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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 CALIFORNIA TRIBAL FAMILIES COALITION) Civil Action No. 3:20-cv-06018-MMC (LB)
14 *et al.*,)
15 Plaintiffs,) **DEFENDANTS' MOTION FOR**
16 v.) **VOLUNTARY REMAND WITHOUT**
17 XAVIER BECERRA, in his official capacity as) **VACATUR**
18 Secretary of Health and Human Services *et al.*,) Hearing date: December 3, 2021
19 Defendants.) Time: 9:00 a.m.

1 **NOTICE OF MOTION**

2 PLEASE TAKE NOTICE that on December 3, 2021 at 9:00 a.m., or as soon thereafter as this
3 matter may be heard by the Honorable Maxine M. Chesney, Senior United States District Judge of the
4 United States District Court for the Northern District of California, located at 450 Golden Gate Avenue,
5 San Francisco, California, Defendants¹ will and hereby do move the Court for an order remanding the
6 final rule that is the subject of Plaintiffs'² complaint (“Complaint”), Dkt. No. 1, without vacatur. This
7 motion is based on this notice, the supporting memorandum of points and authorities set forth below, all
8 pleadings and papers on file with the Court, and all other matters properly before this Court.

9 **RELIEF SOUGHT**

10 Defendants seek an order remanding the final rule issued on May 12, 2020 related to the
11 Adoption and Foster Care Analysis and Reporting System (85 Fed. Reg. 28,410) without vacatur.

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. INTRODUCTION**

14 In May 2020, the U.S. Department of Health and Human Services (“HHS”) issued a final rule
15 regarding the Adoption and Foster Care Analysis and Reporting System (“AFCARS”), a data collection
16 system for national adoption and foster care data. The 2020 final rule removed the requirement in the
17 2016 AFCARS rule that state and tribal child welfare agencies collect and submit data related to sexual
18 orientation and the Indian Child Welfare Act of 1978 (“ICWA”). Plaintiffs have brought suit alleging
19 that HHS’s decision to remove these elements violates the Administrative Procedure Act and requesting
20 that the 2020 final rule be set aside. However, HHS now wishes to reconsider its decision regarding the
21 sexual orientation and ICWA-related data in light of a change in administration and the attendant change
22 in policies. To the end, Defendants are requesting, without confessing error, that the Court remand the
23

24 ¹ Defendants are Xavier Becerra, in his official capacity as Secretary of Health and Human
25 Services; JooYeun Chang, in her official capacity as Acting Assistant Secretary and Principal Deputy
26 Assistant Secretary at the Administration for Children and Families; U.S. Department of Health and
27 Human Services; and Administration for Children and Families. Pursuant to Federal Rule of Civil
28 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.

1 2020 AFCARS final rule without vacatur. That request should be granted.

2 On remand, HHS intends to initiate a rulemaking process that would propose to collect the
3 sexual orientation and ICWA-related data that are the subject of Plaintiffs' Complaint. Work has
4 already begun to obtain the necessary departmental clearance from agency leadership to move forward
5 with the rulemaking process. Given HHS's good faith intention to address the issues raised by
6 Plaintiffs, remand should be granted. In addition, remand should be without vacatur. HHS's intention to
7 revisit the challenged action in a manner that could address Plaintiffs' concerns means that any alleged
8 errors with the 2020 final rule are not sufficiently serious to warrant vacatur. Moreover, vacating the rule
9 would result in enormous disruption to HHS and child welfare agencies across the country, while keeping the
10 rule in place would result in little tangible prejudice to Plaintiffs.

11 Accordingly, the Court should remand the 2020 final AFCARS rule without vacatur.

12 **II. STATEMENT OF ISSUES TO BE DECIDED**

13 Whether the AFCARS final rule issued on May 12, 2020 (85 Fed. Reg. 28,410) should be
14 remanded without vacatur.

15 **III. BACKGROUND**

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

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

25 The data for AFCARS are collected and reported by state and tribal child welfare agencies,
26 which are known as "Title IV-E agencies" because they receive funding under Title IV-E of the Act (as
27 well as Title IV-B). As Plaintiffs acknowledge, Title IV-E agencies are the principal recipients of the
28 nearly \$10 billion per year that the federal government spends on child welfare programs. Compl. ¶ 54.
Section 474(f) of the Act requires HHS to impose penalties on all Title IV-E agencies (i.e., both states
and tribes) for failing to submit the data required by AFCARS. *See also* 45 C.F.R. § 1355.47. Section

1 1102 of the Act instructs the Secretary of HHS to promulgate regulations necessary for the effective
2 administration of the functions for which HHS is responsible under the Act.

3 On February 24, 2017, President Trump issued Executive Order 13777, which directed federal
4 agencies to establish task forces to make recommendations regarding their repeal, replacement, or
5 modification of existing regulations to lower regulatory burdens on the American people. The HHS task
6 force identified the AFCARS final rule published on December 14, 2016 (“2016 Final Rule”) as one in
7 which the reporting burden may impose costs that exceed benefits. 81 Fed. Reg. 90,524. The 2016
8 Final Rule updated AFCARS to add 153 data elements to the original 119 data elements, bringing to 272
9 the total number of data elements that state and tribal child welfare agencies would be required to report
10 to HHS. Ex. A, Declaration of Joseph Kracke-Bock (“Bock Decl.”) ¶ 6.

