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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,) **REPLY IN SUPPORT OF DEFENDANTS'**
16 v.) **CROSS-MOTION FOR SUMMARY**
17 XAVIER BECERRA, in his official capacity as) **JUDGMENT**
Secretary of Health and Human Services, *et al.*,) Hearing Date: December 3, 2021
18 Time: 9:00 a.m.
19 Defendants.)

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 As established in Defendants' Cross-Motion for Summary Judgment ("Defendants' MSJ" or
4 "Defs' MSJ"), Dkt. No. 103, the 2020 Final Rule was issued in accordance with the AFCARS statute
5 and in compliance with the rulemaking requirements of the APA. HHS's determination to exclude the
6 sexual orientation data elements is based on a reasonable and permissible interpretation of the AFCARS
7 statute and, thus, is not contrary to law. HHS also offered a reasoned explanation for excluding the
8 sexual orientation data elements, namely that the sexual orientation questions would not result in a
9 reliable and consistent data collection, as required by the AFCARS statute. HHS also adequately
10 explained its reasons for excluding the ICWA-related data elements, namely that collecting them would
11 be inconsistent with the statutory requirement that AFCARS avoid unnecessary diversion of resources
12 from Title IV-E agencies.

13 In their Opposition to Defendants' MSJ ("Opposition" or "Pls' Opp."), Dkt. No. 105, Plaintiffs'
14 chief contention is that Defendants' reasoning is based on *post hoc* rationalizations found nowhere in the
15 actual rulemaking. This assertion is demonstrably incorrect. All of HHS's reasoning can be found
16 within the four corners of the 2018 ANPRM, the 2019 NPRM, and the 2020 Final Rule. Plaintiffs' other
17 contentions are also easily addressed. Defendants properly weighed costs and benefits, took account of
18 the significant comments, and offered reasoned explanations for its decisions. When considering the
19 highly-deferential standard of review that is applicable to agency rulemaking, the 2020 Final Rule
20 comfortably withstands judicial review.

21 Therefore, the Court should grant Defendants' MSJ, deny Plaintiffs' MSJ, and let the 2020 Final
22 Rule stand. Even if the Court finds otherwise, it should remand the 2020 Final Rule without vacatur so
23 that Defendants can complete the rulemaking process that would propose to collect the sexual
24 orientation and ICWA-related data that are the subject of Plaintiffs' challenge.

25 **II. ARGUMENT**

26 **A. The 2020 Final Rule Is in Accordance With Law**

27 The issue presented by Plaintiffs, and the one before the Court, is whether the statutory mandate
28 that AFCARS "provide comprehensive national information with respect to — the demographic

1 characteristics of adoptive and foster children” *requires* HHS to promulgate a rule that collects sexual
2 orientation data in light of the statute’s requirement that the data collected be “reliable” and “avoid
3 unnecessary diversion of resources from [Title IV-E] agencies.” 42 U.S.C. § 679(c). Plaintiffs do not
4 dispute that this question is governed by the two-step analysis set forth in *Chevron, U.S.A., Inc. v. Nat.*
5 *Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

6 Applying *Chevron* step one, Plaintiffs express no disagreement with Defendants’ position that
7 Congress has not spoken to the precise question of whether the statute requires the collection of sexual
8 orientation data by AFCARS. Nor do Plaintiffs dispute Defendants’ argument that the dictionary
9 definition of “demographics” does not compel the inclusion of sexual orientation data. So, while
10 Plaintiffs may argue that sexual orientation is demographic information (*see* Pls’ Opp. at 2), the Court
11 cannot definitively conclude that the phrase “demographic characteristics” obligates HHS to issue an
12 AFCARS rule that collects sexual orientation data. This is also consistent with HHS’s pronouncement
13 in the 2019 NPRM that “there is no statutory requirement that [information on sexual orientation] be
14 reported to a national administrative data set.” 84 Fed. Reg. 16,572, 16,577.

15 Therefore, the Court must turn to *Chevron* step two, in which “[courts] *must* ‘accept the agency’s
16 construction of the statute’ so long as that reading is reasonable.” *Perez-Guzman v. Lynch*, 835 F.3d
17 1066, 1079 (9th Cir. 2016) (quoting *Nat’l Cable and Telecomms. Ass’n v. Brand-X Internet Servs.*, 545
18 U.S. 967, 980 (2005)) (emphasis added). “This is a generous standard, requiring deference ‘even if the
19 agency’s reading differs from what the court believes is the best statutory interpretation.’” *Or. Rest. &*
20 *Lodging Ass’n v. Perez*, 816 F.3d 1080, 1089 (9th Cir. 2016) (quoting *Brand-X*, 545 U.S. at 980). The
21 Ninth Circuit has instructed district courts to “reject an agency’s construction *only* if it is arbitrary,
22 capricious, or manifestly contrary to the statute.” *Id.* (citing *Chevron*, 467 U.S. at 844) (emphasis
23 added). To determine whether HHS’s interpretation is reasonable, courts “look to the plain and sensible
24 meaning of the statute, the statutory provision in the context of the whole statute and case law, and to the
25 legislative purpose and intent.” *Id.* (quoting *NRDC v. United States EPA*, 526 F.3d 591, 605 (9th Cir.
26 2008)).

