

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CALIFORNIA TRIBAL FAMILIES
COALITION, et al.,

Plaintiffs,

v.

XAVIER BECERRA, et al.,

Defendants.

Case No. 20-cv-06018-MMC

**ORDER DENYING PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT; GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT; DENYING AS
MOOT DEFENDANTS' MOTION FOR
VOLUNTARY REMAND**

Before the Court are three motions: (1) plaintiffs California Tribal Families Coalition, Yurok Tribe, Cherokee Nation, Facing Foster Care in Alaska, Ark of Freedom Alliance, Ruth Ellis Center, and True Colors, Inc.'s Motion for Summary Judgment (Doc. No. 66); (2) defendants Xavier Becerra, JooYeun Chang, U.S. Department of Health and Human Services, and Administration for Children and Families' Cross-Motion for Summary Judgment (Doc. No. 103); and (3) defendants' Motion for Voluntary Remand Without Vacatur (Doc. No. 102). The motions have been fully briefed, including, with leave of court, supplemental briefing. Additionally, also with leave of court, amicus briefs have been filed by (1) the American Academy of Pediatrics, (2) Family Equality and National Center for Lesbian Rights, and (3) twenty-eight members of Congress.

Having read and considered the papers filed in support of and in opposition to the motions, as well as the administrative record submitted by defendants, the Court rules as follows.

BACKGROUND

In their complaint, plaintiffs challenge a rule issued by the Department of Health and Human Services ("HHS") on May 12, 2020. See 85 Fed. Reg. 28,410 ("2020 Rule"),

The 2020 Rule revised regulations HHS had promulgated in 2016, see 81 Fed. Reg. 90,524 ("2016 Rule"), which regulations, in turn, revised regulations HHS initially promulgated in 1993, see 58 Fed. Reg. 67,912 ("1993 Rule"), by which initial promulgation it implemented a data collection system known as the "Adoption and Foster Care Analysis and Reporting System" ("AFCARS"), see id. at 67,912. As discussed in greater detail below, AFCARS is a system by which states and tribes that receive grants and entitlements under the Social Security Act provide the Administration for Children and Families ("ACF"), an agency within HHS, with "data on the almost 500,000 children in foster care or adopted through a state [or tribal] agency." (See Compl. ¶¶ 54, 57, 64; Ans. ¶¶ 54, 57, 64).

Plaintiffs allege HHS's issuance of the 2020 Rule was "arbitrary and capricious," and, consequently, said Rule "should be vacated" under the Administrative Procedure Act ("APA"). (See Compl. ¶¶ 249, 252.) Specifically, plaintiffs challenge the decision to remove from AFCARS various questions HHS had added by the 2016 Rule, namely, questions pertaining to the states' application of the Indian Child Welfare Act ("ICWA") (see Compl. ¶ 11) and questions pertaining to the sexual orientation of youth, foster and adoptive parents, and legal guardians (see Compl. ¶ 195).

DISCUSSION

The Court first summarizes the 1993 Rule that implemented AFCARS, as well as the 2016 and 2020 Rules that revised AFCARS, and next addresses the parties' respective motions for summary judgment on plaintiffs' claim that HHS violated the APA when it issued the 2020 Rule.

A. AFCARS

In 1986, Congress directed HHS to "study the various methods of establishing, administering, and financing a system for the collection of data with respect to adoption and foster care in the United States," see 42 U.S.C. § 679(a), to "submit to the Congress a report that . . . proposes a method of establishing, administering, and financing" such system, see 42 U.S.C. § 679(b)(1), and to "promulgate final regulations providing for the

1 implementation of . . . the system proposed," see 42 U.S.C. § 679(b)(2). In 1993, HHS,
 2 after conducting the above-referenced study, submitting its findings to Congress,
 3 providing public notice of its proposal, and considering responsive comments it received
 4 from states and others, issued the 1993 Rule, which established AFCARS. See 58 Fed.
 5 Reg. at 67,912, 67,914-17.

