STEPHANIE M. HINDS (CABN 154284)
Acting United States Attorney
MICHELLE LO (NYBN 4325163)
Chief, Civil Division
EMMET P. ONG (NYBN 4581369)
Assistant United States Attorney

1301 Clay Street, Suite 340S
Oakland, California 94612-5217
Telephone: (510) 637-39293929
Facsimile: (510) 637-3724
E-mail: emmet.ong@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

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I. INTRODUCTION

As established in Defendants' Motion for Voluntary Remand Without Vacatur ("Motion"), Dkt. No. 102, the Court should remand the 2020 Final Rule to HHS without vacatur while HHS continues the process of issuing a new rule or rules that would propose to collect the data that are the very subject of Plaintiffs' challenge to the 2020 Final Rule. None of the arguments in Plaintiffs' Opposition to the Motion ("Opposition"), Dkt. No. 104, justify a different outcome.

As set forth in Defendants' summary judgment briefing, Dkt. Nos. 103, 110, no serious errors attended the issuance of the 2020 Final Rule. Contrary to Plaintiffs' contentions, Defendants' intention to adopt a different rule on remand has no bearing on the vacatur analysis. That an agency is unlikely to adopt the same rule on remand is only relevant to the extent it sheds light on the seriousness of the alleged errors. Here, Defendants are seeking to adopt a new rule due to a change in administration, not due to any perceived errors in the 2020 Final Rule. Plaintiffs' challenges to the disruptive consequence of vacatur are likewise misplaced. Defendants have adequately quantified the costs of vacatur and they comfortably surpass the threshold for being unduly disruptive. Plaintiffs' proposal that the Court use an equitable remedy to mitigate the disruptive impact of vacatur is unworkable from both a legal and practical standpoint and should be dismissed.

At bottom, Plaintiffs are asking the Court to vacate a rule that applies to each and every state in the nation, not to mention the disruptive impact to the federal government and tribes nationwide, all while HHS endeavors to put a new rule or rules in place, which would make reinstating the 2016 Final Rule an interim change that itself would be changed. The Court should decline Plaintiffs' invitation to upend the regulatory framework for this nationwide data collection system and remand the 2020 Final Rule to HHS without vacating it.

II. ARGUMENT

A. The Court Should Grant Defendants' Request to Remand the 2020 Final Rule

Plaintiffs do not contest Defendants' request for remand. Opp. at 1. Therefore, the Court should treat this issue as conceded and remand the 2020 Final Rule.

B. The Court Should Not Vacate the 2020 Final Rule

1. No Errors Were Committed in Issuing the 2020 Final Rule

In their Opposition, Plaintiffs contend that the first *Allied-Signal* factor weighs in favor of vacatur because the 2020 Final Rule has a number of serious errors. Opp. at 4-5. Contrary to Plaintiffs' arguments, Defendants did not commit any errors in issuing the 2020 Final Rule, let alone any serious errors. As explained in Defendants' summary judgment briefing, HHS's interpretation of the AFCARS statute in promulgating the 2020 Final Rule was reasonable and in accordance with law. Dkt. No. 103, Defendants' Cross-Motion for Summary Judgment ("Defs' MSJ") at 14-16; Dkt. No. 110, Reply in Support of Defs' MSJ ("Reply ISO Defs' MSJ") at 1-5. After careful consideration of all the evidence and the significant comments, HHS provided a reasoned explanation for excluding the sexual orientation data elements from the 2020 Final Rule, namely that the sexual orientation questions would not result in a reliable and consistent data collection, as required by the AFCARS statute. Defs' MSJ at 16-20; Reply ISO Defs' MSJ at 5-11. With respect to the ICWA-related data elements, HHS, after appropriate assessment of their costs and benefits and consideration of the significant comments, reasonably concluded that including them in the 2020 Final Rule would be inconsistent with the statutory requirement that AFCARS avoid unnecessary diversion of resources from Title IV-E agencies. Defs' MSJ at 20-24; Reply ISO Defs' MSJ at 11-14. Because the issuance of the 2020 Final Rule was neither arbitrary nor capricious nor contrary to law, no errors (serious or otherwise) attended its issuance.