11 On March 15, 2018, Defendants published an Advance Notice of Proposed Rulemaking,
12 soliciting comments on the data elements added to AFCARS by the 2016 Final Rule and their associated
13 burden. 83 Fed. Reg. 11,449. Based on the feedback received by HHS, and its review of the need for
14 and utility of the data elements, HHS initiated a rulemaking process that resulted in the promulgation of
15 a AFCARS final rule on May 12, 2020 (“2020 Final Rule”). 85 Fed. Reg. 28,410. The 2020 Final Rule
16 excluded approximately one-third of the data elements from the 2016 Final Rule (from 272 to 183),
17 which was still a net increase of 64 data elements from the AFCARS regulations, issued in 1993, that
18 existed prior to the 2016 Final Rule. Bock Decl. ¶ 9.

19 Among the data elements removed by the 2020 Final Rule were data elements asking for
20 information on the sexual orientation of the child, foster parent, adoptive parent, or legal guardian, and
21 data elements related to ICWA. 85 Fed. Reg. at 28,413. HHS maintained the data element added by the
22 2016 Final Rule that asked whether conflict related to a child’s sexual orientation or gender identity
23 contributed to the child’s removal from home as well certain data elements specifically focused on the
24 needs of Indian children. *Id.* at 28,412-13, 28,429. The 2020 Final Rule also removed, streamlined or
25 simplified data elements covering the child’s relationship to foster/adoptive parents and legal guardians,
26 the child’s financial and medical assistance, health assessment date and time, educational stability,
27 authority for placement and care responsibility, private agency living arrangement, juvenile justice
28 involvement, transition plan and date, and interjurisdictional adoption or guardianship jurisdiction. *See*

1 *generally id.* at 28,410. Title IV-E agencies are required to comply with the 2020 Final Rule by
2 October 1, 2022. *Id.* at 28,413. Because the 2016 Final Rule was never implemented, HHS and Title
3 IV-E agencies still operate under the AFCARS regulations that were issued in 1993. Bock Decl. ¶ 8.

4 Plaintiffs are two Indian tribes and five nonprofits. *See* Compl. ¶¶ 18-47. Several of the
5 nonprofits focus on tribal interests, while others serve LGBTQ+ children. *Id.* Plaintiffs are challenging
6 HHS’s decision in the 2020 Final Rule to remove certain ICWA-related and sexual orientation elements
7 added by the 2016 Final Rule, alleging that Defendants’ actions were arbitrary, capricious and not in
8 accordance with law, in violation of Section 706(2)(A) of the Administrative Procedure Act. *See id.*
9 ¶¶ 248-251.

10 **IV. ARGUMENT**

11 **A. The Court Should Grant Defendants’ Request to Remand the 2020 Final Rule**

12 Agencies have inherent authority to reconsider past decisions and to revise, replace, or repeal a
13 decision to the extent permitted by law and supported by a reasoned explanation. *FCC v. Fox Television*
14 *Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto.*
15 *Ins. Co.*, 463 U.S. 29, 42 (1983) (“[R]egulatory agencies do not establish rules of conduct to last forever
16 [and] an agency must be given ample latitude to adapt their rules and policies to . . . changing
17 circumstances.”) (internal citations and quotation marks omitted); *Nat’l Ass’n of Home Builders v. EPA*,
18 682 F.3d 1032, 1038, 1043 (D.C. Cir. 2012) (explaining that an agency’s “reevaluation of which policy
19 would be better in light of the facts” is “well within” its discretion and that a “change in administration .
20 . . is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its
21 programs and regulations.” (citations and internal quotation marks omitted)).

22 Allowing for voluntary remand is consistent with this principle. *See Ethyl Corp. v. Browner*, 989
23 F.2d 522, 524 (D.C. Cir. 1993). “[W]hen an agency action is reviewed by the courts, in general the
24 agency may take one of five positions,” including that the agency may request “a remand (without
25 confessing error) in order to reconsider its previous position.” *SKF USA Inc. v. United States*, 254 F.3d
26 1022, 1027–28, 1029 (Fed. Cir. 2001); *see also Cal. Cmty. Against Toxics v. EPA (CCAT)*, 688 F.3d
27 989, 992 (9th Cir. 2012) (“A federal agency may request remand in order to reconsider its initial action.”
28 (citing *SKF*, 254 F.3d at 1029)). An agency may seek remand because, for example, “it wishe[s] to

1 consider further the governing statute, or the procedures that were followed.” *SKF*, 254 F.3d at 1029. “It
2 might simply state that it had doubts about the correctness of its decision or that decision’s relationship
3 to the agency’s other policies.” *Id.* “Here, the reviewing court has discretion over whether to remand.”
4 *Id.* (citations omitted).