6 In the 1993 Rule, HHS described AFCARS as a system "designed to collect
 7 uniform, reliable information on children who are under the responsibility of a State title
 8 IV-B/IV-E agency for placement and care."¹ See 58 Fed. Reg. at 67,912. HHS also
 9 identified therein the purpose for establishing AFCARS, namely, "[t]o address policy
 10 development and program management issues at both the State and Federal levels."
 11 See id. As explained by HHS, the data collected would "enable policymakers to assess
 12 the reasons why children are in foster care and develop remedies to prevent it," and,
 13 additionally, would "be useful for research, the ultimate purpose of which [being] to gain a
 14 better understanding of the foster care program and the causes and other factors
 15 contributing to its expansion and other changes [,] and, eventually, to make suggestions
 16 and proposals for change to improve the child welfare system." See id.

17 The 1993 Rule added 45 C.F.R. § 1355.40 to the Code of Federal Regulations,
 18 which regulation required each state that "administers or supervises the administration of
 19 titles IV-B and IV-E" to transmit semi-annually to ACF "information on each child in foster
 20 care and each child adopted during the reporting period," specifically, a number of "data
 21 elements" identified in the 1993 Rule. See 45 C.F.R. §§ 1355.40(a)(1), (b)(1) (1993).²
 22 Among the "data elements" each agency was required to report were the age, sex, and
 23

24 ¹ "Title IV-B of the Social Security Act . . . is a formula program," under which the
 25 federal government provides grants to state and tribal agencies that provide "child
 26 welfare services." See id. at 67,912; see also 42 U.S.C. §§ 622-628. "Title IV-E of the
 27 [Social Security] Act is an entitlement program," under which the federal government
 28 pays for certain costs incurred by state and tribal agencies to provide "foster care" and
 "adoption" services. See 58 Fed. Reg. at 67,912; see also 42 U.S.C. §§ 670-679c.

² In 2012, the regulation was amended to require tribal agencies to transfer
 information to ACF in the same manner as state agencies. See 77 Fed. Reg. at 906.

1 race of each child, the date the child was removed from his/her home, the date the child
2 was placed in foster care or was adopted, the race/ethnicity of the foster caretaker(s) or
3 adoptive parent(s), and which of fifteen identified "[a]ctions or conditions" was
4 "associated with the child's removal." See 45 C.F.R., Part 1355, Appendixes (1993).

5 In 2015, HHS issued a notice of proposed rulemaking, in which HHS stated the
6 AFCARS regulations "need[ed] to be revised and updated" to "[i]ncorporate statutory
7 requirements since 1993," see 80 Fed. Reg. at 7132, e.g., a statutory requirement that
8 the "data collection system" obtain information as to "the annual number of children in
9 foster care who are identified as sex trafficking victims," see 42 U.S.C. § 679(c)(3)(E),
10 and also "to enhance the type and quality of information title IV-E agencies report to ACF
11 by modifying and expanding data elements," see 80 Fed. Reg. at 7132.

12 On December 14, 2016, HHS announced the 2016 Rule, whereby it added a
13 number of new data elements to AFCARS, such as whether a child is a full-time student,
14 see 81 Fed. Reg. at 90,541, is pregnant, see id. at 90,542, or has siblings, see id. at
15 90,544. Additionally, as relevant to the instant action, HHS "incorporate[d] data elements
16 related to [ICWA]," see id. at 90,524, such as requiring a state agency to state, as to each
17 child, whether it "researched whether there is reason to know that a child is an 'Indian
18 Child' as defined in ICWA," see id. at 90,535, and, if it answers it "knows or has reason to
19 know that a child is an Indian child as defined in ICWA," to identify "all federally
20 recognized Indian tribes that are or may potentially be the Indian child's tribe(s)," see id.
21 at 90,536. Further, as relevant to the instant action, HHS added data elements pertaining
22 to the sexual orientation of minors 14 years of age and older, see id. at 90,534, the foster
23 parent(s), see id. at 90,554, and the adoptive parent(s) or guardian(s), see id. at 90,558-
24 59, as well as a data element indicating whether a child's removal from home was on
25 account of sexual orientation, see id. at 90,549. The revisions to AFCARS, as set forth in
26 the 2016 Rule, were to become effective "two fiscal years" after said Rule was
27 promulgated, see id. at 90,529.