Plaintiffs also contend that the first *Allied-Signal* factor weighs in favor of vacatur because Defendants do not intend to adopt the same rule on remand. Opp. at 5-8. Plaintiffs' reliance on this consideration is misplaced because it has little, if any, application to the facts of this case. That an agency is unlikely to adopt the same rule on remand is only relevant to the extent it sheds light on the seriousness of the alleged errors. That is, if the agency indicates that it cannot or likely will not be able to issue the same rule on remand due to concerns about the correctness of the challenged rule, that concession may be probative of the significance of the flaws in the rulemaking process. *See In re Clean Water Act Rulemaking*, No. C 20-04636 WHA, 2021 U.S. Dist. LEXIS 203567, at *38-39 (N.D. Cal. Oct. 21, 2021) (finding that where EPA had "substantial concerns" that "address[ed] nearly every substantive change" introduced in the challenged rule, "the scope of potential revisions EPA is

considering supports vacatur of the current rule because the agency has demonstrated that it will not or could not adopt the same rule upon remand"). Here, HHS is not seeking to revise the 2020 Final Rule due to any concerns that it erred during the rulemaking process. Rather, HHS is seeking remand due to a change in administration and the attendant change in policies. Because HHS's intention to adopt a different rule on remand is not an indication that any "serious errors" attended the issuance of the 2020 Final Rule, HHS's proposed course of action on remand has no bearing on whether the 2020 Final Rule should be vacated. The Court should decline Plaintiffs' invitation to apply this consideration in rote fashion in making its vacatur determination.

Plaintiffs' position that the 2020 Final Rule must be vacated because it is likely to be changed on remand is also undercut by the Ninth Circuit's decision in *Safer Chems. v. United States EPA*, 791 F. App'x 653 (9th Cir. 2019), which, contrary to Plaintiffs' assertions, is highly relevant and instructive. Like here, the agency in *Safer Chems.*, without confessing error, sought remand without vacatur because it "believe[d] that [Petitioners'] concerns about these [two] provisions can be addressed through modifications to the language of the regulations" and the consequences of the alleged errors were not serious. *Id.* at 656. The Ninth Circuit held that "[a]ccepting EPA's representation that it can address Petitioners' concerns, we agree with EPA that remand without vacatur is appropriate with respect to the challenged provisions." *Id.* (citing *Cal. Cmtys. Against Toxics v. United States EPA (CCAT)*, 688 F.3d 989, 992 (9th Cir. 2012)).

Plaintiffs urge the Court to ignore the Ninth Circuit's holding in *Safer Chems.* because the court did not utter the phrase "*Allied-Signal*" in reaching its conclusion. Opp. at 7-8. However, this does not rob the decision of its force. As the Ninth Circuit recognized in reaching its conclusion, the vacatur decision, at its core, is an equitable determination and "when equity demands, the regulation can be left in place while the agency follows the necessary procedures to correct its action." *Id.* (quoting *CCAT*, 688 F.3d at 992) (cleaned up). It was entirely proper for the Ninth Circuit to rely on equitable principles in determining that the challenged rule in *Safer Chems.* should not be vacated. The Court may and should follow *Safer Chems.* and determine that it would be inequitable to take HHS's desire to redress Plaintiffs' grievances due to a policy shift arising from a change in administration as a sign that the 2020 Final Rule was promulgated in error and should be vacated.

Proceeding in this way also would be consistent with longstanding principles of administrative law that courts should grant an agency significant leeway to reconsider its past regulations. *See also Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("[R]egulatory agencies do not establish rules of conduct to last forever [and] an agency must be given ample latitude to adapt their rules and policies to . . . changing circumstances.") (internal citations and quotation marks omitted)); *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038, 1043 (D.C. Cir. 2012) (explaining that an agency's "reevaluation of which policy would be better in light of the facts" is "well within" its discretion and that a "change in administration . . . is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations." (citations and internal quotation marks omitted)). Furthermore, were the Court to hold that HHS's stated intention to issue a new rule or rules that would collect the challenged data elements weighs in favor of vacatur, it would discourage agencies from cooperating with plaintiffs who have common policy objectives out of concern that such actions would be used against them in litigation.

For the foregoing reasons, the first *Allied-Signal* factor weighs in favor of remand without vacatur. Therefore, the Court need go no further in granting Defendants' motion for voluntary remand without vacatur.