27 As set forth in the 2019 NPRM, HHS, while recognizing the value of collecting the sexual
28 orientation elements, determined that they should be excluded from the 2020 Final Rule due to concerns

1 about their reliability. 2019 NPRM, 84 Fed. Reg. at 16,577 (“While we understand the importance of
2 collecting sexual orientation data and appreciate the comments that supported keeping the data elements,
3 we must balance this with the need to collect accurate data per the statu[t]e and in a manner that is
4 consistent with children’s treatment needs.”), 16,574 (acknowledging concerns that sexual orientation
5 data elements “will not be reliable because youth would self-report, which could result in an
6 undercount”). Given the competing mandates in the AFCARS statute, there was nothing unreasonable
7 about HHS’s interpretation that the 2020 Final Rule required HHS to balance the benefits of collecting
8 the sexual orientation data with the statutory command that the data collected be reliable. Indeed, the
9 most sensible reading of the statute is that it contains two express limitations on the scope of the
10 demographic characteristics data AFCARS is required to collect; namely, the data collected must be
11 “reliable” and “avoid unnecessary diversion of resources from agencies.” 42 U.S.C. § 679(c)(1), (c)(2).
12 Because HHS’s interpretation is reasonable, the Court must defer to it under unambiguous and binding
13 Supreme Court and Ninth Circuit precedent.

14 Plaintiffs urge the Court to reject Defendants’ eminently reasonable interpretation of the statute.
15 Plaintiffs argue that Defendants’ interpretation is not entitled to *Chevron* deference because HHS was
16 required, but failed, to provide an “explanation” for the interpretation and point to the Ninth Circuit’s
17 decision in *Gila River Indian Cmty. v. United States*, 729 F.3d 1139 (9th Cir. 2013). That decision is
18 inapposite. In *Gila River Indian Cmty.*, the agency erroneously concluded that Congress’ intent had
19 been clearly expressed at *Chevron* step one, and thus deference was not in order because the agency did
20 not exercise its expertise and discretion in interpreting the statute at *Chevron* step two. *Id.* at 1147.
21 Here, HHS did not rest on the plain meaning of “demographic characteristics.” Rather, HHS exercised
22 its discretion and determined that the statute required it to balance the requirement to collect
23 “demographic characteristics” with the need that the data collected be “reliable.”

24 Other than in the specific circumstances described in *Gila River Indian Cmty.*, Defendants are
25 not aware of any Supreme Court or Ninth Court decision that has required an agency to explain its
26 interpretation in order to obtain *Chevron* deference. Therefore, the Court should reject Plaintiffs’
27 attempt to create a new, heightened *Chevron* standard in the Ninth Circuit, especially when there exists
28 an abundance of Supreme Court and Ninth Circuit decisions that enunciate the standard of review. *See*,

1 *e.g.*, *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 54 (2011) (“The sole
2 question for the Court at step two under the *Chevron* analysis is whether the agency’s answer is based on
3 a permissible construction of the statute.” (emphasis added) (citation and internal quotation marks
4 omitted)); *Brand-X*, 545 U.S. at 980 (“If a statute is ambiguous, and if the implementing agency’s
5 construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the
6 statute” (emphasis added)); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 949 (9th Cir. 2007) (“If the
7 [agency’s] interpretation is permissible in light of the statute’s text, structure and purpose, we *must* defer
8 under *Chevron* to the [agency’s] interpretation” (emphasis added)).

9 That the 2020 Final Rule was issued by HHS pursuant to authority delegated by Congress (*see*
10 Def’s MSJ at 15-16) also weighs heavily in favor of the Court affording *Chevron* deference to HHS’s
11 interpretation. *Mayo Found.*, 562 U.S. 44, 56-57 (2011) (“We have held that *Chevron* deference is
12 appropriate ‘when it appears that Congress delegated authority to the agency generally to make rules
13 carrying the force of law, and that the agency interpretation claiming deference was promulgated in the
14 exercise of that authority.’” (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001))).
15 Plaintiffs do not dispute that is the case here.

16 The Court need go no further in rejecting Plaintiffs’ arguments that the 2020 Final Rule was
17 contrary to law. But even if HHS was required to explain its interpretation to obtain *Chevron* deference,
18 it has satisfied this criterion. As HHS explained in the supplemental NPRM published on April 7, 2016
19 in connection with issuing the 2016 Final Rule, the statutory requirements that the data collected be
20 “reliable and consistent” and “avoid unnecessary diversion of resources from agencies” are express
21 limitations on HHS’s authority to collect demographics data. 81 Fed. Reg. 20283, 20286 (“Section 479
22 of the Social Security Act *contains some express limits on the authority of ACF to collect data*
23 *including: Data collected under AFCARS must avoid an unnecessary diversion of resources from*
24 *agencies responsible for adoption and foster care (section 479(c)(1) of the Act) and must assure that any*
25 *data that is collected is reliable and consistent over time and among jurisdictions through the use of*
26 *uniform definitions and methodologies (section 479(c)(2) of the Act) (emphasis added)*). Given the
27 deferential standard in APA cases, this discussion is sufficient to satisfy any obligation HHS may have
28 to explain its interpretation. It is also dispositive of Plaintiffs’ claim that HHS is relying on a *post hoc*

1 interpretation of the statute. Pls' Opp. at 2.