28 On February 24, 2017, President Trump issued an executive order "to lower

1 regulatory burdens on the American people" and directed federal agencies "to review
2 existing regulations and make recommendations regarding their repeal, replacement, or
3 modification." See 83 Fed. Reg. at 11,449. In response thereto, HHS, on March 15,
4 2018, issued an "advance notice of proposed rulemaking" ("2018 ANPRM") in which HHS
5 sought "public suggestions . . . for streamlining the [AFCARS] data elements and
6 removing any undue burden related to reporting AFCARS." See id. Thereafter, HHS
7 extended the date on which the 2016 Rule would become effective, specifically, to
8 October 1, 2020. See 83 Fed. Reg. at 42,225.

9 On April 19, 2019, HHS, having reviewed the comments received in response to
10 the 2018 ANPRM, issued a notice of proposed rulemaking ("2019 NPRM"), in which HHS
11 proposed to "streamline the AFCARS data elements that were finalized in the [2016
12 Rule]." See 84 Fed. Reg. at 16,572. Specifically, HHS proposed that, with regard to "the
13 out-of-home care data file,"³ the number of data elements be decreased from 272 to 183,
14 "representing 170 that [HHS] propose[d] to keep from the 2016 final rule and 13 [HHS]
15 propose[d] to modify." See 84 Fed. Reg. at 16,576. As relevant to the instant action,
16 HHS proposed removing some of the "ICWA-related data elements," such as "court
17 findings related to involuntary and voluntary termination of parental rights," while retaining
18 others, such as "[w]hether the state title IV-E agency made inquiries of whether the child
19 is an Indian child," see id. at 16,577-78, and proposed removing data elements pertaining
20 to sexual orientation, other than whether the child's "sexual orientation, gender identity, or
21 gender expression" was a "circumstance surrounding the child at removal," which data
22 element HHS proposed retaining, see id. at 16,576-77.

23 On May 12, 2020, HHS announced the 2020 Rule, by which it "finalize[d] the out-
24 of-home care data elements proposed in the 2019 NPRM," see 85 Fed. Reg. at 28,410,

26 ³ For purposes of AFCARS, "[t]he out-of-home care reporting population includes a
27 child of any age who is in foster care under the placement and care responsibility of the
28 title IV-E agency; is receiving title IV-E foster care maintenance payments under a title IV-
E agreement; or has run away or whose whereabouts are unknown at the time the title
VI-E agency becomes responsible for the child." See 81 Fed. Reg. at 90,524.

without "substantive changes," see id. at 28,411. The 2020 Rule, consistent with the 2019 NPRM, "reduces data elements related to [ICWA]" and "does not include data elements asking for information on . . . the sexual orientation of the child, foster parent, adoptive parent, or legal guardian." See id. at 28,410.

In light of the 2020 Rule, which presently is in effect, the 2016 Rule never became effective.

B. Motions for Summary Judgment

As noted, plaintiffs challenge under the APA HHS's issuance of the 2020 Rule.

Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See 5 U.S.C. § 706(2). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency" and "may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by [a] statute." See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 42-43 (1983). The record must indicate, however, that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." See id. at 43 (internal quotation and citation omitted).

"Agencies are free to change their existing policies so long as they provide a reasoned explanation for the change." Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221 (2016). An agency "need not demonstrate to a court's satisfaction," however, "that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates." See FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (emphases in original).

The Court next considers whether, as plaintiffs assert, HHS's decision to remove

from AFCARS some of the data elements it added by the 2016 Rule was arbitrary and capricious, or whether, as defendants assert, such decision was lawful under the APA.

1. ICWA-Related Data Elements

In 1978, Congress enacted ICWA, declaring therein that "it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." See 25 U.S.C. § 1902.

The Supreme Court has summarized the provisions of ICWA as follows:

At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings. Section 1911 lays out a dual jurisdictional scheme. Section 1911(a) establishes exclusive jurisdiction in the tribal courts for proceedings concerning an Indian child 'who resides or is domiciled within the reservation of such tribe,' as well as for wards of tribal courts regardless of domicile. Section 1911(b), on the other hand, creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation: on petition of either parent or the tribe, state-court proceedings for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of 'good cause,' objection by either parent, or declination of jurisdiction by the tribal court.