5 “Generally, courts only refuse voluntarily requested remand when the agency’s request is
6 frivolous or made in bad faith.” *CCAT*, 688 F.3d at 992 (citing *SKF*, 254 F.3d at 1029). But “if the
7 agency’s concern is substantial and legitimate, a remand is usually appropriate.” *SKF*, 254 F.3d at 1029.
8 As courts have recognized, “administrative reconsideration is a more expeditious and efficient means of
9 achieving an adjustment of agency policy than is resort to the federal courts.” *B.J. Alan Co. v. ICC*, 897
10 F.2d 561, 562 n.1 (D.C. Cir. 1990) (citation omitted). For this reason, while recognizing that an agency
11 need not confess error in seeking remand, one court of appeals has held that, in the absence of a tenable
12 reason to the contrary, “it is an abuse of discretion to prevent an agency from acting to cure the very
13 legal defects asserted by plaintiffs challenging federal action.” *Citizens Against the Pellissippi Parkway*
14 *v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004). Accordingly, “courts routinely grant agency requests for
15 voluntary remand to reconsider an initial determination.” *ASSE Int’l, Inc. v. Kerry*, 182 F. Supp. 3d
16 1059, 1063 (C.D. Cal. 2016) (citing *Nat. Res. Def. Council, Inc. v. U.S. Dep’t of Interior*, 275 F.Supp.2d
17 1136, 1141 (C.D. Cal. 2002)); see also *Limnia, Inc. v. Dep’t of Energy*, 857 F.3d 379, 386 (D.C. Cir.
18 2017) (explaining that remand should be granted so long as “the agency intends to take further action
19 with respect to the original agency decision on review”).

20 Here, HHS is requesting remand of the 2020 Final Rule so that it can reconsider its previous
21 position regarding the collection of the sexual orientation and ICWA data elements. Ex. B, Declaration
22 of Aysha Schomburg (“Schomburg Decl.”) ¶ 4. On remand, HHS intends to issue one or more notice(s)
23 of proposed rulemaking (“NPRM”) and seek comment regarding one or more rules that would propose
24 to collect the sexual orientation and ICWA-related data that were in the version of the 2016 Final Rule
25 and removed by the 2020 Final Rule. *Id.* ¶ 8. Work has already begun to obtain the necessary
26 departmental clearance from agency leadership to move forward with the rulemaking process. *Id.*

27 Remand in this case is consistent with HHS’s inherent authority to reconsider the 2020 Final
28 Rule, including reappraisal of the costs and benefits that went into shaping that rule, particularly in light

1 of the change of administration and attendant change in policy priorities. Exec. Order No. 13988, 86
2 Fed. Reg. 7,023 (Jan. 20, 2021) (Preventing and Combating Discrimination on the Basis of Gender
3 Identity or Sexual Orientation); Exec. Order No. 13985, 86 Fed. Reg. 7,009 (Jan. 20, 2021) (Advancing
4 Racial Equity and Support for Underserved Communities Through the Federal Government); *see also*
5 Exec. Order No. 13992, 86 Fed. Reg. 7,049 (Jan. 20, 2021) (revoking Exec. Order No. 13777).

6 Granting remand to allow Defendants to revisit the 2020 Final Rule also promotes judicial
7 economy and conserves the parties' and the courts' resources. *See B.J. Alan Co.*, 897 F.2d at 562 n.1
8 (recognizing the efficiency of administrative reconsideration to modify agency policy as compared to
9 judicial review). Plaintiffs are focused on the removal of the sexual orientation and ICWA-related data,
10 which Defendants now intend to propose to collect under AFCARS or another legal authority (sections
11 471(a)(6) and 476(a)(2) of the Act). Defendants' reconsideration of the 2020 Final Rule directly
12 addresses Plaintiffs' concerns and if, as intended, HHS issues one or more new NPRMs that proposes to
13 collect this data, it would address any purported deficiencies that are the subject of Plaintiffs' challenge.
14 In addition, continuing to litigate this case would interfere with Defendants' ongoing reconsideration
15 process by forcing HHS to structure its administrative process around pending litigation, rather than its
16 policy priorities and expertise. *See Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 43 (D.D.C.
17 2013) (noting that because agency did "not wish to defend" action, "forcing it to litigate the merits
18 would needlessly waste not only the agency's resources but also time that could instead be spent
19 correcting the rule's [alleged] deficiencies"), *aff'd*, 601 F. App'x 1 (D.C. Cir. 2015).

20 Additionally, Defendants' request for voluntary remand here is timely and made in good faith.
21 On February 9, 2021, Defendants notified the Court and Plaintiffs that it was reevaluating the 2020 Final
22 Rule and considering the collection of the data that are the subject of Plaintiffs' challenge. Dkt. No. 56.
23 In March 2021, Defendants, through counsel, notified Plaintiffs of their intention to file a motion for
24 voluntary remand without vacatur. Over the next several months, the parties attempted to negotiate a
25 resolution to the case. To accommodate these negotiations, the parties jointly sought and received
26 extensions to the summary judgment schedule. Dkt. Nos. 59, 62, 81, 89. In August 2021, Plaintiffs,
27 through counsel, notified Defendants that they wished to resume the summary judgment schedule while
28 negotiations continued. On September 3, 2021, Defendants notified the Court that Defendants intended

1 to proceed with a motion for voluntary remand without vacatur and requested that the Court stay the
2 summary judgment briefing schedule pending resolution of the remand motion. Dkt. No. 96.

3 Because Defendants have demonstrated a good faith intent to reconsider the 2020 Final Rule,
4 and to do so in a way that would directly address the issues raised by Plaintiffs' challenge, remand is
5 appropriate here and would promote judicial economy and conserve the parties' resources. Furthermore,
6 Plaintiffs agree that the 2020 Final Rule should be remanded. Dkt. No. 96 at 5:22-23.