2 Plaintiffs also argue that the statute does not allow Defendants to decline to collect data as a way
3 of conserving state resources and ensuring reliability. *Id.* at 2-3. Plaintiffs do not provide any textual
4 analysis, or point to any legislative history, in support of this position. This is not surprising because the
5 most sensible interpretation of the statute is that it is within HHS's discretion to resolve any conflicts
6 that arise between the statute's competing mandates, consistent with Congress' broad grant of authority
7 to the Secretary of HHS to "make and publish such rules and regulations, not inconsistent with th[e]
8 Act." 42 U.S.C. § 1302(a). As the Supreme Court has declared, "[r]egulation, like legislation, often
9 requires drawing lines." *Mayo Found.*, 562 U.S. at 59. That is what HHS has done here. While
10 Plaintiffs may disagree with where the lines were drawn, that does not change the fact that HHS acted in
11 accordance with law when doing so.

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

14 As discussed in detail in Defendants' MSJ, HHS provided a reasoned explanation for excluding
15 the sexual orientation data elements from the 2020 Final Rule, namely that the sexual orientation
16 questions would not result in a reliable and consistent data collection, as required by the AFCARS
17 statute. *See* Defs' MSJ at 3-4, 6-7, 10-11, 16-18. In their Opposition, Plaintiffs nevertheless complain
18 that HHS did not sufficiently explain its change in policy and that the explanation set forth in
19 Defendants' MSJ is found nowhere in the administrative record. Pls' Opp. at 7.

20 In a theme that is repeated throughout their briefing, Plaintiffs' arguments rely on a
21 misapprehension of the standard of review in this case. The law does not require HHS to write an
22 exegesis on its reasoning for removing the sexual orientation elements. To the contrary, it is well-
23 established that HHS "need provide only a 'minimal level of analysis' to avoid its action being deemed
24 arbitrary and capricious." *City of L.A. v. Barr*, 929 F.3d 1163, 1181-82 (9th Cir. 2019) (quoting *Encino*
25 *Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016)). If HHS's "explanation is clear enough that
26 its 'path may reasonably be discerned,'" no further demonstration is required. *Id.* (quoting *Encino*
27 *Motorcars*, 136 S. Ct. at 2125).
28

1 Here, the administrative record’s description of HHS’s reasoning is more than sufficient to
2 satisfy this highly-deferential standard of review. As HHS explained in the 2018 ANPRM, it
3 “previously . . . received comments questioning the utility, reliability, and purpose of certain data” and
4 requested “specific recommendations on which data elements in the regulation to remove because they
5 would not yield reliable national information about children involved child welfare system” 83
6 Fed. Reg. 11,449, 11,450. As discussed in the 2019 NPRM, HHS received comments in response to the
7 2018 ANPRM recommending that the sexual orientation data elements “be removed due to reasons such
8 as it will not be reliable because youth would self-report, which could result in an undercount.” 84 Fed.
9 Reg. at 16,574.

10 The 2019 NPRM further explained that HHS did not rely solely on these comments but also
11 reviewed a 2016 working paper prepared by OMB that provides guidance to federal agencies when
12 choosing sexual orientation and gender identity (“SOGI”) questions for inclusion in administrative
13 databases. *Id.* at 16,576. HHS explained that the OMB paper raised a number of issues “concerning to
14 our AFCARS work.” *Id.* For example, the paper “advises that new questions added to a survey or data
15 base should be validated with qualitative techniques and question validation efforts should include both
16 the SOGI and non-SOGI group.” *Id.* This raised a significant concern for HHS because “[i]t is not
17 feasible . . . to test the validity or accuracy of adding questions related to sexual orientation across all
18 title IV-E agencies.” *Id.*

19 Based on the OMB paper, HHS also identified the following issues with collecting sexual
20 orientation data from children: (1) that “teenagers may be in the midst of developing their sexual
21 orientation . . . and therefore they may be unsure of how to respond to SOGI questions”; (2)
22 “[a]dolescents may use different terms to describe their sexual orientation than terms used by adults”;
23 (3) “[b]ullying related to one’s sexual orientation may cause some adolescents to be reluctant to identify
24 themselves with terms that must be regulated in AFCARS.” *Id.* HHS explained that these concerns
25 “emphasize[s] the importance that respondents are confident that their responses are private,
26 anonymous, and confidential” and that “it is impossible to ensure that a child’s response to a question on
27 sexual orientation would be kept private, anonymous, or confidential considering a caseworker would be
28 gathering this information to enter into a child’s case electronic record.” *Id.* HHS pointed to another

1 factor raised by the OMB paper, which is that “there may also be regional differences in interviewers’
2 and respondents’ comfort with questions about their sexual orientation.” *Id.*

3 HHS continued by explaining that “[a]s a result of our review of the OMB document, in
4 particular, taking into consideration the need to validate questions related to sexual orientation and
5 ensure responses about sexual orientation, especially with adolescents, are private, anonymous, and
6 confidential, it is clear that AFCARS is not the appropriate vehicle to collect this information.” *Id.*
7 HHS also stated that “[w]hile we understand the importance of collecting sexual orientation data and
8 appreciate the comments that supported keeping the data elements, *we must balance this with the need to*
9 *collect accurate data per the statu[t]e.” Id.* at 16,577 (emphasis added).