Various other provisions of ICWA Title I set procedural and substantive standards for those child custody proceedings that do take place in state court. The procedural safeguards include requirements concerning notice and appointment of counsel; parental and tribal rights of intervention and petition for invalidation of illegal proceedings; procedures governing voluntary consent to termination of parental rights; and a full faith and credit obligation in respect to tribal court decisions. See §§ 1901–1914. The most important substantive requirement imposed on state courts is that of § 1915(a), which, absent 'good cause' to the contrary, mandates that adoptive placements be made preferentially with (1) members of the child's extended family, (2) other members of the same tribe, or (3) other Indian families.

See Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36-37 (1989) (internal footnote omitted).

The Bureau of Indian Affairs ("BIA"), an agency within the Department of the Interior ("DOI"), has promulgated regulations, see 25 C.F.R. §§ 23.1-23.144; see also 25 U.S.C. § 1952 (providing Secretary of Interior "shall promulgate such rules and

1 regulations as may be necessary to carry out the provisions of [ICWA]), which
 2 regulations set forth, inter alia, procedures a state court is required to follow when, in a
 3 case involving a child who is or may be an Indian child, a motion is made to transfer a
 4 foster care proceeding to a tribal court, see 25 C.F.R. §§ 23.115-23.119, or when a party
 5 to a state court foster care or adoption proceeding asserts that "good cause" exists not to
 6 follow the "placement preferences" set forth in ICWA, see 25 C.F.R. § 23.132.

7 With ICWA and the above regulations in mind, HHS, prior to its issuance of the
 8 2016 Rule, provided public notice that it intended to "collect data elements in AFCARS
 9 related to ICWA's statutory standards for removal, foster care placement, and adoption
 10 proceedings." See 81 Fed. Reg. at 20,284. Thereafter, in the 2016 Rule, HHS added a
 11 number of ICWA-related data elements to AFCARS, which elements can be summarized
 12 as follows: (1) whether the title IV-E agency conducted research to determine if a child is
 13 an "Indian child" as defined in ICWA and knows or has reason to know the child is an
 14 Indian child, see 81 Fed. Reg. at 90,535-36; (2) whether the child is a member of a tribe,
 15 see id. at 90,570, as well as whether the parents, the foster parent(s), and/or adoptive
 16 parent(s)/guardian(s) are members of a tribe, see id. at 90,545, 90,553, 90,558; and
 17 (3) whether, during the course of any child custody, foster care, termination of parental
 18 rights, and/or adoption proceeding in which the child is or may be an Indian child, the
 19 procedures required by ICWA and BIA regulations were followed, see id. at 90,536-38,
 20 90,546-48, 90,552-53, 90,556-57, 90,560-61.

21 In the 2020 Rule, HHS retained in AFCARS the ICWA-related data elements
 22 pertaining to the title IV-E agency's own actions, namely, data elements bearing on
 23 whether such agency has "[r]eason to know a child is an 'Indian Child' as defined in
 24 [ICWA]" and "made inquiries whether the child is an Indian child," see 85 Fed. Reg. at
 25 28,424, along with data elements pertaining to whether the child, parents of the child,
 26 foster parent(s), and/or adoptive parent(s)/guardian(s) are members of a tribe, see id. at
 27 28,424, 28,427, 28,431, 28,432, as well as whether notice of the pendency of a state
 28 court proceeding had been given to the tribe or tribes in the manner required by ICWA,

1 see id. at 28,424-25; see also 25 U.S.C. § 1912(a) (providing "party seeking the foster
2 care placement of, or termination of parental rights to, an Indian child" must give notice of
3 proceeding to "the Indian child's tribe").

