skidmore* deference to litigation positions unmoored from any official agency interpretation because 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'" (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988))).

With or without *Chevron* deference, Defendants' *post hoc* arguments fail. Defendants suggest that Congress's directives to "avoid unnecessary diversion of resources" and "assure that any data that is collected is reliable and consistent over time and among jurisdictions through the use of uniform definitions and methodologies" allow them to decline to follow Congress's

concomitant directive to "provide comprehensive national information with respect to . . . demographic characteristics." 42 U.S.C. § 679(c)(1)-(3); *see* Defs.' Opp'n at 16. But the statutory language does not allow HHS to pick and choose among the objectives of 42 U.S.C. § 679(c); it must pursue all of them. Declining to collect data on a demographic characteristic *at all* is not a statutorily permissible way of conserving state resources or ensuring reliability. Under Defendants' theory, they could decline to collect *any* data on, for example, race or sex, just by purporting to determine that collecting it would be an unnecessary diversion or insufficiently reliable. Congress has plainly foreclosed that choice.

Nor does the fact that Defendants collect some categories of demographic data excuse them from collecting an unrelated category, any more than collecting data on race would allow them to forgo collecting data on sex. And while Defendants posit a slippery slope concern—that respecting the plain language of 42 U.S.C. § 679(c)(3) would require some gargantuan collection of additional demographic characteristics—they tellingly do not even hypothesize an additional data element that they might be required to collect. There is thus no reason to fear some flood of demographic questions.

Accordingly, the 2020 Final Rule was not in accordance with law. In any event, as explained in Plaintiffs' opening brief, Defendants "entirely failed to consider [this] important aspect of the problem" during the rulemaking, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), rendering their resulting decision arbitrary and capricious. *See* Pls.' MSJ Mem. at 20, 24.

II. The 2020 Final Rule Is Arbitrary and Capricious

A. The 2020 Final Rule Is Arbitrary and Capricious as a Whole

Defendants are largely silent as to the overarching flaws that made the entire 2020 Final Rule arbitrary and capricious. Most importantly, they do not (and could not) deny that their cost-benefit analysis "fail[ed] to include . . . the benefit of [the removed data elements] in either quantitative or qualitative form." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008). Cost-benefit analysis was ostensibly the cornerstone of Defendants' motivation for revisiting the 2016 Final Rule, yet Defendants never discussed the

benefits of the eliminated data elements for children, families, and other stakeholders. *See* Pls.' Br. at 21-22. Defendants do not dispute in their brief that they "put a thumb on the scale by undervaluing the benefits" of the 2016 Final Rule, *Ctr. for Biological Diversity*, 538 F.3d at 1198. Just as they ignored those benefits entirely in the rulemaking, they have no response to Plaintiffs' arguments highlighting that key failing and the caselaw showing it to be fatal.

Similarly, Defendants do not acknowledge the blackletter law that an agency acts arbitrarily when it "disregard[s] facts and circumstances that underlay" a prior rule without a "reasoned explanation." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Tele. Stations, Inc.*, 556 U.S. 502, 515-16 (2009)). In the rulemaking that produced the 2020 Final Rule, Defendants ignored numerous significant portions of the 2016 Final Rule's analysis of the facts and circumstances underlying that rule. *See* Pls.' MSJ Mem. at 13-14, 16, 22-23, 26-29; *see also* Compl. ¶¶ 154-57, 165, 168, 171-73, 182-85, 192-93, 199-200. In their brief, however, Defendants acknowledge just *one* of these unexplained reversals, Defs.' Opp'n at 20—and as discussed below, *infra* page 9, their defense fails even as to that one. An agency cannot justify significant departures from a prior rule without "display[ing] awareness that it is changing position," *Encino Motorcars*, 136 S. Ct. at 2126, and a litigant cannot overcome an argument that it refuses even to address. Defendants' silence thus confirms Plaintiffs' arguments and requires that the 2020 Final Rule be set aside.

Rather than address these overarching failings, Defendants attempt to defend the rule's inflated "burden estimate" of the number of hours Title IV–E agencies would spend collecting data. Even if they could justify their burden estimate, it would be arbitrary and capricious to properly estimate the burden while "fail[ing] to include . . . the benefit of [the removed data elements] in either quantitative or qualitative form," *Ctr. for Biological Diversity*, 538 F.3d at 1198, as explained above. In any event, their attempt to defend the burden estimate similarly fails to address Plaintiffs' main arguments. As Plaintiffs' opening brief explains, the burden estimate in the 2020 Final Rule radically changed the methodology from the 2016 Final Rule, significantly inflating the burden estimate for the 2016 Final Rule through this unacknowledged change. *See* Pls.' MSJ Mem. at 14 & 23. This new methodology was predicated on the understanding that the

2016 Rule required agencies to ask every ICWA question of every child—an assumption contradicted by the fact that such questions were only required in 2 percent of cases. *See* Pls.' MSJ Mem. at 23 (citing 84 Fed. Reg. at 16,589; 85 Fed. Reg. at 28,420). Defendants' brief is silent on this point, as there is no denying that Defendants impermissibly "overvalu[ed] the costs" associated with data collection. *Ctr. for Biological Diversity*, 538 F.3d at 1198.