2. Vacatur Would Be Extraordinarily Disruptive

Regarding the second *Allied-Signal* factor, Plaintiffs argue that vacatur would not be sufficiently disruptive to justify keeping the 2020 Final Rule in place. As an initial matter, and contrary to Plaintiffs' suggestion, remand without vacatur is not "rare" and has not been granted only in instances of irreparable environmental harm, such as the extinction of the species, or to avoid, for example, statewide blackouts and billions of dollars in waste. Opp. at 8-9. As the Ninth Circuit recently acknowledged, "[r]emand without vacatur is common." *Nat'l Family Farm Coal. v. United States EPA*, 966 F.3d 893, 930 (9th Cir. 2020) (quoting *In re Core Commc'ns, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring)). And remand without vacatur has not been limited to doomsday scenarios only. Indeed, the Ninth Circuit itself has granted remand without vacatur in cases with disruptive consequences that were less severe or less certain than those presented here.

For example, the Ninth Circuit in *Nat'l Family Farm Coal.*, which is cited throughout Plaintiffs'

brief, found "evidence of *potentially* serious disruption if a pesticide that has been registered for over five years can no longer be used" in remanding without vacatur. *Id.* at 929-30 (emphasis added). In *Local Joint Exec. Bd. of Las Vegas v. NLRB*, the Ninth Circuit remanded a National Labor Relations Board collective bargaining rule without vacatur on grounds that "another judicial intervention in the Board's policymaking process with respect to dues check off in 'right to work' jurisdictions *may* be needlessly disruptive" because "the Board has already changed its approach to the issue twice, based on legitimate shifts in regulatory perspective" and it "*may* change direction yet again." 840 F. App'x 134, 137-38 (9th Cir. 2020) (emphasis added). Even in *CCAT*, the Ninth Circuit decided against vacating the challenged rule because doing so "*could* well delay a much needed power plant" and "the region *might* not have enough power . . . , resulting in blackouts." 688 F.3d at 992; *see also Beverly Hills Unified Sch. Dist. v. Fed. Transit Admin.*, No. CV 12-9861-GW(SSx), 2016 U.S. Dist. LEXIS 134134, at *47 n.11 (C.D. Cal. Aug. 12, 2016) (observing that the Ninth Circuit's decision not to vacate in *CCAT* was based on the mere "possibility" that construction of the power would be delayed and the attendant consequences from such a delay). By comparison, vacating the 2020 Final Rule *will* have disruptive consequences for the federal government, all 50 states, and numerous tribes.

Plaintiffs do not dispute that vacating the 2020 Final Rule will be disruptive but argue, without merit, that the consequences of vacatur are not sufficiently severe to weigh against vacatur. First, Plaintiffs contend that Defendants have failed to quantify the economic costs of vacatur and, in any event, such costs do not rise to the level of being unduly disruptive. Opp. at 9. As described in Defendants' Motion and the accompanying Bock Declaration, HHS and Title IV-E agencies have been working on implementing the 2020 Final Rule for the last one-and-a-half years. Vacating the 2020 Final Rule and reinstating the 2016 Final Rule will require HHS, all 50 states, and tribal title IV-E agencies to modify and, in some cases, unwind this work. This would not only jeopardize HHS's $24.4 million enterprise systems contract but also require HHS to develop new procedures, training, and implementation plans. Title IV-E agencies nationwide would incur similar types of costs. Plaintiffs' complaint that Defendants failed to provide adequate estimates of the costs of compliance to the states is easily addressed. The Court need look no further than the 2019 NPRM, which provided the following:

States estimated that total costs to comply with the 2016 final rule ranged from $1 million

> for one year to $45 million over multiple years. They provided ranges for specific costs, such as $41 million to hire and train new staff for administrative support, $600,000 to $1 million for total initial costs, and $741,000 to $11 million for ongoing costs. These costs included:
>
> - Analyzing policies, practice, and casework to determine and implement modifications to capture and report data,
> - Systems changes (for example, contract and staff costs to revise systems),
> - Developing and administering staff training, ongoing monitoring, and quality assurance, and
> - Reporting the data to ACF.

84 Fed. Reg. 16572, 16573-16574. This is sufficient to show that the compliance costs at stake are at least in the tens of millions of dollars.