7 **B. The Court Should Not Vacate the 2020 Final Rule**

8 The 2020 Final Rule should be remanded without vacatur. "Whether agency action should be
9 vacated depends on how serious the agency's errors are 'and the disruptive consequences of an interim
10 change that may itself be changed.'" *CCAT*, 688 F.3d at 992 (quoting *Allied-Signal, Inc. v. U.S. Nuclear*
11 *Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). "A flawed rule need not be vacated.
12 Indeed, when equity demands, a regulation can be left in place while the agency follows the necessary
13 procedures to correct its action." *Id.* at 991.

14 "The first *Allied-Signal* factor deals with the likelihood that a rule's deficiencies can be redressed
15 on remand" *Am. Forest Res. Council*, 946 F. Supp. 2d at 44 (citing *Black Oak Energy, LLC v.*
16 *FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013)); *see also United States Sugar Corp. v. Envtl. Prot. Agency*,
17 830 F.3d 579, 630, (D.C. Cir. 2016) (characterizing factor as "likelihood of cure on remand"). As
18 discussed in Part IV.A *supra*, although Defendants do not confess error in promulgating the 2020 Final
19 Rule, and need not do so, *see SKF*, 254 F.3d at 1029, they seek remand to reconsider the 2020 Final
20 Rule in light of a change in administration and the attendant change in policies. In doing so, Defendants
21 are initiating a rulemaking process that would propose to collect, under AFCARS or an alternate legal
22 authority, the sexual orientation and ICWA-related data that are the subject of Plaintiffs' challenge.
23 Therefore, the purported errors raised by Plaintiffs are not sufficiently serious to warrant vacatur
24 because any such errors, assuming they exist, can be addressed on remand. *See Allied-Signal*, 988 F.2d
25 at 150-51 (finding that the deficiencies were the failure of the agency to adequately state its reasoning,
26 and thus not "serious" because the agency, on remand, might be able to easily provide the necessary
27 explanation); *Del. Riverkeeper Network v. United States EPA*, No. 20-3412, 2021 U.S. Dist. LEXIS
28 147539, at *9-11 (E.D. Pa. Aug. 6, 2021) (remanding without vacatur where agency, without confessing

1 error, sought to reconsider rule in light of a new policy resulting from a change in administration and
2 engage in a rulemaking process expected to take two years).

3 Two recent Ninth Circuit orders indicate that remand without vacatur should be routinely granted
4 where, as the case is here, the agency intends to revisit the challenged action to address the plaintiffs’
5 concerns. *See Neighbors for Envtl. Justice v. EPA*, Nos. 20-72091, 20-73276, 2021 U.S. App. LEXIS 20889,
6 at *4-5 (9th Cir. July 14, 2021) (granting “request for voluntary remand without vacatur to permit EPA to
7 conduct reconsideration proceedings” without analyzing *Allied Signal* factors); *Safer Chems. v. EPA*, 791 F.
8 App’x 653, 656-57 (9th Cir. 2019) (“Accepting EPA’s representation that it can address Petitioners’
9 concerns, we agree with EPA that remand without vacatur is appropriate with respect to the challenged
10 provisions” and doing so without analyzing *Allied Signal* factors (citing *CCAT*, 688 F.3d at 992)).

11 Regarding the second *Allied-Signal* factor, vacatur would be extraordinarily disruptive.
12 AFCARS is a nationwide system that requires Title IV-E agencies from all 50 states and numerous
13 tribes to collect and submit data to HHS. Bock Decl. ¶ 5. HHS and Title IV-E agencies have been
14 working on implementing the 2020 Final Rule for the last one-and-a-half years, which includes
15 developing policies, training tools, and technology systems. *Id.* ¶ 11. For example, HHS has procured a
16 \$24.4 million contract to develop an enterprise system to receive new AFCARS data based on the 2020
17 Final Rule. *Id.* Vacating the 2020 Final Rule and reinstating the 2016 Final Rule would require HHS,
18 all 50 states, and tribal title IV-E agencies to modify and, in some cases, unwind that work at great
19 expense and burden. *Am. Great Lakes Ports Ass’n v. Schultz*, 962 F.3d 510, 519 (2020) (“Under our
20 precedents, a quintessential disruptive consequence arises when an agency cannot easily unravel a past
21 transaction in order to impose a new outcome. We have rejected [such] approaches . . . as ‘an invitation
22 to chaos.’” (quoting *Sugar Cane Growers v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002))).

23 For example, HHS would need to modify its enterprise system to implement the ICWA and
24 sexual orientation elements, which will require significant analysis, additional funding, potential
25 contract acquisition or modification and project plan or schedule changes, as well as additional meetings
26 with various stakeholders, including states and tribes. Bock Decl. ¶ 11. Title IV-E agencies would
27 likewise require new contract solicitations, amendments to existing technology contracts, and funding
28 approvals. *Id.* ¶ 12. Both HHS and Title IV-E agencies would also need to develop new policies and

1 training to reflect the new data elements. *Id.* ¶¶ 11-12. Any changes would also divert the attention and
2 resources of Title IV-E agencies from their current obligations, including mandated federal reporting for
3 other Title IV-B and Title IV-E programs, thereby potentially disrupting the flow of billions of dollars in
4 federal funding. *Id.* ¶ 12.