Defendants suggest that their burden analysis as to the eliminated ICWA questions was reasonable because retaining those questions would have required all states to include fields for answering the ICWA questions when they modified their data systems, and some states self-report a low number of AI/AN children in foster care (without, of course, data confirming that they are making the ICWA inquiries required to be certain of that). *See* Defs.' Opp'n at 20-21. This misses the point. Defendants' burden analysis included not only the costs of modifying data systems, but also the supposed costs of *collecting* the full ICWA data even for the 98% of children for whom only three questions would need to be reported. *See* Pls.' MSJ Mem. at 14, 23. Defendants propose no excuse for this unexplained and plainly erroneous methodological change.[1]

Defendants try to distract from this error by pointing out that the 2016 Rule entailed other costs, such as updating states' data systems, and then accusing Plaintiffs of merely disagreeing with how Defendants weighed those costs against the benefits of the data. Defs.' Opp'n at 21-22. This mischaracterizes Plaintiffs' argument: Plaintiffs take issue with the improper *inflation* of the costs, combined with the complete absence of any evaluation of the benefits. Resolving this case therefore does not require the Court to substitute its judgment for that of HHS, as Defendants claim. *See id.* The Court need only find that the 2020 Final Rule's burden estimate "runs counter to the evidence before the agency," making the rule arbitrary and capricious. *State Farm*, 463 U.S. at 43.

Defendants' dismissal of comments about the putative burden is likewise unsuccessful. For example, in response to commenters (including states themselves, *see, e.g.*, AR 2644-45)

[1] Even as to the burden of modifying data systems, Defendants' estimate was unreliable due to its inclusion of costs that would have been incurred anyway or had already been occurred, as discussed below. *See infra* page 17.

explaining that some states' burden estimates were inflated because they included costs that would be incurred regardless of the specific data elements and that states were already incurring, *see* Pls.' MSJ Mem. at 23-24, Defendants merely recite the states' estimates unquestioningly without explaining why they ignored commenters' critiques, *see* Defs.' Opp'n at 22. As in the 2020 Final Rule itself, this unreasoned failure to "consider and respond to significant comments" is insufficient. *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 775 (9th Cir. 2018) (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015)).

Defendants attempt to justify their inability to rebut adverse commenters by arguing that they were not required to respond because the arguments were allegedly not "significant." Defs.' Opp'n at 22-23. This overreads *American Mining Congress v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992). A comment need not change everything about the agency's final decision in order to be significant; it need only be sufficient to change *something* about the relevant rule, such as the weight of the factors the agency must consider about the agency's rule. *See id.* ("The failure to respond to comments is grounds for reversal only if it reveals that the agency's decision was not based on consideration of the relevant factors."); *see also Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830, 842-43 (E.D. Cal. 2008) (agency was obligated to respond to comments that were relevant to the rule's rationale). Defendants' interpretation would suggest that an agency need not respond to *any* comments in any rulemaking for which an agency has policymaking discretion, which would render the notice-and-comment process a dead letter.

Moreover, even under Defendants' expansive reading of *American Mining Congress*, the comments cast doubt on the entire cost-benefit analysis, Defendants' principal justification for the 2020 Final Rule. This failure "reveals that the agency's decision was not based on consideration of the relevant factors." *Am. Mining Congress*, 965 F.2d at 771; *see also District of Columbia v. USDA*, 496 F. Supp. 3d 213, 254-55 (D.C. Cir. 2020) (rule's estimate of costs was arbitrary and capricious where agency failed to consider costs raised by commenters). Defendants cannot evade their obligation to address comments on the rule's central justification by hypothesizing that they could conceivably have reached the same conclusion even if their main reason was compromised. *See Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1069 (9th Cir. 2018) ("[A]n agency's

action must be upheld, if at all, on the basis articulated by the agency itself, not post-hoc rationalizations.").

In sum, the 2020 Final Rule must be set aside because its central justification was a cost-benefit analysis that contained multiple fatal flaws, including key points that Defendants do not even attempt to refute.