Plaintiffs also claim that there is no factual basis for Defendants' assertion that vacating the 2020 Final Rule could disrupt the flow of billions of dollars of federal funding to Title IV-E agencies by diverting attention and resources from their mandated federal reporting for other Title IV-B and Title IV-E programs. Opp. at 11. However, there is nothing speculative about this risk. States had previously "expressed concerns about the proposed data elements, implementation period, penalties, [and] timeframe for submission" associated with the 2016 Final Rule. 2016 Final Rule, 81 Fed. Reg. 90,524, 90,526. Indeed, HHS found it necessary to extend the implementation timeframe for the 2016 Final Rule by one year. 83 Fed. Reg. 42,225, 42,226. Many Title IV-E agencies continue to struggle to meet the more streamlined requirements of the 2020 Final Rule, even though they were given two years to prepare for the implementation of this rule. Bock Decl. ¶ 13. Plaintiffs suggest that HHS could solve this problem by simply excusing states from reporting penalties during the transition period. Opp. at 11. But the penalties are required by statute, which means that HHS is not at liberty to accept Plaintiffs' invitation to disregard this mandate. 42 U.S.C. § 674(f)(2) ("If the Secretary finds that the State has failed to submit the data, as so required, . . . the Secretary *shall* reduce the amounts otherwise payable to the State . . . ." (emphasis added)); *see also* 2016 Final Rule, 81 Fed. Reg. 90,524, 90,565 ("Section 474(f) of the Act provides for mandatory penalties on the title IV-E agency for non-compliance on AFCARS data . . . . Therefore, we are not authorized to permit some states to be subject to a penalty and not others.").

Plaintiffs also scoff at the notion that an appreciable amount of federal spending might be

jeopardized. Opp. at 10-11. But when considering that the federal government allocates most of the $10 billion a year it spends on state child welfare systems to Title IV-E agencies (Compl. ¶ 54), that it obviously will be the case that *no* Title IV-E agencies are prepared to implement the requirements of the 2016 Final Rule were the Court to vacate the 2020 Final Rule, that recent history shows that many Title IV-E agencies will not be prepared to do so for multiple reporting periods (Bock Decl. ¶ 13), and Plaintiffs' concession that the statutorily-mandated penalties could reach as high as 5.5% of federal spending (Opp. at 16), it is reasonable to believe that the penalties incurred by states and tribes would be sizable by any measure. Therefore, Defendants' assertion that vacating the 2020 Final Rule could disrupt the billions of dollars a year the federal government allocates to Title IV-E agencies is far from "outlandish."

The foregoing information is sufficient to apprise the Court of the magnitude and nature of the economic costs of vacating the 2020 Final Rule. Defendants are not aware of any decision, and Plaintiffs point to none, where a court has held that an agency seeking remand without vacatur must provide a precise computation of the potential economic costs of vacating a challenged rule. Indeed, both the Ninth Circuit and this Court have remanded rules without vacatur on grounds that vacatur would be economically wasteful even where the agency did not provide *any* quantification of the costs. *See Nat'l Family Farm Coal.*, 966 F.3d at 930; *Inst. for Fisheries Res. v. United States FDA*, 499 F. Supp. 3d 657, 669-70 (N.D. Cal. 2020) (finding that decision to allow a company to create and farm genetically engineered salmon should not be vacated because "revoking the approval would presumably require the current stock of salmon to be destroyed, a significant loss of property and animal life that would be wasteful").

Even if vacatur of the 2020 Final Rule requires state Title IV-E agencies to incur, for example, only 10% of the estimated costs associated with complying with the 2016 Final Rule, the total economic consequences to the states likely will be millions of dollars and potentially tens of millions of dollars. When combined with the costs to HHS and the tribal Title IV-E agencies and the potential for significant mandatory penalties, the magnitude of the economic impact of vacating the 2020 Final Rule—which Plaintiffs do not dispute would be felt on a nationwide basis—comfortably meets the standard for being unduly disruptive. *See Nat'l Family Farm Coal.*, 966 F.3d at 930; *Inst. for Fisheries*

Res., 499 F. Supp. 3d at 669-70; *see also WildEarth Guardians v. Steele*, No. CV 19-56-M-DWM, 2021 U.S. Dist. LEXIS 118341, at *77-78 (D. Mont. June 24, 2021) (finding that the economic impact of vacatur on companies and on the local communities that depend on approved projects for employment could be severe and noting that one of the companies "provides about 575 important family-wage jobs to the local community with an annual payroll of over $40 million"); *Alliance v. Savage*, 375 F. Supp. 3d 1152, 1157 (D. Mont. 2019) (finding that economic impact weighed against vacatur of plan to allow road construction in protected bear habitat that impacted timber sales that are "expected to generate more than $555,000 in revenue" and another sale that "is anticipated to bring in over $1 million in revenue," which would be a boon to a local economy (internal quotation marks and citation omitted)).