4 The ICWA-related data elements removed from AFCARS by the 2020 Rule were
5 those pertaining to actions required to be reported by the agencies but taken by the state
6 courts rather than the agencies themselves, namely, data elements bearing on whether
7 state court proceedings were conducted in accordance with the procedures required
8 under ICWA, i.e., proceedings, as summarized by HHS, comprising "request[s] to transfer
9 to tribal court, denial[s] of transfer, court findings related to involuntary and voluntary
10 termination of parental rights, including good cause findings, qualified expert witness
11 testimony, whether active efforts were made prior to the termination/modification,
12 removals under ICWA, available ICWA foster care/pre-adoptive placement preferences,
13 adoption/guardianship placement preferences under ICWA, good cause and basis for
14 good cause under ICWA, and information on active efforts." See 84 Fed. Reg. at 16,577
15 (setting forth proposed revisions to 2016 Rule); see also 85 Fed. Reg. at 28,411 (stating
16 proposed revisions were promulgated without "substantive changes").

17 Plaintiffs argue HHS's removal from the 2016 Rule of the above-referenced ICWA-
18 related data elements was arbitrary and capricious because, according to plaintiffs,
19 HHS's decision to "disregard[]" the position it took in 2016 was "wholly unreasoned."
20 (See Pls.' Mot. at 27:20-21, 28:25-26). In particular, according to plaintiffs, HHS only
21 considered the burdens imposed by the 2016 Rule and not the benefits that would be
22 realized by said Rule. As set forth below, the Court disagrees.

23 Initially, the Court observes that the comments received in response to HHS's
24 proposal to remove some of the ICWA-related data elements basically fell within one or
25 the other of two groups. First, as HHS pointed out, of the thirty-eight states that offered
26 comments, thirty-six indicated support for removal of ICWA-related data elements, in light
27 of what those states projected would be hundreds and, in some instances, thousands of
28 extra hours of work it would take to answer all the ICWA-related data elements in the

2016 Rule, as well as those states' belief that such extra work "would pull valuable resources away from the field and decrease the amount of time caseworkers have to work with families and children." See 84 Fed. Reg. at 16,573; see also 85 Fed. Reg. at 28,412 (noting "the vast majority of state commentators . . . specified that a lower reporting burden will help their work with children and families by enabling caseworkers to spend less time on data entry").⁴ Second, as HHS also pointed out, Indian tribes, advocacy groups, and two states, as well as the majority of other entities and citizens who submitted comments, opposed elimination of any ICWA-related data elements, focusing on benefits they believed would be realized from requiring state agencies to answer all applicable ICWA-related data elements, which benefits included the potential "insight into state compliance with ICWA's requirements" and the potential acquisition of information addressing "concerns that there are children in state custody who are not identified as Indian children and thus are not protected under ICWA." See 84 Fed. Reg. at 16,573-74; see also 85 Fed. Reg. at 28,412 (noting "common reasons" given by those opposing revisions to 2016 Rule were that data would "help [HHS] track outcomes, address disparities, and address a perceived need for research and legislation").

Having considered the comments, HHS set forth its conclusion that "[t]he need for streamlining was convincingly argued through the states' detailed work and cost estimates" and that "the 2016 final rule has many data elements that can be streamlined while still providing critical information on the out-of-home care population from a national perspective." See 84 Fed. Reg. at 16,575. As HHS explained, the ICWA-related data elements it retained were the elements tribes had "identified as the most important pieces of information to be able to know the number of children nationally where ICWA applies and provide some national information on whether the state made inquiries and whether notification to the Indian child's tribe occurred." See id. at 16,577; see also id. (stating

⁴ The Court has considered the analysis HHS set forth in both the 2019 NPRM and the 2020 Rule. See id. at 28,412-13 (responding to commentors opposing 2019 proposal).

1 retained data elements were "essential for identifying the number of children in out-of-
2 home care nationally, who should be afforded the protections of ICWA").