B. The Elimination of the Sexual Orientation Elements Was Arbitrary and Capricious

As shown in Plaintiffs' motion, the 2020 Final Rule's purported rationale for eliminating the sexual orientation questions was conclusory, contrary to the evidence in the record, and an unexplained departure from the 2016 Final Rule. *See* Pls.' MSJ Mem. at 24-27. In their opposition, Defendants rely on a combination of conclusory snippets and revisionist history, justifying their decision with reasoning that is nowhere to be found in the administrative record. This effort must fail, as *post hoc* rationalizations cannot save an arbitrary and capricious rule. *See Ctr. for Biological Diversity*, 900 F.3d at 1069. In any event, Defendants' belated rationales are no more persuasive than the ones in the record.

Defendants' leading argument is their claim that the 2020 Final Rule "offers a reasoned explanation" that "the sexual orientation questions would not result in a reliable and consistent data collection." Defs.' Opp'n at 17. But the sole discussion of the sexual orientation questions' reliability is a half of a sentence in the 2019 NPRM noting that a minority of states "expressed concerns with the data elements around sexual orientation and recommended they be removed due to reasons such as it will not be reliable because youth would self-report, which could result in an undercount." 84 Fed. Reg. at 16,574.[2] Neither the 2019 NPRM nor the 2020 Final Rule contains even a sentence of analysis of this claim. *See id.* at 16,576-77 (providing rationale for eliminating sexual orientation questions without mentioning reliability); 85 Fed. Reg. at 28,413 (adopting

[2] Defendants' opposition puts an inaccurate gloss on this statement, saying that "[a] third of states recommended that the sexual orientation data elements be removed due to reliability concerns (youth self-reporting could result in undercounting)." Defs.' Opp'n at 6. As far as Plaintiffs can find in the administrative record, only *three* states claimed to believe that the sexual orientation questions were problematic because they might be unreliable or might result in undercounting. *See* AR 714, 1432, 1890. None of them suggested that the question regarding foster or adoptive parents and legal guardians raised reliability concerns.

conclusion from 2019 NPRM without mentioning reliability). A stray mention in a notice that some commenters made a claim is not even a statement of the *agency's* view, much less a "reasoned explanation" of that view. *Encino Motorcars*, 136 S. Ct. at 2126; *see also Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) ("[C]onclusory statements will not do; an agency's statement must be one of reasoning." (internal quotation marks omitted)); *California by & through Becerra v. U.S. Dep't of the Interior*, 381 F. Supp. 3d 1153, 1169 (N.D. Cal. 2019) (same); *Office of Commc'n of United Church of Christ v. FCC*, 560 F.2d 529, 533 (2d Cir. 1977) (agency cannot rely on rationale "mentioned only in passing in the [agency's] notice of proposed rulemaking").[3]

Defendants attempt to bolster their supposed "reliability" rationale by tying it to the OMB Working Group paper, *see* Defs.' Opp'n at 17-18, but this is a purely *post hoc* rationalization. The 2019 NPRM's discussion of the Working Group paper focused on the "sensitive and/or personal" nature of the questions, then based its determination on "the need to validate questions related to sexual orientation and ensure responses about sexual orientation, especially with adolescents, are private anonymous, and confidential," together with the purported "impossib[ility] [of] ensur[ing] that a child's response to a question on sexual orientation would be kept private, anonymous, or confidential." 84 Fed. Reg. at 16,576. Reliability was never mentioned.[4] Similarly, even if the

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[3] A reasoned explanation would have to explain, for example, why having *no* estimate of LGBTQ+ youth in foster care is better than having a conservative estimate that can provide a lower bound, particularly given ACF's recognition that LGBTQ+ youth "are at an increased risk for poor outcomes" and having data can "ensure that foster care placement resources and services are designed appropriately." 81 Fed. Reg. at 90,534; *see also* AR 1512 ("The absence of administrative data at a national level make it impossible to track whether the system is making improvements in the treatment and care of this very vulnerable, but significant proportion, of the population of youth in out-of-home care.").

[4] To the extent Defendants argue for the first time in their reply that "validity" and "reliability" are interchangeable, this is incorrect. *See, e.g.*, Paul C. Price, et al., *Research Methods in Psychology* 4.2 (3d Am. ed. 2017) (explaining the difference between reliability and validity in social science research and noting that "a measure can be extremely reliable but have no validity whatsoever"). The text of 42 U.S.C. § 679(c)(2) confirms that Congress had this technical definition of reliability in mind. *Compare Research Methods in Psychology* 4.2 (explaining "[r]eliability refers to the consistency of a measure," including "over time" and "across different researchers") *with* 42 U.S.C. § 679(c)(2) (HHS shall "assure that any data that is collected is reliable and consistent over

differences Defendants posit between the AFCARS questions and the Youth Risk Behavior Surveillance System were significant, *see* Defs.' Br. at 17-18, there is no indication whatsoever that this was considered in the rulemaking; it is another *post hoc* rationalization standing in the place of a reasoned explanation. *See Ctr. for Biological Diversity*, 900 F.3d at 1069 ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself, not post-hoc rationalizations." (internal quotation marks omitted)).