Plaintiffs attempt to downplay the costs of vacating the 2020 Final Rule by arguing that many, if not all, the compliance costs associated with vacatur will be incurred anyway if Defendants ultimately issue a rule or rules that would collect the sexual orientation and ICWA-related data. Opp. at 10. Plaintiffs are not correct that the costs of vacatur will be coextensive with the costs of compliance with the new rule(s) contemplated by Defendants. Plaintiffs elide the fact that the 2020 Final Rule also removed data elements that are not the subject of Plaintiffs' challenge and which no party to this litigation has proposed collecting or reinstating. *See* 2019 NPRM, 84 Fed. Reg. at 16,576. In addition, as Plaintiffs concede, the 2020 Final Rule modified a number of data elements that were in the 2016 Final Rule. Opp. at 11. Plaintiffs nitpick the materiality of the modifications to these elements, but do not deny that vacating the 2020 Final Rule would require HHS and Title IV-E agencies to make changes to their systems, processes and procedures for collecting them. *See generally id.* at 12. Plaintiffs' argument also fails to recognize that the new rule or rules proposed by HHS will be subject to public comment and that such comments may result in a data collection system that either does not collect all the sexual orientation and ICWA-related elements sought by Plaintiffs or does not collect them in the same format as the 2016 Final Rule.

In light of the foregoing, any new rule(s) issued by HHS *will* be materially different than the 2016 Final Rule. It simply makes no sense to require HHS and Title IV-E agencies nationwide to change their systems, processes, and procedures—at significant cost—when HHS is already taking steps toward revising the AFCARS rule to collect the sexual orientation and ICWA-related data removed from

the 2020 Final Rule. *See* Schomburg Decl. ¶ 8. Therefore, and contrary to Plaintiffs' assertions, vacating the 2020 Final Rule would be an "interim change that may itself be changed," which further weighs against vacatur. *Local Joint Exec. Bd. of Las Vegas*, 840 F. App'x at 137-38 (quoting *CCAT*, 688 F.3d at 992).

Plaintiffs claim that the Court could fashion an equitable remedy that would address these disruptions. Opp. at 12-13. For example, Plaintiffs suggest that the Court could defer vacatur in order to provide HHS and Title IV–E agencies time to prepare for implementation of the 2016 Final Rule. *Id.* This proposal lacks merit from both a legal and practical standpoint. First, Plaintiffs' suggestion puts the cart before the horse because, under the *Allied-Signal* test, the Court must determine whether the disruptive consequences warrant remand without vacatur *prior* to considering whether those disruptions could be alleviated through an equitable remedy. *See, e.g., California v. Bernhardt*, 472 F. Supp. 3d 573, 631 (N.D. Cal. 2020) (staying vacatur but only after concluding that vacatur is the appropriate remedy because defendants "fail[ed] to show that a return to the Waste Prevention Rule would have disruptive effects" and previously "recognize[d] that compliance costs are but a small fraction of operator profits"). Proceeding any other way would render the second prong of the *Allied-Signal* test a dead letter. Second, Defendants respectfully submit that the Court does not possess the requisite expertise or resources to determine the appropriate implementation timeframe for a complex, nationwide data collection system such as the one at issue in this case. Third, Plaintiffs' proposal necessarily contemplates judicial oversight over the AFCARS system that could stretch for years, which raises significant separation-of-powers concerns. Fourth, delaying implementation would do nothing to address the waste of resources that would result from Title IV-E agencies collecting the data elements removed by the 2020 Final Rule that neither Defendants nor Plaintiffs are seeking to collect.

Furthermore, past experience teaches that it would take a minimum of two to three years to implement the 2016 Final Rule, which means that Plaintiffs' proposal necessarily contemplates deferring vacatur for a comparable period of time. *See* 81 Fed. Reg. 90,524, 90,569 (setting effective date of October 1, 2019 for 2016 Final Rule); 83 Fed. Reg. 42,225, 42,226 (extending effective date for 2016 Final Rule to October 1, 2020). But if that is the case, then the Court should simply decline to vacate the 2020 Final Rule given that Defendants anticipate that it would likely take less time to issue a

new rule or rules regarding the collection of the disputed sexual orientation and ICWA data than it would to implement the 2016 Final Rule. As noted, it would be pointless for the Court to vacate the 2020 Final Rule when doing so would amount to nothing more than an interim change that itself would likely be changed. *See Local Joint Exec. Bd. of Las Vegas*, 840 F. App'x at 138; *CCAT*, 688 F.3d at 992).