3 As HHS further explained, the removed data elements "asked for detailed
4 information on ICWA, tied to DOI requirements and the ICWA statute, and court actions,"
5 see id., which information, it determined, in accordance with comments it received from
6 "[m]any states," was "too specific for a national data set and [was] better suited for a
7 qualitative review," see id. at 16,574-75; see also id. at 16,573 (noting "many new data
8 elements are qualitative and therefore more accurately evaluated by quality assurance
9 staff, through a case review or other monitoring efforts"). As one of several examples,
10 see id. at 16,578, HHS stated that, although, consistent with the 2016 Rule, it would
11 require state IV-E agencies to report whether the termination or modification of the
12 parental rights of an Indian child occurred on a voluntary or involuntary basis, it would not
13 require reporting of ICWA-required court findings as to "reasonable doubt on continued
14 custody, qualified expert witness testimony, and whether efforts to prevent the breakup of
15 an Indian family were unsuccessful," as those state court findings would be "specific to
16 each case and court action and thus need context to fully understand them," see id. The
17 above-described determination by HHS was consistent with its statutory mandate to
18 implement a "data collection system," i.e., AFCARS, that "avoid[s] unnecessary diversion
19 of resources from agencies responsible for adoption and foster care." See 42 U.S.C.
20 § 679(c)(1).

21 Further, HHS, after acknowledging comments by tribes and others as to benefits
22 that would be realized if all ICWA-related data elements in the 2016 Rule were retained,
23 see 84 Fed. Reg. at 16,574, balanced those potential benefits against the burdens that
24 had been identified by state title IV-E agencies. In so doing, HHS made a judgment call
25 that the claimed benefits from obtaining information about how state courts comply with
26 ICWA would be better realized through a process other than AFCARS, such as the Child
27 and Family Services Review process, see id. at 16,575, whereby HHS reviews, inter alia,
28 a state agency's implementation of the statutory requirement that it develop a "plan" that

"contain[s] a description . . . of the specific measures taken by the State to comply with [ICWA]," see 42 U.S.C. § 622(b)((9), 45 C.F.R. § 1355.34(b)(2)(ii)(E), and/or by the Court Improvement Program, see 84 Fed. Reg. at 16,578; 85 Fed. Reg. at 28,424, whereby HHS provides grants to state courts that sufficiently demonstrate, inter alia, they engage in "meaningful and ongoing collaboration [with] . . . Indian tribes," see 42 U.S.C. § 629h(b)(3).

Although a court may find the issuance of a rule arbitrary and capricious where the administrative agency "only [takes] into account the costs to the [regulated entities] and completely ignore[s] the benefits that would result from compliance," see California v United States Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017), the record in the instant case, as set forth above, shows HHS did not ignore the benefits identified in comments, but, rather, stated why it concluded those benefits, when weighed against the burdens identified, did not warrant retention of all ICWA-related data elements in AFCARS. Where, as here, an agency has balanced the potential burdens and benefits of a proposed rule, courts are "prohibited from second-guessing the agency's weighing of risks and benefits and penalizing it from departing from the inferences and assumptions of others." See California v. Azar, 950 F.3d 1067, 1096 (9th Cir. 2020) (internal quotation, alterations, and citation omitted).

Accordingly, to the extent plaintiffs' claim is based on HHS's removal of ICWA-related data elements, plaintiffs are not entitled to summary judgment and defendants are entitled to summary judgment.

2. Sexual Orientation Data Elements

When HHS provided public notice in 2015 that it intended to revise its existing AFCARS regulations, it did not take a position on "collecting data on LGBTQ youth," but sought public comment on whether to collect such information. See 80 Fed. Reg. at 7155. In the 2016 Rule it later issued, HHS stated it had "received comments both in favor and against title IV-E agencies collecting and reporting [sexual orientation] information to AFCARS," and, having considered those comments, found it appropriate to

add, as noted above, data elements "related to the sexual orientation of the child," the child's "foster parent(s)," and the child's "adoptive parent(s) or legal guardian(s)," as well as a data element indicating whether "there is family conflict related to the child's sexual orientation, gender identity, or gender expression as a [c]hild and family circumstance at removal reported when a child is removed from home." See 81 Fed. Reg. at 90,526.

In the 2020 Rule, as also noted, HHS, with the exception of the data element pertaining to whether a "circumstance at removal" was the child's sexual orientation, gender identity, or gender expression, eliminated the data elements pertaining to the sexual orientation of the child, the foster parents, and the adoptive parents/legal guardians. See 85 Fed. Reg. at 28,413.