Moreover, Defendants continue to misstate the Working Group paper. It did not affirmatively "recommend[] that even validated questions be tested for new settings with a different audience," Defs.' Br. at 17; it merely noted that additional testing "*may* be needed to evaluate how the question performs in a new setting with a different audience," AR 187 (emphasis added). Similarly, Defendants invoke a caveat in the Working Group paper discouraging "nonresponse categories (Don't Know/Refused/Other/Something else)" in some settings, Defs.' Br. at 17 (quoting AR 189), without acknowledging that the same paragraph of the Working Group paper explicitly noted that "*[i]n the case of adolescents* . . . 'don't know' or similar categories may be more fitting," AR 189 (emphasis added).[5] And in any event, neither of these rationales are even hinted at in the 2019 NPRM or 2020 Final Rule, and thus could not save the Rule even if they had merit.

As to the 2020 Final Rule's actual rationale—sensitivity and confidentiality—Defendants' only argument is to claim that "commenters did not cite the [2013 professional guidelines] for

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time and among jurisdictions through the use of uniform definitions and methodologies"). Dictionary definitions support much the same conclusion. *See, e.g.*, *Reliability*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/reliability (last accessed Nov. 2, 2021) (providing technical definition of reliability as "the extent to which an experiment, test, or measuring procedure yields the same results on repeated trials"); *Reliable*, American Heritage Dictionary (5th ed. 2020) (providing technical definition of reliability as "[y]ielding the same or compatible results in different clinical experiments or statistical trials"). Validity, by contrast, refers to whether a question measures what it purports to measure—for example, whether a "Don't know" response means that the respondent didn't understand the question or didn't know the answer. *See Research Methods in Psychology* 4.2; AR 189.

[5] The source on which the Working Group paper relies goes even further, noting that a "not sure category . . . may be especially appropriate for adolescents." Sexual Minority Assessment Research Team (SMART), *Best Practices for Asking Questions About Sexual Orientation on Surveys* at 9 (2009) (cited at AR 189, 196).

purposes of mitigating any sensitivity and confidentiality concerns." Defs.' Opp'n. at 18. This is demonstrably incorrect. Commenters specifically cited the guidelines in response to the "unsubstantiated conclusion . . . that the data could lead to breaches of confidentiality because a case worker would be gathering the information." AR 2340. As commenters explained, the guidelines "address[] all aspects of managing [sexual orientation] information in child welfare systems." *Id.* Commenters went on to explain that child welfare agencies "collect data about information that is highly personal, private and confidential" and that sexual orientation questions would not need to "be handled any differently from the sort of sensitive information case workers have been collecting and managing for decades." AR 2341. Defendants' *post hoc* justification for ignoring the guidelines therefore fails. Tellingly, Defendants do not attempt to defend the actual rationale in the 2020 Final Rule, nor explain their reversal from their reliance on similar guidelines in the 2016 Final Rule. *See* Pls.' MSJ Mem. at 26 (citing 81 Fed. Reg. at 90,526).

As to the 2020 Final Rule's failure to respond meaningfully to comments about the benefits of the eliminated questions and similar matters, Defendants point to a single conclusory sentence in the 2020 Final Rule. Defs.' Opp'n. at 19 (citing 85 Fed. Reg. at 28,413 ("[S]tate and local child welfare agency commenters generally acknowledged that information about a youth's or provider's sexual orientation can be collected as part of the title IV–E agency's casework and should be documented in the case file, if it pertains to the circumstances of the child, and reporting it to a national database would not enhance their work with children and families.").[6] Agencies cannot merely "[n]od[] to concerns raised by commenters only to dismiss them in a conclusory manner." *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020); *accord California by & through*

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[6] This sentence purportedly responds to the following comments:

> The common reasons provided, which were the same or similar reasons provided by these commenters in response to the 2018 ANPRM, are that the data would (1) enhance recruitment of foster homes; (2) aid permanency and case decisionmaking; (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. Defendants' rationale is plainly non-responsive as to most of the comments, and conclusory as to the subset it touches on.

Becerra, 381 F. Supp. 3d at 1169; *see* Pls.' Br. at 27. Equally damning, several state commenters asserted the exact opposite. *See, e.g.*, AR 1343 (Ohio child welfare agency explaining that "The addition of the elements identifying LGBTQ youth in foster care are helpful in assessing the need for additional and/or specialized services for this population, thus creating successful outcomes."); AR 1716 (Oregon explaining that "this data is an important component to helping us improve our services"); *see also, e.g.*, AR 1563-67, 2544-45, 2647, 2650. Now as then, Defendants do not explain why they gave controlling weight to one set of comments and zero weight to the other.