10 In the 2020 Final Rule, HHS explained that “[f]or the reasons set forth in the 2019 NPRM, we
11 continue to disagree with the commenters that suggested this final rule should include this sexual
12 orientation data and have made no changes” and “[w]e continue to rely on the 2016 Office of
13 Management and Budget (OMB) guidance to ground our decision making because it provides direction
14 for Federal agencies to consider before requiring SOGI information in surveys and administrative
15 databases.” 85 Fed. Reg. 28,410, 28,413. Moreover, contrary to Plaintiffs’ claim that HHS completely
16 ignored the 2013 professional guidelines (*see* Pls’ Opp. at 10), “which largely provide best practice
17 guidelines related to client/caseworker/agency interaction in gathering and managing [SOGI]
18 information from clients,” HHS expressly considered them and “conclude[d] that those guidelines are
19 not relevant to collecting sexual orientation information through a Federal administrative data
20 collection.” *Id.* HHS also pointed out that “Section 479(c)(2) of the Act requires that data collected is
21 reliable and consistent over time” and that it had “removed data elements that 2018 ANPRM and 2019
22 NPRM commenters identified would not meet the requirements for reliability and consistency, thus are
23 ineffective at providing a national picture of children placed in out-of-home care.” *Id.* at 28,419. HHS
24 further explained that “[n]ot publishing this final rule, and in effect requiring title IV-E agencies to
25 implement the vast requirements of the 2016 final rule, would not meet these statutory requirements.”
26 *Id.*

27 The foregoing demonstrates that HHS’s evaluation of the sexual orientation elements
28 comfortably meets the “minimal level of analysis” needed to avoid the 2020 Final Rule being declared

1 arbitrary and capricious. This puts to rest Plaintiffs’ assertions that HHS failed to offer a reasoned
2 explanation for removing the sexual orientation elements from the 2020 Final Rule and that HHS unduly
3 relied on state comments about the reliability of collecting sexual orientation data. Pls’ Opp. at 7-8.
4 The foregoing discussion—much of which is quoted verbatim from the administrative record—also
5 shows that the entirety of HHS’s reasoning can be found within the four corners of the 2018 ANPRM,
6 the 2019 NPRM, and the 2020 Final Rule, which disposes of Plaintiffs’ claims that HHS is “justifying
7 their decision with reasoning that is nowhere to be found in the administrative record” and relying on
8 *post hoc* rationalizations. *Id.*

9 With specific respect to HHS’s use of the OMB paper, Plaintiffs urge the Court to conclude that
10 HHS did not actually rely on the OMB paper in concluding that the sexual orientation data elements
11 were not reliable. Pls’ Opp. at 8. Plaintiffs’ main argument appears to be that HHS never mentioned
12 reliability while discussing the OMB paper. *Id.* However, it is clear from the context in which it was
13 discussed that the OMB paper raised accuracy concerns with collecting sexual orientation data from
14 teenagers who would be self-reporting, which is the exact concern raised by the state commenters. For
15 example, as HHS so noted, the OMB paper explained that adolescents may be unsure of how to respond
16 to SOGI questions, that the terms they use to describe their sexual orientation may differ from those
17 used by adults, and that bullying may make them reluctant to identify themselves using the terms set
18 forth in AFCARS. 2019 NPRM, 84 Fed. Reg. at 16,576. So, while HHS never invoked the word
19 “reliability,” it can “reasonably be discerned” that HHS was relying on the OMB paper to assess the
20 reliability of the data to be collected by the sexual orientation elements, which is sufficient to withstand
21 judicial review.

22 In their Opposition (Pls’ Opp. at 8-9), Plaintiffs also continue to quibble with HHS’s statement
23 that the OMB paper “advises that new questions added to a survey or data base should be validated with
24 qualitative techniques and question validation efforts should include both the SOGI and non-SOGI
25 groups” (84 Fed. Reg. at 16,576). To put this issue to rest, there is no inconsistency between HHS’s
26 statement and the contents of the OMB paper. The OMB paper states that with regard to SOGI
27 questions that have undergone extensive testing and validation, “[e]ven if a validated SOGI question is
28 used, additional testing during the designed phase may be needed to evaluate how the question performs

1 in new setting with a different audience.” AR 187. The OMB paper continues by stating that
2 “[c]ognitive testing is used to . . . test question validity” and that in “[p]revious cognitive testing of
3 SOGI questions . . . in some cases, the non-SOGI population misinterpreted the question and response
4 categories.” *Id.* “Therefore, it is important that question validation effort include both SOGI and non-
5 SOGI groups.” *Id.* This is enough for the Court to reasonably discern the rationale for the conclusions
6 that HHS drew from the OMB paper regarding the need for validation. But even if it is not, nowhere in
7 their briefing do Plaintiffs take issue with HHS’s reliance on the other reliability issues raised in the
8 OMB paper related to bullying, lack of uniform terminology used among adolescents, and differences in
9 attitudes due to geography (which is especially important for a nationwide survey). *Compare* 84 Fed.
10 Reg. at 16,576 *with* AR 188.