Therefore, even if any serious errors attended the issuance of the 2020 Final Rule, the disruptive consequences of vacatur weigh against vacating the 2020 Final Rule.

3. Balancing the Equities Favors Remand Without Vacatur

Because Defendants have satisfied the *Allied-Signal* test, the Court need not reach Plaintiffs' arguments that the equities weigh in favor of vacatur. But even if the Court were inclined to consider them, they do not justify a different result.

Plaintiffs complain that remanding without vacatur would further delay collection of the sexual orientation and ICWA-related data elements. But even if the 2020 Final Rule is vacated, implementation of the 2016 Final Rule will still take two to three years while requiring the federal government, all 50 states, and tribes nationwide to incur vast costs and disruption to their operations. Also, in balancing the equities, Plaintiffs discount the salient fact 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. Bock Decl. ¶ 9. Contrary to Plaintiffs' unsupported speculation, only if the Court declines to vacate the 2020 Final Rule, will updated AFCARS data reporting concerning these elements be able to begin in 2023. *Id.* ¶ 11. In particular, the ICWA elements retained in the 2020 Rule will then be available for use in descriptive reports and analyses that will provide critical information about outcomes for ICWA applicable children and youth placed in foster care. *Id.* In addition, the 2016 Final Rule contained data elements that were modified or removed by the 2020 Final Rule and are not the subject of this litigation. It would be inequitable to require the entire nation to move forward with data elements that neither side is proposing to be collected.

Equally unpersuasive are Plaintiffs' attempts to rebut Defendants' contention that any harm suffered by Plaintiffs is too speculative and amorphous to weigh against remand without vacatur. First, Plaintiffs contend that there is a direct relationship between collecting the data and protecting children in

the child welfare system. Opp. at 15. Defendants do not disagree that collecting the subject data is a worthy endeavor, but the role the data will play in assisting these children is far too inchoate and uncertain at this stage to weigh against remand without vacatur. Indeed, Plaintiffs do not provide any concrete examples of how the data, which as HHS explained, is aggregated and de-identified at the national level and thus not designed to provide information on or account for specific individual children who are in foster care, would be used to further this objective. 2020 Final Rule, 85 Fed. Reg. at 12,412. Second, Plaintiffs claim that their ability to engage in fundraising has been hampered without access to the disputed data elements. Opp. at 16. But Plaintiffs do not address Defendants' contention that Plaintiffs have failed to quantify these damages or provide some other basis that would allow the Court to conclude that they are of sufficient magnitude to sway the balance of the equities in their favor. Irrespective of its scale, Plaintiffs do not assert that they cannot continue their operations without this funding, which reinforces the conclusion that remand without vacatur would not be unduly prejudicial to them.

Plaintiffs also complain that Defendants are improperly attempting to shift the burden of persuasion to Plaintiffs. *Id.* But if Plaintiffs wish to argue that the balance of equities tips in favor of vacatur, it is incumbent on them to come forward with a showing of significant prejudice, which they have failed to do. Finally, Plaintiffs also assert that remand without vacatur improperly deprives them of the opportunity to vindicate their claims. *Id.* at 17. But, under Ninth Circuit precedent, a motion for remand without vacatur is a judicially-accepted avenue for an agency that is seeking to reconsider its prior decision. Plaintiffs also argue that Defendants are attempting to shield unlawful rulemaking from legal review. *Id.* No such thing is happening here. As set forth in the sworn declaration of the Associate Commissioner of the Children's Bureau, HHS is committed to reconsidering the 2020 Final Rule and to undertake a rulemaking process that will seek to collect the sexual orientation and ICWA-related data. Schomburg Decl. ¶¶ 4, 8-9.

Accordingly, to the extent the Court finds it necessary to do so, balancing the equities here weighs in favor of granting remand without vacatur.

III. CONCLUSION

For all the foregoing reasons, the Court should grant Defendants' motion for voluntary remand

without vacatur.

DATED: November 19, 2021

Respectfully submitted,

STEPHANIE M. HINDS
Acting United States Attorney

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

Attorneys for Defendants