Perhaps recognizing the conclusory nature of their response, Defendants fall back on the claim that they did not need to respond to comments at all. *See* Defs.' Br. at 19. As discussed above, *see supra* page 6-7, this argument misreads the Ninth Circuit's caselaw. It is also premised on Defendants' impermissible *post hoc* "reliability" justification, *see supra* pages 7-9, along with a second *post hoc* theory that the two sexual orientation questions somehow would cause "unnecessary diversion of resources." Defs.' Br. at 19. Here again, Defendants cannot invent new arguments in litigation to save their arbitrary and capricious rulemaking, because "courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *State Farm*, 463 U.S. at 50.

Accordingly, Defendants' attempt to supplement their conclusory and flawed rationales with *post hoc* (yet still flawed) ones should be rejected, and the elimination of the sexual orientation questions should be held arbitrary and capricious.

C. The Elimination of the ICWA Elements Was Arbitrary and Capricious

The 2020 Final Rule's decision to remove or narrow the ICWA data elements was likewise arbitrary and capricious because it was wholly unreasoned, departed from the 2016 Final Rule without explanation, and failed to respond meaningfully to comments. Pls.' MSJ Mem. at 27-30. Defendants' arguments to the contrary are either nonresponsive or incorrect.

To begin, Defendants offer no answer to Plaintiffs' criticism of the 2020 Final Rule's leading rationale for removing ICWA data elements. As Plaintiffs explained in their opening brief, that rationale—*i.e.*, that HHS lacked authority to collect the elements because HHS would need to interpret and enforce compliance with ICWA—is contradicted by the record. Pls.' MSJ Mem. at 27-28. The removed data elements do not interpret ICWA (because they are taken directly from

the Department of Interior's ICWA regulations), and the 2016 Rule would not penalize states for ICWA non-compliance (because it penalizes only the failure to submit AFCARS-compliant data). *Id.* Defendants' brief does not respond, nor does it deny that the supposed lack of authority was the leading reason for removing the ICWA data specifically. *See* Defs.' Opp'n at 24 (reciting the rule's rationale without acknowledging Plaintiffs' argument). Accordingly, the decision to remove the ICWA data elements was arbitrary and capricious. *State Farm*, 463 U.S. at 43.

Defendants are largely or entirely silent regarding other key flaws as well, such as the 2020 Final Rule's unexplained departures from the 2016 Final Rule's analysis of the benefits and necessity of specific ICWA data elements, or its unreasoned and incorrect description of the eliminated ICWA elements as "qualitative." *See* Pls.' MSJ Mem. at 28-30. Plaintiffs' motion for summary judgment explained why the former failing was an unexplained departure from the 2016 Final Rule, rendering the 2020 Final Rule arbitrary and capricious under *Encino Motorcars*, 136 S. Ct. at 2126, and the latter failing contrary to the record, rendering the rule arbitrary and capricious under *State Farm*, 463 U.S. at 43. Defendants' complete silence in response confirms Plaintiffs' argument.

Where Defendants do respond to Plaintiffs' arguments, their contentions do not save the 2020 Final Rule. Defendants' attempt to defend their burden estimate is addressed above and is no more availing here. *See supra* pages 4-6. The rest of their defenses are similarly incomplete or incorrect. For example, in response to Plaintiffs' point that "[t]he 2016 Final Rule makes clear that [ICWA] data is intended for use in the aggregate to inform policy-driven activities (such as targeting guidance and assistance to states)," Pls.' MSJ Mem. at 28, Defendants recite the 2020 Rule's arguments that *commenters* "did not identify any additional evidence that required this data for policymaking or why AFCARS specifically is the best means for collecting it," Defs.' Br. at 23; *see also id.* at 21. This is unresponsive, as it does not address the unexplained departure from the agency's own findings in the 2016 Final Rule. *See* 2016 Rule, 81 Fed. Reg. at 90,525 (data will "inform national policies"), 90,556 (ICWA data "will help develop policy"), 90,565 (rejecting alternative means of collecting data because "AFCARS is the only comprehensive case-level data set").

In any event, it is incorrect: commenters specifically pointed to such facts as the passage of the Family First Prevention Services Act in 2018, which "expands the purpose of the Title IV–E program" by requiring states to provide evidence-based services and therefore "makes collection of the data elements in the 2016 Final Rule more important." AR 1061; *see also* Compl. ¶ 158 (citing 42 U.S.C. § 671(e)(5)(B)(vii)).[7] Commenters also explained that AFCARS is the "appropriate" vehicle for collecting the data because "previous attempts to capture [the] data through" other means "have failed." AR 2247. Even members of Congress explained why they needed the data for policymaking purposes. AR 1166-78, 2437-41. As in the rulemaking itself, Defendants' only response is to rely on the 2019 NPRM's non sequitur that Congress has passed child welfare laws despite not having the data. *See* 84 Fed. Reg. at 16,575. But that has no bearing on whether data would be useful to *future* policymaking, nor whether it would help implement the policy goals of the laws already passed.