11 In reiterating their assertion that HHS did not adequately address significant comments regarding
12 the benefits of maintaining the sexual orientation elements, Pls’ Opp. at 10-11, Plaintiffs once again fail
13 to take account of the highly deferential standard of review. The law did not require HHS to provide a
14 lengthy discourse on the comments it received. As Plaintiffs acknowledge, HHS explained that “sexual
15 orientation can be collected as part of the title IV-E agency’s casework and should be documented in the
16 case file . . . and reporting it to a national database would not enhance their work with children and
17 families.” 85 Fed. Reg. at 28,413. HHS also explained that it disagreed with the comments supporting
18 inclusion of sexual orientation in the 2020 Final Rule for the reasons set forth in the 2019 NPRM,
19 specifically citing the OMB paper. 85 Fed. Reg. at 28,413. As discussed above, the 2019 NPRM
20 contains a fulsome discussion of HHS’s reasons for excluding the sexual orientation data elements, with
21 the leading explanation that they were not reliable enough to include in AFCARS. This is enough to
22 satisfy the procedural requirements of the APA, which require only a “minimal level of analysis.”
23 Furthermore, Plaintiffs do not explain why HHS would need to conduct a detailed analysis of the
24 benefits of collecting data that HHS had reasonably concluded could not be collected reliably, especially
25 in light of the statutory mandate that AFCARS collect data that is reliable and does not unnecessarily
26 divert the resources of Title IV-E agencies.

27 Also, for the reasons discussed in Defendants’ MSJ (Defs’ MSJ at 19), these comments were not
28 “significant,” so HHS did not need to respond to them at all (although it did). Plaintiffs are

1 demonstrably incorrect in their interpretation of the case law regarding what constitutes a “significant”
2 comment. Pls’ Opp. at 6. The Ninth Circuit’s statement on the law could not be clearer: “[A]n agency
3 need only respond to ‘significant’ comments, i.e., those which raise relevant points and which, *if*
4 *adopted, would require a change in the agency’s proposed rule.” Am. Mining Cong. v. United States*
5 *EPA*, 965 F.2d 759, 771 (9th Cir. 1992) (citation omitted) (emphasis added). This standard has been
6 followed in subsequent Ninth Circuit decisions, as demonstrated clearly by *Altera Corp. & Subsidiaries*
7 *v. Commissioner*:

8 As discussed in our *Chevron* analysis, Treasury’s conclusion that it could require parties
9 to a QCSA to share all costs was a reasonable one. *Thus, “significant” comments that*
10 *required a response would have spoken to why this interpretation was not, in fact,*
11 *reasonable, so that adopting the comments would require Treasury to change the*
12 *regulation. As an example, Treasury would have been required to respond to comments*
13 *demonstrating that doing away with analysis of comparables did not, in fact, serve the*
14 *purposes of parity set out in the statute.*

15 926 F.3d 1061, 1082 (9th Cir. 2019) (citing *Am. Mining Cong.*, 965 F.2d at 771) (emphasis added),
16 *reh’g denied*, 941 F.3d 1200 (9th Cir. 2019) (en banc), *cert. denied*, 141 S. Ct. 131 (2020). Notably, the
17 D.C. Circuit also applies the same standard to comments. *Am. Fuel & Petrochemical Mfrs. v. EPA*, 937
18 F.3d 559, 586 (D.C. Cir. 2019) (“An agency must consider comments relevant to the agency’s decision
19 and which, if adopted, would require a change in an agency’s proposed rule.” (cleaned up)).

20 Here, Plaintiffs offer no explanation as to why any of the comments that HHS allegedly
21 disregarded, if adopted, would have required HHS to incorporate the sexual orientation data elements
22 into the 2020 Final Rule. *See id.* at 587 (“Here, the Obligated Parties have not explained how a change
23 in the EPA’s RIN policy for renewable fuel exports would have required the agency also to change its
24 proposed applicable volumes and percentage standards. Therefore, the EPA could, without acting
25 arbitrarily and capriciously, take the discrete action of establishing annual applicable volumes and
26 percentage standards under the Program while declining to reconsider its RIN policy for renewable fuel
27 exports.”). Therefore, based on unambiguous and binding Ninth Circuit precedent, none of these
28 comments are “significant” and any error that may have attended HHS’s response to them is not grounds
to find that HHS acted arbitrarily and capriciously.