In challenging the removal of the above-referenced data elements, plaintiffs first argue HHS is statutorily required to collect data on the sexual orientation of children, foster parents, and adoptive parents, i.e., that HHS's promulgation of a regulation that does not include those data elements is, under the APA, "not in accordance with law." See 5 U.S.C. § 706(2)(A) (providing courts shall "hold unlawful and set aside agency action . . . not in accordance with law"). In support of this argument, plaintiffs rely on § 679, the statute by which Congress directed HHS to develop a "data collection system," see 42 U.S.C. § 679(c), and which provides that said "data collection system . . . shall . . . provide comprehensive national information with respect to . . . the demographic characteristics of adoptive and foster children and their biological and adoptive or foster parents," see id. According to plaintiffs, sexual orientation, being a demographic characteristic, must be included as a data element in AFCARS. As set forth below, the Court disagrees.

First, neither the administrative record before the Court nor, as defendants point out, any dictionary, provides meaningful guidance as to the intent of Congress in using the word "demographic." Further, neither the requirement to which plaintiffs cite, nor any of the requirements among which it is listed, is unqualified. Rather, the statute prefaces those requirements with the admonition that HHS, in adopting the requisite data

1 collection system, "avoid unnecessary diversion of resources from agencies responsible
2 for adoption and foster care" and "assure that any data collected is reliable and
3 consistent over time and among jurisdictions through the use of uniform definitions and
4 methodologies." See id.

5 Second, "[w]here an agency's statutory construction has been fully brought to the
6 attention of the public and the Congress, and the latter has not sought to alter that
7 interpretation although it has amended the statute in other respects, then presumably the
8 legislative intent has been correctly discerned." See North Haven Board of Educ. v. Bell,
9 456 U.S. 512, 535 (1982) (internal quotation and citation omitted)). Here, in 1990, when
10 it first proposed AFCARS, HHS submitted a report to Congress and provided public
11 notice of its proposed rule, in which it stated its intent to collect "demographic information
12 on the child," defined as "sex, birth date, race, ethnicity, previous stays in foster care,
13 service goals, availability for adoption, duration of care, funding sources, and what
14 happens to the child after the period of foster care is concluded," see 55 Fed. Reg.
15 39,543, which proposed rule became the 1993 Rule. Thereafter, in 2014, more than
16 twenty years after AFCARS went into effect and Congress and the public were aware
17 that HHS was not collecting sexual orientation data, Congress amended § 679(c) to
18 require HHS to obtain through AFCARS "the annual number of children in foster care
19 who are identified as sex trafficking victims." See Pub. L. No. 113-183, 128 Stat. 1919.
20 In so doing, Congress did not otherwise amend § 679(c), thus "presumably" indicating
21 HHS had "correctly discerned" congressional intent that the collection of sexual
22 orientation data was not statutorily mandated. See North Haven Board of Educ., 456
23 U.S. at 535.

24 Although plaintiffs alternatively argue that, if collection of sexual orientation data is
25 not statutorily mandated, HHS's decision to remove sexual orientation data elements was
26 arbitrary and capricious, the Court again disagrees. In particular, plaintiffs' assertions
27 that HHS did not "consider whether eliminating [sexual orientation] data elements
28 detracted from the goals of the statutory scheme" (see Pls.' Mot. at 24:17-18), acted

1 "contrary to the evidence before [it]" (see id. at 24:26), "disregarded facts and
2 circumstances that underlay their prior policy" (see id. at 26:22), and "failed to respond
3 meaningfully to significant comments opposing the elimination of the sexual orientation
4 questions" (see id. at 27:5) are not, as set forth below, supported by the record.