Similarly, Defendants attempt to wave away the 2020 Final Rule's internal inconsistencies and unexplained reversals by relying on the rule's assertion that ACF has authority to collect some ICWA data elements, but not others. Specifically, the rule states that "the AFCARS authority allows us to collect ICWA-related data elements . . . to inform [ACF] whether a child's connections with his or her family, heritage, and community are preserved" and to "provide supplemental information on whether states follow certain best practices with regard to Native American children in foster care," but "does not provide authority for ACF to require states to report specific details on ICWA's requirements in AFCARS." 85 Fed. Reg. at 28,412-13. But the rule (like Defendants' brief) neither explains how it derives this legal conclusion from the statutory text, nor why the elements it retained fall into the supposedly permissible categories, while the elements it removed fall into the impermissible. These categories do not match Defendants' actual decisions regarding what to keep and what to cut. For example, one of the *retained* data elements tracks whether the Title IV–E agency provided legal notice to tribes, *see id.*

[7] *See also, e.g.*, AR 2476 (citing a government report "demonstrat[ing] the need for quality national data" to target guidance and assistance to states); AR 2494 (identifying policy needs for data).

at 28,414, which is a "specific detail[] on ICWA's requirements," *id.* at 28,413; on the other hand, all of the *removed* data elements provide information on whether states are following "best practices with regards to Native American children," *id.*; *see also* 81 Fed. Reg. at 90,527 (describing the ICWA requirements as "the 'gold standard' of child welfare practice"). Such "internally inconsistent analysis is arbitrary and capricious." *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015). Defendants' brief does not even attempt to square the 2020 Final Rule's choices with its supposed logic. Defs.' Opp'n at 24.

Defendants' other arguments suffer from the same defects discussed above. They repeatedly fall back on the 2020 Final Rule's cost-benefit analysis, without acknowledging their complete refusal to look at one side of that equation and the manifest flaws in their analysis of the side that they did consider. *See supra* pages 3-6. They insist that they were not required to address significant comments that cast doubt on the viability of alternatives to AFCARS, such as the Court Improvement Program ("CIP"), simply because the agency *could* have reached the same decision if it considered those comments. Defs.' Opp'n at 22-23. But as explained above, *see supra* page 6-7, this misreads the caselaw; these comments "raise relevant points" and "reveal[] that the agency's decision was not based on consideration of the relevant factors," and are therefore significant comments that required a response. *Am. Min. Congress*, 965 F.2d at 771.[8] Thus, even if Defendants *could* have reached this conclusion, Defs.' Opp'n at 23, that did not relieve the agency of the separate obligation to address comments explaining why that course of action would be inappropriate.

Finally, even if Defendants' arguments sufficed to justify some small portion of the 2020 Final Rule, this would not save the rule under the APA. *Cf. Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 619 (D.C. Cir. 2017) (holding that an agency decision was arbitrary and

[8] And even if they could ignore the comments, they could not ignore (without a reasoned explanation) their own previous conclusion that alternatives would not suffice because "AFCARS is the only comprehensive case-level data set on the incidence and experiences of children who are in out-of-home care." 81 Fed. Reg. at 90,565; *see* Pls.' Mem. at 9. Nor are Defendants saved by the argument that the agency should receive deference on its predictions that the CIP would be a successful alternative for collecting data. Defs.' Opp'n at 23. The agency cannot receive deference to an explanation that it did not provide. *See supra* pages 1-2.

capricious where it was based "in part" on a rationale that "r[an] counter to the evidence allegedly before it"). Given Defendants failure to substantiate *any* of their reasons for removing the ICWA data elements, their decision to do so was arbitrary and capricious.

III. The 2020 Final Rule Should Be Vacated

Finally, Defendants propose that the Court should leave the 2020 Final Rule in place even if it concludes that Defendants acted unlawfully. *See* Defs.' Opp'n at 24-27. Defendants never acknowledge that remand without vacatur is an "exceptional remedy," *Am. Great Lakes Port Ass'n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020), that the Ninth Circuit has restricted to "limited circumstances," *Nat'l Family Farm Coal.*, 960 F.3d at 1144 (quoting *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015)). As explained in more detail in Plaintiffs' opposition to Defendants' motion for voluntary remand, *see* Pls.' Opp'n to Defs.' Mot. for Voluntary Remand Without Vacatur, Doc. No. 104 ("Pls.' RWV Opp'n"),[9] these limited circumstances do not apply here, and the Court should decline Defendants' exceptional request.

