

1 Elizabeth Callahan (California Bar No. 323510)
DLA PIPER LLP (US)
2 555 Mission Street, Suite 2400
San Francisco, California 94105-2933
3 elizabeth.callahan@dlapiper.com
Tel.: (415) 836-2500
4 Fax: (415) 836-2501

5 Peter Karanjia (*pro hac vice* application pending)
Paul Schmitt (D.C. Bar No. 1007680)
6 (on the brief)

7 Melissa Turcios (D.C. Bar No. 1030901)
(on the brief)

8 Ariel Diamond (D.C. Bar No. 1644801)
(on the brief)

9 DLA PIPER LLP (US)
800 5th Street, N.W.
10 Washington, D.C. 20010
peter.karanjia@dlapiper.com
11 Tel.: (202) 799-4135
12 Fax: (202) 863-7855

13 *Attorneys for Amici Curiae Members of Congress*

14 **UNITED STATES DISTRICT COURT**
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
16 **SAN FRANCISCO DIVISION**

17 CALIFORNIA TRIBAL FAMILIES
18 COALITION, et al.,

19 Plaintiffs,

20 v.

21 ALEX AZAR, in his official capacity as
Secretary of Health and Human Services, et al.,

22 Defendants.
23

) CASE NO.: 3:20-CV-06018
)
) **BRIEF OF AMICI CURIAE MEMBERS**
) **OF CONGRESS IN SUPPORT OF**
) **PLAINTIFFS' MOTION FOR**
) **SUMMARY JUDGMENT**

)
) Hearing Not Yet Scheduled
) Judge: Hon. Maxine M. Chesney

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IDENTIFICATION AND INTEREST OF *AMICI CURIAE*..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 4

 I. HHS’s Rescission of the 2016 Data Collection Requirements Rests on an
 Unreasonable and Irrational Application of the Statute..... 4

 A. The Social Security Act Requires HHS to Collect Comprehensive
 Information Regarding Demographic and Other Characteristics of
 Adoptive and Foster Children. 4

 B. HHS’s Arguments in Support of Rescission Fail. 8

 II. HHS’s Rescission of the 2016 Final Rule Will Deprive Congress of
 Crucial Information to Inform its Legislative Efforts..... 10

CONCLUSION..... 13

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. Weinberger,
521 F.2d 656 (2d Cir. 1975)5

City of Oakland v. Wells Fargo & Co.,
972 F.3d 1112 (9th Cir. 2020)6

Lamie v. U.S.,
540 U.S. 526 (2004)6

Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983)8. 9

Schroeder v. United States,
793 F.3d 1080 (9th Cir. 2015)5

Stephens v. U.S. R.R. Ret. Bd.,
704 F.3d 587 (9th Cir. 2012)5

United States v. Ahlers,
305 F.3d 54 (1st Cir. 2002).....5

United States v. Article of Drug, Bacto-Unidisk,
394 U.S. 784 (1969)6

Statutes

25 U.S.C. § 1901.....2

42 U.S.C. § 622(b)(9)3, 9

42 U.S.C. § 679.....1

42 U.S.C. § 679(c)(3)..... *Passim*

42 U.S.C. § 679(c)(3)(A)-(C)2

42 U.S.C. § 679(c)(3)(A)-(E).....5

42 U.S.C. § 679(c)(3)(B)9

42 U.S.C. § 679(c)(3)(D)9

42 U.S.C. §§ 621, 624, 670, 674.....13

44 U.S.C. § 3516.....9

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Consolidated Appropriations Act
P.L. 116-260.....10

Regulations

Adoption and Foster Care Analysis and Reporting System,
80 Fed. Reg. 17,713 (April 2, 2015).....10

Adoption and Foster Care Analysis and Reporting System,
81 Fed. Reg. 20,283 (April 7, 2016).....11

Adoption and Foster Care Analysis and Reporting System,
81 Fed. Reg. 90,524 (Dec. 14, 2016).....12