5 Vacating the 2020 Final Rule would also delay HHS from receiving updated data and
6 comprehensive historical information on key data elements included in the 2020 Final Rule. *Id.* ¶ 9.
7 Notably, the 2020 Final Rule substantially altered the data collection specified in the initial 1993
8 AFCARS rule to permit more complete reporting on all foster care entries and exits, child placements,
9 case visits, as well as reporting on prior guardianships, and whether a child has a sibling also in foster
10 care. *Id.* Thus, if the 2020 Final Rule were vacated, HHS and Title IV-E agencies would be unable to
11 collect and report this additional data by 2023, as required by the 2020 Final Rule. *Id.* ¶ 10. It would
12 not serve the interests of anyone, including the foster care population, to prevent the implementation of
13 the 2020 Final Rule, which has 64 more data elements than the 1993 regulations currently in effect. *See*
14 *CCAT*, 688 F.3d at 993-94 (finding that vacatur could stall the construction of a much needed power
15 plant and result in blackouts, thereby “necessitate[ing] the use of diesel generators that pollute the air,
16 the very danger the Clean Air Act aims to prevent”). However, if the 2020 Final Rule were to remain in
17 place while HHS reconsiders the collection of the ICWA and sexual orientation data at issue in this
18 litigation, the ICWA elements retained in the 2020 Final Rule would be available for use in descriptive
19 reports and analyses that will provide important information about outcomes for ICWA applicable
20 children and youth placed in foster care. Bock Decl. ¶ 10.

21 Reverting to the 2016 Final Rule would also be a waste of federal, state and tribal resources
22 because some data elements that were carried over from 2016 Final Rule to the 2020 Final Rule were
23 modified and thus, while similar, are not identical. *Id.* ¶ 14. For this reason, the system modifications
24 that Title IV-E agencies have already made to collect 2020 Final Rule data will not, in all cases, line up
25 to collect the corresponding data elements in the 2016 Final Rule. *Id.* Therefore, Title IV-E agencies
26 would need to implement additional system modifications to revert even partially to the 2016 Final Rule
27 and collect the ICWA and sexual orientation data elements removed from the 2020 Final Rule. *Id.*
28 Moreover, reverting to the 2016 Final Rule would entail HHS and Title IV-E agencies collecting the

1 data elements that are not the subject of Plaintiffs' challenge. *Id.* It is difficult to imagine anything
2 more wasteful, and contrary to the statutory admonition that AFCARS avoid unnecessary diversion of
3 resources from Title IV-E agencies, than reinstating data elements that neither side is seeking to collect.

4 Plaintiffs' allegations of harm from keeping the 2020 Final Rule in place are too speculative and
5 amorphous to outweigh the disruptive consequences of vacatur. For example, Plaintiffs assert that not
6 having the data elements forces them to divert resources to address harms to their mission-driven
7 activities and impairs their ability to obtain funding. Compl. ¶ 209. But Plaintiffs do not attempt to
8 quantify these amounts or how they compare to the costs that would be incurred by HHS and Title IV-E
9 agencies in reverting back to the 2016 Final Rule. *See Neighbors Against Bison Slaughter v. Nat'l Park*
10 *Serv.*, No. CV 19-128-BLG-SPW, 2021 U.S. Dist. LEXIS 22584, at *6-11 (D. Mont. Feb. 4, 2021)
11 (remanding without vacatur where agencies, without confessing error, sought to reconsider bison
12 management plan because harm alleged was too attenuated and loss of monetary value to local business
13 did not outweigh disruption of collaborative bison management goals and would result in confusion
14 about the management framework for bison); *Am. Forest Res. Council*, 946 F. Supp. 2d at 43-44
15 (finding the "administrative and economic costs of remand without vacatur are too abstract and
16 speculative to clearly outweigh its benefits" where plaintiff "ha[d] not attempted to quantify these costs .
17 . . [or] provided any concrete examples of projects impacted by the consultation requirement or
18 additional timber that could be harvested in the next three years if the rule were vacated"). Nor do
19 Plaintiffs assert that they cannot continue their advocacy efforts without this data.

20 To paraphrase the Ninth Circuit, "if saving a snail warrants judicial restraint," then it is surely the
21 case that the Court should exercise restraint with respect to the 2020 Final Rule, which impacts not only
22 HHS but child welfare agencies in all 50 states as well as numerous tribes. *CCAT*, 688 F.3d at 994
23 (citing *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995)). Because HHS
24 would reconsider the alleged errors on remand, and the significant disruptive consequences of vacatur
25 outweigh any prejudice to Plaintiffs, the 2020 Final Rule should be remanded without vacatur.

26 **V. CONCLUSION**

27 For all the foregoing reasons, the Court should grant Defendants' motion for voluntary remand
28 without vacatur.

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DATED: October 15, 2021

Respectfully submitted,

STEPHANIE M. HINDS
Acting United States Attorney

/s/ Emmet P. Ong
EMMET P. ONG
Assistant United States Attorney

Attorneys for Defendants

Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CALIFORNIA TRIBAL FAMILIES COALITION,
YUOK TRIBE, CHEROKEE NATION, FACING
FOSTER CARE IN ALASKA, ARK OF
FREEDOM ALLIANCE, RUTH ELLIS CENTER,
and TRUE COLORS, INC.,

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

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as
Secretary of Health and Human Services,
JOOYEUN CHANG, in her official capacity as
Assistant Secretary for the Administration for
Children and Families, U.S. DEPARTMENT OF
HEALTH AND HUMAN SERVICES, and
ADMINISTRATION FOR CHILDREN AND
FAMILIES,

Defendants.