The Ninth Circuit leaves "invalid rule[s] in place only 'when equity demands' that [the court] do so," *Pollinator Stewardship Council*, 806 F.3d at 532 (quoting *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995)). "To determine whether vacatur is appropriate," the Ninth Circuit applies the *Allied-Signal* test, which requires "weigh[ing] [1] the seriousness of the agency's errors against [2] the disruptive consequences of an interim change that may itself be changed." *Nat'l Family Farm Coal.*, 960 F.3d at 1144 (quoting *Pollinator Stewardship Council*, 806 F.3d at 532)). *See also Cal. Cmtys. Against Toxics v. EPA ("CCAT")*, 688 F.3d 989, 992 (9th Cir. 2012) (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). A court may decline to vacate agency decisions "only 'when vacatur would cause serious and irremediable harms that significantly outweigh the magnitude of the agency's error.'" *AquAlliance v. U.S. Bureau of Reclamation*, 312 F. Supp. 3d

[9] Plaintiffs' opposition to Defendants' motion to remand provides significantly more detail on this issue. To avoid repetition, Plaintiffs respectfully ask that the Court treat the arguments in their concurrently filed opposition to Defendants' motion for voluntary remand as if fully incorporated herein.

878, 882 (E.D. Cal. 2018) (quoting *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin. Nat'l Marine Fisheries Serv.*, 109 F. Supp. 3d 1238, 1242 (N.D. Cal. 2015)).

Defendants cannot satisfy either of these requirements.

First, the seriousness of the agency's errors precludes leaving the 2020 Final Rule in place. *See* Pls.' RWV Opp'n. at 4–8. The test is whether "the fundamental flaws in the agency's decision make it unlikely that the same rule would be adopted on remand," *Nat'l Family Farm Coal.*, 960 F.3d at 1145, not, as Defendants would have it, whether the agency might "reconsider" the flawed rule and propose a completely different rule. *See* Defs.' Opp'n at 25. Defendants get the test exactly backward: the fact that the agency may issue a completely different rule on remand weighs *in favor of* vacatur, not against it. *See, e.g.*, *Nat'l Family Farm Coal.*, 960 F.3d at 1145 (vacating where "it is exceedingly 'unlikely that the same rule would be adopted on remand'" (quoting *Pollinator Stewardship Council*, 806 F.3d at 532); *Pollinator Stewardship Council*, 806 F.3d at 532 (vacating where "a different result may be reached on remand"); *In re Clean Water Act Rulemaking*, --- F. Supp. 3d ----, 2021 WL 4924844 at *8 (vacating where "the scope of potential revisions [the agency] is considering supports vacatur of the current rule because the agency has demonstrated it could not or will not adopt the same rule on remand"); *Ctr. for Env't Health v. Vilsack*, No. 15-cv-1690, 2016 WL 3383954, at *11 (N.D. Cal. June 20, 2016) (vacating where it was "far from certain" that the agency would "adopt the same rule").

Defendants suggest that "failures to provide an adequate explanation or adequately consider comments," Defs.' Opp'n at 25, are not serious errors that warrant vacatur. This too gets the test backward; "[c]ourts generally only remand without vacatur when the errors are minor procedural mistakes, such as failing to publish certain documents in the electronic docket of a notice-and-comment rulemaking." *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1125 (N.D. Cal. 2017). Courts routinely deny requests to withhold vacatur where, as here, a rule was substantively arbitrary and capricious or not in accordance with law. *See, e.g.*, *Nat'l Family Farm Coal.*, 960 F.3d at 1144-45 (vacating where agency's decision "substantially understated the risks it acknowledged, . . . entirely failed to acknowledge other risks" and lacked "substantial evidence"); *In re Clean Water Act Rulemaking*, --- F. Supp. 3d ----, 2021 WL

4924844, at *8 (vacating "in light of the lack of reasoned decisionmaking and apparent errors in the rule," among other factors); *California v. Bernhardt*, 472 F. Supp. 3d 573, 615-18, 631 (N.D. Cal. 2020) (vacating where agency failed to "provide a reasoned explanation for disregarding and contradicting facts and circumstances underlying the adoption of the rules that it now seeks to repeal," among other violations (internal quotation marks omitted)). Defendants' approach would turn the narrow *Allied-Signal* test into free-floating judicial policymaking in which courts make their own standardless determinations as to the importance of substantive Administrative Procedure Act violations. This invitation should be rejected.