1 For the foregoing reasons, Plaintiffs’ assertions that Defendants are relying on *post hoc*
2 rationalizations and conclusory argument in an attempt to save the 2020 Final Rule are unavailing.
3 HHS’s primary rationale for excluding the sexual orientation elements—that they ran afoul of the
4 statutory mandate that AFCARS assure the data collected be reliable—is amply supported by the
5 administrative record. And HHS’s reasoned explanation for this decision more than satisfies the
6 deferential standard of review applicable to this case. Accordingly, the removal of the sexual orientation
7 data elements from the 2020 Final Rule was not arbitrary or capricious.

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

10 As discussed in Defendants’ MSJ, HHS adequately explained its reasons for excluding from the
11 2020 Final Rule certain of the ICWA-related data elements that were in the 2016 Final Rule, consistent
12 with the statutory requirement that AFCARS avoid unnecessary diversion of resources from agencies.
13 Defs’ MSJ at 20-24. In response, Plaintiffs advance four main arguments, none of which persuade.

14 First, Plaintiffs claim that Defendants overvalued the costs and burdens of implementing the
15 ICWA data elements. Plaintiffs contend that HHS significantly changed its methodology for estimating
16 the burden of collecting the data elements that were in the 2016 Final Rule and removed by the 2020
17 Final Rule. Pls’ Opp. at 4-5; *see also* Pls’ MSJ at 14, 23. Specifically, Plaintiffs claim that the
18 methodology for the 2020 Final Rule improperly assumed that Title IV-E agencies would need to ask
19 every ICWA question to every child. They assert that whereas the 2016 Final Rule separately calculated
20 burdens for ICWA- and non-ICWA children, the calculations for the 2020 Final Rule lumped all
21 children together, assuming agencies would spend the same number of hours on each case. Plaintiffs’
22 argument is not supported by the administrative record.

23 As discussed in Defendant’s MSJ, HHS received too few estimates to reference for calculating
24 the cost and burden associated with the 2016 Final Rule. Defs’ MSJ at 5, 20. In response to the 2018
25 ANPRM, HHS received additional, more detailed burden estimates from states regarding compliance
26 with the ICWA elements in the 2016 Final Rule. *Id.* at 8, 12, 20. In the 2019 NPRM, HHS explained
27 that “[s]tates provided estimates that ranged from 3 to 15 hours related to these tasks for the 2016 final
28 rule” and that “[t]he range *depended on whether the work was for the ICWA-related data elements or*

1 *not.*” 84 Fed. Reg. at 16,589 (emphasis added). Accordingly, as is consistent with the 2016 Final Rule,
2 HHS considered the ICWA versus non-ICWA burdens when issuing the 2020 Final Rule. Specifically,
3 HHS averaged the hours provided by state commenters that broke out this information, noting that the
4 agency “used the average because there were not significant outliers in the comments provided.” *Id.*
5 Contrary to Plaintiffs’ contentions, HHS did not change its methodology by assuming that Title IV-E
6 agencies would need to ask every ICWA question to every child. This discussion is more than enough
7 to satisfy the deferential standard of review that courts must afford to agency rulemaking. *Pac. Coast*
8 *Fed’n of Fishermen’s Ass’ns v. United States Bureau of Reclamation*, 426 F.3d 1082, 1090 (9th Cir.
9 2005) (“Even when an agency explains its decision with ‘less than ideal clarity,’ a reviewing court will
10 not upset the decision on that account ‘if the agency’s path may reasonably be discerned.’” (quoting
11 *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 497 (2004))). Thus, Plaintiffs’ arguments
12 that HHS reversed its policy without explanation and overvalued the costs of collecting the ICWA data
13 are without merit.

14 Second, Plaintiffs renew their contention that Defendants failed to respond meaningfully to
15 significant comments about the burden. Pls’ Opp. at 5-6. The comments that Plaintiffs point to (*see* Pls’
16 MSJ at 23-24), none which were from Title IV-E agencies, offer only qualitative commentary on the
17 nature of the costs and burdens from implementing the 2016 Final Rule. *See, e.g.*, AR 761 (states
18 should have already begun the process of implementing the 2016 Final Rule); AR 988 (there would be a
19 burden to states to upgrade their systems even without the ICWA data element); AR 2781, 2898 (Title
20 IV-E agencies would need to answer only three ICWA-related questions in 98 percent of cases).

21 Contrary to Plaintiffs’ contentions, HHS directly responded to these comments in the 2019
22 NPRM, in which HHS stated that “the vast majority of commenters that opposed streamlining are not
23 required to report AFCARS data and did not offer any specific estimates regarding the burden or cost
24 placed on reporting title IV-E agencies.” 84 Fed. Reg. at 16,575. As Defendants have already
25 explained, and as the administrative record makes abundantly clear, HHS had received new estimates of
26 the cost and burden of implementing the 2016 Final Rule from the states. Defs’ MSJ at 8-9, 12, 22.
27 There is nothing unreasonable about HHS placing less weight on qualitative comments about the burden
28 from non-reporting commenters when it had *actual* cost estimates from Title IV-E agencies. Again,

1 Plaintiffs' argument merely reflects their disagreement with how much weight to assign to the burden of
2 collecting the removed ICWA-related elements, which is not an issue that is properly before this Court.
3 *See California v. Azar*, 950 F.3d 1067, 1096 (9th Cir. 2020).