**DECLARATION OF JOSEPH KRACKE-BOCK, M.S.S.W., DEPUTY ASSOCIATE
COMMISSIONER,
CHILDREN’S BUREAU, ADMINISTRATION FOR CHILDREN AND FAMILIES,
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES**

I, Joseph Kracke-Bock, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that my
testimony below is true and correct:

1. I am the Deputy Associate Commissioner of the Children’s Bureau (“CB”) within the
Administration for Children and Families (“ACF”), in the United States Department of Health and
Human Services (“HHS”). I have held this position since 2002. The Children’s Bureau administers the
federal child welfare programs authorized under titles IV-B and IV-E of the Social Security Act and the
Child Abuse Prevention and Treatment Act. The agency engages in partnerships with federal, state,
tribal, and local agencies to provide support and guidance for the well-being of children and families
across the nation. As Deputy Associate Commissioner, I oversee the day-to-day operations of the

1 Children’s Bureau, including direction over the development and interpretation of federal child welfare
2 legislation, regulation, policy, and standards. I also have oversight of federal monitoring protocols that
3 assess state practices against federal requirements to ensure those practices comport with Federal law,
4 regulation and policy. My oversight includes engaging state and tribal child welfare agencies in
5 corrective action to bring them into compliance with federal law and improving the child welfare policies
6 and procedures of such Title-IV agencies to comport with best practices.
7

8 2. I received a Masters of Science in Social Work degree from the University of Texas at
9 Austin in 1989.

10 3. In addition to my personal knowledge regarding AFCARS, this declaration is based upon
11 other knowledge and information I obtained in the regular course of business throughout my career in child
12 welfare, which spans more than thirty years. I provide this declaration based on the best of my knowledge,
13 information, belief, and reasonable inquiry for the above-captioned case.
14

15 4. I am submitting this declaration in order to describe the effects of a decision by this Court
16 vacating the 2020 AFCARS rule.

17 5. The Adoption and Foster Care Analysis and Reporting System (“AFCARS”) collects case-
18 level information from state and tribal title IV-E agencies on all children in foster care and those who have
19 been adopted with title IV-E agency involvement. AFCARS is a nationwide system that requires title IV-
20 E agencies from all 50 states and numerous tribes to collect and submit data to HHS. Examples of data
21 reported in AFCARS include demographic information on the foster child as well as the foster and adoptive
22 parents, the number of removal episodes a child has experienced, the number of placements in the current
23 removal episode, and the current placement setting. Title IV-E agencies are required to submit the
24 AFCARS data twice a year based on two 6-month reporting periods. The Secretary first promulgated
25 AFCARS regulations in 1993.
26

27 6. In 2016, HHS published a revision of the AFCARS provisions in the Federal Register, but
28 these provisions never were implemented (“2016 Final Rule”). The 2016 Final Rule updated AFCARS to

1 add 153 data elements to the original 119 data elements, bringing to 272 the total number of data elements
2 that state and tribal child welfare agencies would have been required to report to HHS. The 2016 Final
3 Rule initially provided two fiscal years for title IV–E agencies to comply.

4 7. In May 2020, HHS issued a final AFCARS rule (“2020 Final Rule”) that retained, revised,
5 and omitted elements included in the 2016 AFCARS Final Rule. Some of the omitted elements related to
6 compliance with the Indian Child Welfare Act (ICWA) and sexual orientation data of foster children and
7 foster/adoptive parents and legal guardians. The 2020 Final Rule, however, did include the data element
8 added by the 2016 Final Rule that asked whether conflict related to a child’s sexual orientation or gender
9 identity contributed to the child’s removal from home. The 2020 Final Rule also included some data
10 elements focused on the needs of ICWA applicable children. This information includes whether the child,
11 child’s parents, and providers are members of an Indian Tribe, name of the child’s Indian Tribe, whether
12 ICWA applies, whether the state agency made inquiries to determine if the child is an Indian child as
13 defined in ICWA, and whether the child's Indian tribe was sent legal notice.

14 8. States are required to comply with the 2020 Final Rule by October 1, 2022. They currently
15 continue to report data as required by the pre-2016 AFCARS regulations (the 1993 regulations). These
16 regulations do not include ICWA or sexual orientation data elements.

17 9. Vacating the 2020 Final Rule would delay HHS from receiving updated data and
18 comprehensive historical information on key data elements included in the 2020 Final Rule. The 2020
19 Final Rule substantially altered the data collection specified in the initial 1993 AFCARS rule to permit
20 more complete reporting on all foster care entries and exits, child placements, case plans, caseworker
21 visits, as well as reporting on prior guardianships, and whether a child has siblings also in foster care.
22 While the 2020 final rule removed approximately one-third of the data elements from the 2016 Final
23 Rule -- from 272 to 183, including those at issue in this litigation, the 2020 Final Rule still includes an
24 increase of 64 data elements over the 1993 regulations.