Second, Defendants have failed to demonstrate that "vacatur would cause serious and irremediable harms that significantly outweigh the magnitude of the agency's error." *Klamath-Siskiyou Wildlands Ctr.*, 109 F. Supp. 3d at 1246. An agency cannot obtain "the rare exception[] to vacatur" without showing "irreparable and severe disruptive consequences," such as the extinction of an endangered species or statewide blackouts, worse air pollution, and a billion dollars of waste. *U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d at 1125 (citing *Idaho Farm Bureau*, 58 F.3d at 1406, and *Cal. Cmtys. Against Toxics*, 688 F.3d at 993-94). The "limited circumstances" in which the Ninth Circuit has allowed an unlawful rule to remain in place have all involved "serious irreparable environmental, or possibly other forms of significant harm to the public interest." *AquAlliance*, 312 F. Supp. 3d at 882.

As explained in detail in Plaintiffs' opposition to Defendants' motion for remand, Defendants' claimed disruption does not come close to this level. *See* Pls.' RWV Opp'n at 8-12. The vague, unquantified costs Defendants posit are far lower than those that courts routinely reject. *See id.* at 9; *see, e.g., U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d at 1125-26 (rejecting argument that $114 million in compliance costs is sufficiently disruptive); *California by & through Becerra*, 381 F. Supp. 3d at 1179 (rejecting argument that regulated entities' need for time to "convert their accounting systems" and the "inevitab[ility]" of "an adjustment period for interested parties" are sufficiently disruptive). Moreover, most of those costs would be incurred anyway if Defendants follow through on their proposal to reissue the eliminated data requirements, so withholding vacatur would cause minimal if any marginal costs. *See* Pls.' RWV

Opp'n at 10. The supposed "unwinding" that vacatur would entail here bears no resemblance to the kind of resetting of historical rates or "recoup[ment] and redistribut[ion] of funds that had changed hands years ago in numerous separate transactions," *Am. Great Lakes Ass'n*, 962 F.3d at 519, that may constitute cognizable disruption. And Defendants' claim that vacatur could "potentially disrupt[] the flow of billions of dollars in federal funding" is entirely illusory. Defs.' Opp'n at 26.[10]

Defendants' argument that vacating the 2020 Final Rule would "delay HHS from receiving updated data and comprehensive historical information on key data elements included in the 2020 Final Rule," Defs.' Opp'n at 26, deserves special mention. As an initial matter, this claim would be largely baseless even if the Court's only options were between immediate vacatur and remanding without vacatur. *See* Pls.' RWV Opp. at 11-12. But even if Defendants could identify such an obstacle—or if their vague claims of unquantified costs to Defendants or state agencies were considered significant—these problems could be readily addressed through the Court's ability to exercise equitable discretion in tailoring the remedy to the facts of the case. *See generally, e.g.*, *Coal. for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 460 (6th Cir. 2004) ("It is well-established that federal courts possess broad discretion to fashion equitable remedies.").

For example, this Court has discretion to defer vacatur in order to provide HHS and Title IV–E agencies time to prepare for implementation of the 2016 Rule. *See California v. Bernhardt*, 472 F. Supp. 3d at 631-32 (delaying, but not forgoing, vacatur to "minimize the expenditure of resources"). Likewise, the Court could take such concerns into account when setting a new compliance deadline for the 2016 Rule, which has passed and will now need to be reset. *See, e.g.*, *id.* at 631 ("The fact that vacatur may not lead to 'immediate compliance' with the 2016 Rule does

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[10] Given Defendants' inability to demonstrate "serious and irremediable harms that significantly outweigh the magnitude of the agency's error," *Klamath-Siskiyou Wildlands Ctr.*, 109 F. Supp. 3d at 1246, their disparagement of Plaintiffs' harms, Defs.' Opp'n at 26-27—harms that they do not dispute are concrete, particularized, and actual or imminent—is irrelevant. In any event, as explained in Plaintiffs' opposition to Defendants' motion to remand, Plaintiffs' harms are no more speculative and unquantified than Defendants' claims of disruption, and the equities—the length of time that Plaintiffs have waited and will continue to wait if vacatur is withheld, along with the continuing harm to children, non-profit organizations, and sovereign Indian tribes—weigh in favor of vacatur. *See* Pls.' RWV Opp. at 15-17.

not warrant a remand without vacatur."); *Am. Acad. of Pediatrics v. FDA*, 399 F. Supp. 3d 479, 483-87 (D. Md. 2019) (resetting lapsed deadline after vacating agency action that had altered that deadline).

With such options available, any disruption that warranted equitable forbearance could easily be accommodated without resort to the "exceptional remedy" of remand without vacatur. *Am. Great Lakes Ass'n*, 962 F.3d at 519. The Court's ability to order vacatur in a manner that allows for a reasonable transition back to the status quo ex ante, the 2016 Final Rule, disposes of any need to employ remand without vacatur in a setting so far removed from its ordinary scope.

CONCLUSION

For the foregoing reasons and those in Plaintiffs' opening brief, the 2020 Final Rule was contrary to law and arbitrary and capricious, and must be set aside.

Dated: November 5, 2021

Respectfully submitted,

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