4 Third, Plaintiffs argue that Defendants made unexplained departures from the 2016 Final Rule
5 with respect to analysis of the benefits. Plaintiffs' main contention is that HHS reversed course on the
6 value of collecting the ICWA data for policymaking purposes without providing a reasoned explanation.
7 Pls' Opp. at 12-13. This is not correct. With respect to the 2016 Final Rule, Plaintiffs can point only to
8 general, conclusory statements that HHS made about the value of collecting the ICWA data for
9 policymaking purposes, such as ICWA data will "inform national policies" and "help develop policy."
10 Pls' Opp. at 12. However, as discussed in the 2018 ANPRM, HHS determined that it should undertake a
11 more searching assessment of the ICWA elements to determine if collecting this data was overly
12 burdensome. 83 Fed. Reg. at 11,450. In response to the 2018 ANPRM, HHS received comments
13 opposing removal of the ICWA elements on the ground that "it was necessary for agencies to report
14 qualitative data on particular topics through AFCARS for policy making purposes." 2019 NPRM, 84
15 Fed. Reg. at 16,575.

16 But, as HHS explained in the 2019 NPRM, the "suggestion that more data elements in AFCARS
17 is essential for policy making was not sufficiently validated in the ANPRM comments" because
18 commenters had not "identified the *specific* policies that they felt needed the detailed level of AFCARS
19 data so urgently and why AFCARS specifically is the best means for collection of this data." *Id.*
20 (emphasis added). Taken in the context that HHS was undertaking a more searching assessment of the
21 ICWA elements, HHS adequately explained its shift in thinking regarding the benefits of collecting the
22 ICWA data for policymaking purposes. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515
23 (2009) ("[I]t suffices that the new policy is permissible under the statute, that there are good reasons for
24 it, and that the agency *believes* it to be better, which the conscious change of course adequately
25 indicates."); *City of L.A.*, 929 F.3d at 1181-82 (requiring only a "minimal level of analysis" for an
26 agency to avoid its action being deemed arbitrary and capricious). Given that HHS offered both a
27 reasoned explanation for its shift in position and directly addressed comments about the benefits of
28 collecting the ICWA data, the remainder of Plaintiffs' arguments (Pls' Opp. at 13) are no more than an

1 expression of their disagreement with the weight HHS placed on the costs of collecting the ICWA data.
2 Furthermore, even if HHS had not adequately responded to these comments, none of them are
3 significant because none of them, if adopted, would have required HHS to include the ICWA elements
4 in the 2020 Final Rule. *See Altera Corp.*, 926 F.3d at 1082; *Am. Mining Cong.*, 965 F.2d at 771; *Am.*
5 *Fuel & Petrochemical Mfrs.*, 937 F.3d at 586. Plaintiffs do not contend otherwise.

6 Fourth, and finally, Plaintiffs once again trot out the argument that the “leading rationale” for
7 removing the ICWA elements was that HHS lacked authority to collect them. Pls’ Opp. at 11-12. As
8 Defendants have already explained, HHS did not state that it lacked authority to do so. Defs’ MSJ at 23-
9 25. HHS, in responding to comments to the 2019 NPRM, merely sought to clarify any misperceptions
10 regarding the scope and source of that authority. *Id.*; *see also id.* at 11-12. Therefore, Plaintiffs’
11 insistence on calling this the “leading rationale” for removing the ICWA elements is a *non sequitur*.
12 The Court should decline Plaintiffs’ invitation to follow it down this rabbit hole. Equally puzzling is
13 Plaintiffs’ argument that HHS had never denied that a lack of authority was the leading reason for
14 removing the ICWA elements. Pls’ Opp. at 12. As discussed in detail in Defendants’ MSJ, HHS’s
15 primary reason for excluding the ICWA elements from the 2020 Final Rule was that collecting them
16 would result in an unnecessary diversion of resources from Title IV-E agencies, which is amply
17 supported by the administrative record and consistent with HHS’s statutory mandate. *See* Defs’ MSJ at
18 5-6, 8-9, 11-12, 20-21. Indeed, the primary purpose for HHS’s review of the 2016 Final Rule was to
19 assess whether its costs outweighed its benefits, with specific focus on the ICWA data elements, all of
20 which is expressly set forth in the 2018 ANPRM. 83 Fed. Reg. at 11,450 (“We would like to receive
21 more detailed comments on the specific limitations we should be aware of that states will encounter in
22 reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data
23 elements and provide a rationale for why this information is overly burdensome.”)

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

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

27 As established in Defendant’s MSJ and herein, the 2020 Final Rule was promulgated in
28 accordance with the AFCARS statute and HHS did not act arbitrarily or capriciously in issuing it. But

1 to the extent any errors attended the issuance of the 2020 Final Rule, they do not warrant vacatur.
2 Nothing in Plaintiffs' Opposition is to the contrary. Because the reasons for Defendants' position are set
3 forth in detail in Defendants' Reply in Support of Motion for Voluntary Remand Without Vacatur, Dkt.
4 No. 109, and for the sake of brevity, Defendants incorporate them herein by reference and instead
5 provide the following summary of the argument.