25 10. If the 2020 Final Rule remains in place while the HHS considers the collection of the
26
27
28

1 ICWA and sexual orientation data elements at issue in this litigation, updated AFCARS data reporting
2 based on the 2020 Final Rule will begin in 2023. The ICWA elements retained in the 2020 Final Rule
3 will be available for use in descriptive reports and analyses that will provide important information about
4 outcomes for ICWA applicable children and youth placed in foster care. Vacating the 2020 Final Rule
5 would delay the ability of the agency to conduct and report such analyses and would likely affect the
6 types of analyses that the agency could provide.
7

8 11. HHS and Title IV-E agencies have been working on implementing the 2020 Final Rule for
9 the last one-and-a-half years, which includes developing policies, training tools, and technology systems.
10 HHS has procured a contract worth about \$24.4 million to develop an enterprise system to receive new
11 AFCARS data based on the 2020 final rule. Modifications to the enterprise system to implement the
12 ICWA and sexual orientation elements included in the 2016 Final Rule but omitted from the 2020 Final
13 Rule would require significant analysis, additional funding, potential contract acquisition or modification
14 and project plan or schedule changes, as well as additional meetings with various stakeholders, including
15 states and Tribes.
16

17 12. If this Court were to vacate the 2020 Final Rule and reinstate the 2016 ICWA and sexual
18 orientation data elements at issue in this case, state and tribal Title IV-E agencies will likewise need to
19 modify or develop new local policies, training guides and tools, and revise implementation plans in
20 collaboration with impacted stakeholders. Reinstatement of additional data elements will also affect local
21 agencies' plans to modify existing and/or new technology systems. These technology system changes
22 may require new contract solicitations, amendments to existing technology contracts, and funding
23 approvals. Changes would likely have an impact upon the other obligations title IV-E agencies must meet
24 through regular work, such as mandated federal reporting for other title IV-B/IV-E programs.
25

26 13. Reinstating the 2016 ICWA and sexual orientation data elements at issue in this case in
27 AFCARS would require states to engage tribal and youth partners to ensure data are collected accurately
28 and can be used or made available to staff and decision makers. Title IV-E agencies would need to

1 ensure that they have staffing capacity in multiple areas (program, policy, technology) to support that
2 effort. Many agencies are currently struggling to meet the 2020 AFCARS requirements and reinstating
3 the additional 2016 data elements may derail that work, as existing new technology system projects
4 already have contractual development and implementation schedules.

5
6 14. Finally, while there is overlap in the 2016 and 2020 AFCARS data collection, some
7 elements carried over from 2016 to 2020 were modified and thus are different. In some cases, vacating
8 the 2020 final rule and reinstating the ICWA and sexual orientation data elements from the 2016 Final
9 Rule that are at issue in this litigation will result in double work for Title IV-E agencies to comply with a
10 final AFCARS data collection. This is because system modifications that states and Tribes already made
11 to collect 2020 Final Rule data will not always line up to collect the 2016 Final Rule data. Therefore,
12 Title IV-E agencies would need to implement additional system modifications in order to revert even
13 partially to the 2016 Final Rule and collect the ICWA and sexual orientation data elements removed from
14 the 2020 Final Rule. Additionally, reverting to the 2016 Final Rule would entail HHS and Title IV-E
15 agencies collecting the additional data elements that are not the subject of Plaintiffs' challenge.
16

17 I, Joseph Kracke-Bock, declare under penalty of perjury that the foregoing is true and correct.
18 Executed on October 14, 2021.

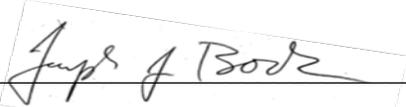
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22 Joseph Kracke-Bock

Exhibit B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CALIFORNIA TRIBAL FAMILIES COALITION,
YUOK TRIBE, CHEROKEE NATION, FACING
FOSTER CARE IN ALASKA, ARK OF
FREEDOM ALLIANCE, RUTH ELLIS CENTER,
and TRUE COLORS, INC.,

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

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as
Secretary of Health and Human Services,
JOOYEUN CHANG, in her official capacity as
Assistant Secretary for the Administration for
Children and Families, U.S. DEPARTMENT OF
HEALTH AND HUMAN SERVICES, and
ADMINISTRATION FOR CHILDREN AND
FAMILIES,

Defendants.

**DECLARATION OF AYSHA SCHOMBURG, J.D., ASSOCIATE COMMISSIONER,
CHILDREN’S BUREAU, ADMINISTRATION FOR CHILDREN AND FAMILIES,
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES**

I, Aysha Schomburg, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that my
testimony below is true and correct:

1. I am the Associate Commissioner of the Children’s Bureau within the Administration for
Children and Families (“ACF”), in the United States Department of Health and Human Services
 (“HHS”). I joined the Biden Administration in March 2021. As Associate Commissioner, I head the
 Children’s Bureau (“CB”) and am responsible for overseeing the administration of the various federal
 child welfare programs authorized by titles IV-B and IV-E of the Social Security Act and the Child
 Abuse Prevention and Treatment Act. The Children’s Bureau partners with federal, state, tribal, and
 local agencies to improve the overall health and well-being of our nation’s children and families. My
 role is to advise the Administration on matters related to child welfare, including child abuse and neglect,

1 child protective services, family preservation and support, adoption, foster care, and independent living.
2 Under my leadership, the Children's Bureau recommends legislative and budgetary proposals, operational
3 planning system objectives and initiatives, and projects and issue areas for evaluation, research, and
4 demonstration activities.