5 First, HHS expressly considered whether retaining those data elements would
6 advance the goals of the statutory scheme, and found it would not. In that regard, HHS,
7 at the outset, identified comments, submitted by a number of states, that the sexual
8 orientation data would "not be reliable because the youth would self-report, which could
9 result in an undercount," see 84 Fed. Reg. at 16,574; it then, as discussed below in
10 greater detail, indicated it found those comments persuasive, see 85 Fed. Reg. at 28,419
11 (finding removed data elements would be "ineffective at providing a national picture of
12 children placed in out-of-home care"), and concluded removal of those data elements
13 "align[ed] with the statutory requirements in [§ 679(c)(2)] . . . to ensure that the data
14 collected is reliable," see id. at 28,411; 42 U.S.C. § 679(c)(2) (providing demographic
15 information collected by HHS must be "reliable"); City of Los Angeles v. Barr, 929 F.3d
16 1163, 1181 (9th Cir. 2019) (holding "agency need provide only a minimal level of analysis
17 to avoid its action being deemed arbitrary and capricious") (internal quotation and citation
18 omitted).

19 Second, the record does not support plaintiffs' argument that HHS's decision is
20 contrary to evidence in the administrative record, specifically, a report issued by the
21 Office of Management and Budget ("OMB") (see Administrative Record ("AR") 171-98),
22 which report HHS cited in support of its decision to eliminate sexual orientation data
23 elements from AFCARS, see 84 Fed. Reg. at 16,576, 85 Fed. Reg. at 28,413. Although
24 the report "describe[s] how the concepts of SOGI [Sexual Orientation and Gender
25 Identity] are currently measured in U.S. Federal surveys" (see AR 173) and contains a
26 chart listing SOGI questions that have been asked by various federal agencies in surveys
27 (see AR 176-85), including one similar to the removed data element, it does not, contrary
28 to plaintiffs' argument, endorse any such listed question, let alone, as defendants point

1 out, address its use in a survey that would not be anonymous. Rather, it announces
 2 therein a "forthcoming working paper [that] will describe what is known about the
 3 reliability and validity of the currently available measures." (See AR 192.) Indeed, HHS,
 4 in citing the report, points to OMB's recognition therein that "[t]eenagers may be in the
 5 midst of developing their sexual orientation, experiencing sexual attraction, and beginning
 6 to engage in sexual behavior, and therefore unsure of how to respond to SOGI
 7 questions" (see AR 188), that "[a]dolescents may use different terms for SOGI concepts
 8 than adults use" (see id.), that, due to "the use of the terms 'lesbian' and 'gay' as slurs,"
 9 teenagers may be "reluctant to identify themselves with those terms" (see id.), and that
 10 "the use of nonresponse categories ('Don't Know/Refused/Other/Something Else') may
 11 reduce the number of SOGI respondents who identify themselves as such, without
 12 yielding usable data" (see AR 189)⁵; see also 84 Fed. Reg. at 16,576. In light of those
 13 observations, HHS concluded it was "not feasible for [HHS] to test the validity or accuracy
 14 of adding questions related to sexual orientation across all title IV-E agencies," see id., a
 15 conclusion the Court finds is not arbitrary and capricious.


16 Third, HHS did not disregard without analysis the facts and circumstances that
 17 underlay the 2016 Rule. As set forth above, HHS explained that, in its view, the
 18 collection of the sexual orientation information could result in unreliable data, which
 19 finding is not contrary to any finding it made in connection with the 2016 Rule, as, in
 20 2016, it made no finding as to reliability. As an agency "must consider varying
 21 interpretations and the wisdom of its policy on a continuing basis," see National Cable &
 22 Telecommunications Ass'n v. Brand-X Internet Services, 545 U.S. 967, 981 (2005)
 23 (internal citation and quotation omitted), the Court finds HHS did not act arbitrarily and
 24 capriciously by considering, in 2020, a statutory requirement it did not address in 2016.

25
 26 ⁵ The sexual orientation question to be asked of minors in the 2016 Rule used four
 27 nonresponse categories, specifically, "Don't know," "something else," "decline," and "non
 28 applicable." (See 81 Fed. Reg. 90,524, Attachment A.) The sexual orientation questions
 to be asked of adults in the 2016 rule used three nonresponse categories, specifically,
 "Don't know," "something else," and "declined." (See id.)

Accordingly, to the extent plaintiffs' claim is based on HHS's removal of sexual orientation data elements, plaintiffs are not entitled to summary judgment and defendants are entitled to summary judgment.

For the reasons stated above:

- IT IS SO ORDERED.**


MAXINE M. CHESNEY
United States District Judge