6 With respect to the first *Allied-Signal* factor, which concerns the seriousness of the errors,
7 Defendants are initiating a rulemaking process that would propose to collect the sexual orientation and
8 ICWA-related data that are the subject of Plaintiffs' challenge. Therefore, the purported errors raised by
9 Plaintiffs are not sufficiently serious to warrant vacatur because any such errors, assuming they exist,
10 can be addressed on remand. Plaintiffs contend that the first *Allied-Signal* factor weighs in favor of
11 vacatur because Defendants do not intend to adopt the same rule on remand. Plaintiffs' reliance on this
12 consideration is inapplicable to the facts of this case. That an agency is unlikely to adopt the same rule
13 on remand is only relevant to the extent it sheds light on the seriousness of the alleged errors. Here,
14 HHS is not seeking to revise the 2020 Final Rule due to any concerns that it erred during the rulemaking
15 process. Rather, HHS is seeking remand due to a change in administrations and the attendant change in
16 policies.

17 Regarding the second *Allied-Signal* factor, Plaintiffs argue that vacatur would not be sufficiently
18 disruptive to justify keeping the 2020 Final Rule in place. According to Plaintiffs, remand without
19 vacatur is rare and only available to avert ecological disasters or the waste of billions of dollars. This is
20 demonstrably untrue. Remand without vacatur is, in fact, common within the Ninth Circuit and has
21 been granted in circumstances with disruptive consequences far less severe or certain than those
22 presented here. *See, e.g., Nat'l Family Farm Coal. v. United States EPA*, 966 F.3d 893, 930 (9th Cir.
23 2020); *Inst. for Fisheries Res. v. United States FDA*, 499 F. Supp. 3d 657, 669-70 (N.D. Cal. 2020);
24 *WildEarth Guardians v. Steele*, No. CV 19-56-M-DWM, 2021 U.S. Dist. LEXIS 118341, at *77-78 (D.
25 Mont. June 24, 2021); *Alliance v. Savage*, 375 F. Supp. 3d 1152, 1157 (D. Mont. 2019).

26 Given the nationwide reach of this rule, the costs of vacatur would be significant. HHS and Title
27 IV-E agencies in all 50 states would incur compliance costs in the tens of millions of dollars. Plaintiffs
28 contend that the costs would be incurred anyway if Defendants issue a new rule or rules, but this

1 argument fails to consider that Title IV-E agencies would also be subject to sizeable statutorily-
2 mandated penalties for noncompliance, that the 2020 Final Rule also removed data elements that are not
3 the subject of Plaintiffs' challenge and which no party to this litigation has proposed collecting or
4 reinstating, and that the new rules or rules may differ from the 2016 Final Rule due to the requirement of
5 notice-and-comment rulemaking.

6 In light of the foregoing, the new rule(s) issued by HHS *would* be materially different than the
7 2016 Final Rule. It simply makes no sense to require HHS and Title IV-E agencies nationwide to
8 change their systems, processes, and procedures—at significant cost—when HHS is already taking steps
9 toward revising the AFCARS rule to collect the sexual orientation and ICWA-related data removed from
10 the 2020 Final Rule. Therefore, vacating the 2020 Final Rule would be an “interim change that may
11 itself be changed,” which further weighs against vacatur. *Local Joint Exec. Bd. of Las Vegas v. NLRB*,
12 840 F. App'x 134, 137-38 (9th Cir. 2020) (quoting *Cal. Cmty. Against Toxics v. United States EPA*,
13 688 F.3d 989, 992 (9th Cir. 2012)).

14 Plaintiffs also claim that the Court could fashion an equitable remedy that would address these
15 disruptions. This proposal fails from both a legal and practical standpoint. For example, it puts the cart
16 before the horse because, under the *Allied-Signal* test, the Court must determine whether the disruptive
17 consequences warrant remand without vacatur *prior* to considering whether those disruptions could be
18 alleviated through an equitable remedy. In addition, delaying implementation would do nothing to
19 address the waste of resources that would result from Title IV-E agencies collecting the data elements
20 removed by the 2020 Final Rule that neither Defendants nor Plaintiffs are seeking to collect.

21 Furthermore, past experience teaches that it would take a minimum of two to three years to
22 implement the 2016 Final Rule, which means that Plaintiffs' proposal necessarily contemplates
23 deferring vacatur for a comparable period of time. But if that is the case, then the Court should simply
24 decline to vacate the 2020 Final Rule given that Defendants anticipate that it would likely take less time
25 to issue a new rule or rules regarding the collection of the disputed sexual orientation and ICWA data
26 than it would to implement the 2016 Final Rule. As noted, it would be pointless for the Court to vacate
27 the 2020 Final Rule when doing so would amount to nothing more than an interim change that itself
28 would likely be changed.

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

3 **III. CONCLUSION**

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

7
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Respectfully submitted,

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