5 2. I received my B.A. degree from the University of Virginia, my M.A. from New York
6 University and my J.D. from New York Law School.
7

8 3. In addition to my personal knowledge regarding AFCARS, this declaration is based upon
9 other knowledge and information I obtained in the regular course of business throughout my career in child
10 welfare. I provide this declaration based on the best of my knowledge, information, belief, and reasonable
11 inquiry for the above-captioned case.
12

13 4. I am submitting this declaration in order to explain ACF/CB's commitment to reconsidering
14 the 2020 AFCARS rule (without confessing any error in its promulgation) and ACF/CB's intent to seek
15 the necessary Departmental approval to propose the collection of the Indian Child Welfare Act ("ICWA")
16 and sexual orientation data elements at issue in this litigation under one/more legal authorities, including
17 but not limited to AFCARS.
18

19 5. The Children's Bureau is responsible for the implementation and management of the
20 Adoption and Foster Care Analysis and Reporting System (AFCARS). State and Tribal title IV-E agencies
21 must report biannually to AFCARS case-level information on all children in foster care and children
22 adopted with the involvement of a title IV-E agency.
23

24 6. In administering the federal title IV-E foster care and adoption assistance programs,
25 Children's Bureau and ACF use the AFCARS data for a number of purposes, including:

- 26 • Responding to Congressional requests for current data on children in foster care or those
27 who have been adopted;
- 28 • Responding to questions and requests from other Federal departments and agencies,
 including the General Accounting Office ("GAO"), the Office of Management and Budget

1 (“OMB”), HHS’ Office of Inspector General (“OIG”), national advocacy organizations,
2 States, Tribes, and other interested organizations;

- 3 • Developing short and long-term budget projections;
- 4 • Developing trend analyses and short and long-term planning;
- 5 • Targeting areas for greater or potential technical assistance efforts, for discretionary
6 service grants, research and evaluation, and regulatory change; and
- 7 • Determining and assessing outcomes for children and families.

8 7. In 1993, the Secretary promulgated the first AFCARS regulations. HHS later revised the
9 AFCARS rule in 2016, but the provisions published in the Federal Register never were implemented.

10 8. In May 2020, HHS issued a final AFCARS rule that retained, revised, and removed elements
11 included in the 2016 AFCARS rule. Some of the elements removed concerned implementation of the Indian
12 Child Welfare Act (ICWA) and sexual orientation data of foster children and foster/adoptive parents and
13 legal guardians. The Administration for Children and Families (“ACF”) within HHS intends to seek
14 departmental clearance from agency leadership, and if clearance is received, work to issue one/more Notice
15 of Proposed Rulemaking (“NPRM”) and seek public comment regarding a rule(s) that would include the
16 ICWA and sexual orientation data that were in the version of the rule promulgated in 2016 and removed
17 by the 2020 final rule. Specifically, ACF is currently taking concrete, good faith steps towards obtaining
18 the approvals needed to begin the rule-making process under one/more legal authorities, including
19 AFCARS and sections 471(a)(6) and 476(a)(2) of the Social Security Act.

20 9. It is ACF/CB’s position that issuing one/more NPRM to collect this additional information
21 on youth who are identified as being subject to the protections of ICWA and youth who identify as lesbian,
22 gay, bisexual, transgender or queer (“LGBTQ+) and their caretakers will enhance racial equity and help
23 avoid discrimination based on gender identity or sexual orientation.
24

1 I, Aysha Schomburg, declare under penalty of perjury that the foregoing is true and correct.

2 Executed on October 14, 2021.

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8 _____
9 Aysha Schomburg

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9

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 CALIFORNIA TRIBAL FAMILIES COALITION) Civil Action No. 3:20-cv-06018-MMC (LB)
14 *et al.*,)
15 Plaintiffs,) **[PROPOSED] ORDER GRANTING**
16 v.) **DEFENDANTS' MOTION FOR**
17 XAVIER BECERRA, in his official capacity as) **VOLUNTARY REMAND WITHOUT**
18 Secretary of Health and Human Services *et al.*,) **VACATUR**
19 Defendants.)
Hearing date: December 3, 2021
Time: 9:00 a.m.

[PROPOSED] ORDER

1
2 Defendants seek an order remanding the final rule issued on May 12, 2020 related to the
3 Adoption and Foster Care Analysis and Reporting System (85 Fed. Reg. 28,410) without vacatur. On
4 remand, Defendants intend to initiate a rulemaking process that would propose to address the issues that
5 are the subject of Plaintiffs' complaint. The Court thus finds that remand is warranted. In addition,
6 remand should be without vacatur because vacating the rule would result in severe disruptions to HHS and
7 child welfare agencies across the country, while keeping the rule in place would result in little tangible
8 prejudice to Plaintiffs.

9 For the foregoing reasons, the Court GRANTS Defendants' motion to remand the 2020
10 AFCARS final rule without vacatur. The Court DENIES all other pending motions as moot.

11 IT IS SO ORDERED.

12 DATED: _____

13
14 _____
HON. MAXINE M. CHESNEY
Senior United States District Judge