Adoption and Foster Care Analysis and Reporting System,
85 Fed. Reg. 28,410 (May 12, 2020).....2, 8, 9

Exec. Order No. 13777, Enforcing the Regulatory Reform Agenda, 82 Fed. Reg. 12,285 (Feb.
24, 2017).....8

Other Authorities

142 Cong. Rec. H8829-0210

1986 U.S.C.C.A.N. 386810

H.R. Rep. 104-72510

H.R. Rep. No. 99-101210

H.R. Rep. No. 99-5207

Congressional Research Service, Child Welfare: Purposes, Federal Programs, and Funding (Jan.
11, 2021)10

Tanya A. Cooper, Racial Bias in American Foster Care: The National Debate, 97(2) Marq. L.
Rev. 215 (2013)12

Laura Baams, PhD, Bianca D.M. Wilson, PhD & Stephen T. Russell, PhD, LGBTQ Youth in
Unstable Housing and Foster Care, 143(3) Pediatrics e20174211 (Mar. 2019).....12

M. Martin, L. Down and R. Erney, Out of the Shadows: Supporting LGBTQ Youth in Child
Welfare through Cross-System Collaboration at 8-9, Center of the Study of Social Policy (May
2016)12

1 (“HHS”).¹ In that rule (the “2020 Final Rule”²), HHS jettisoned a 2016 rule (the “2016 Final
2 Rule”) that required child welfare agencies to report (i) data concerning the sexual orientation of
3 foster youth aged 14 and older, as well as legal guardians, foster parents, and adoptive parents; and
4 (ii) data showing how state child welfare agencies have implemented the requirements of the
5 Indian Child Welfare Act (“ICWA”), 25 U.S.C. § 1901 *et seq.*

6 As Plaintiffs persuasively explain, HHS’s rescission of the 2016 Final Rule rests on an
7 unreasonable and irrational application of the Social Security Act that undermines Congress’s
8 intent. In a key provision enacted in 1986, the Act requires HHS to develop a data collection
9 system that provides “*comprehensive* national information with respect to ... the *demographic*
10 *characteristics* of adoptive and foster children and their biological and adoptive or foster parents,”
11 “the status of the foster care population,” and “the number and *characteristics of*” children in (and
12 removed from) foster care. 42 U.S.C. § 679(c)(3)(A)-(C) (emphasis added.). This data collection,
13 known as the Adoption and Foster Care Analysis and Reporting System (“AFCARS”), is the only
14 source of national data on the almost 500,000 children in foster care or adopted through a state
15 agency. It is used to inform policy and direct resources at both the federal and state levels and to
16 ensure that the more than \$10 billion of annual taxpayer funding that supports state child welfare
17 systems is spent effectively.

18 Properly understood—consistent with Congress’s overarching purpose and the broad
19 language it used—Section 679(c)(3) required HHS to retain the data collection requirements of the
20 2016 Final Rule. Both types of data are crucial: (i) the sexual orientation data for (a) identifying
21 and addressing the drivers contributing to the over-representation of LGBTQ+ youth in the foster
22 care population and their disproportionately negative experiences while in care and (b) recruiting
23 and retaining potential foster and adoptive parents who are supportive of LGBTQ+ youth; and (ii)

24 _____
25 ¹ Unless otherwise specified, we use “HHS” in this brief to refer to both the U.S. Department of
26 Health and Human Services and its division for the Administration for Children and Families
27 (“ACF”).

28 ² Adoption and Foster Care Analysis and Reporting System, 85 Fed. Reg. 28,410, 28,411 (May
12, 2020).

1 the Native American data for (a) facilitating tribes’ efforts to vindicate their and their children’s
2 rights and (b) supporting state child welfare agencies in implementing the ICWA. Absent this
3 data, AFCARS would fail to serve its intended purpose of establishing a truly “comprehensive”
4 and national data collection, as Congress directed.

5 In attempting to justify its rescission of the 2016 Final Rule, HHS further abused its
6 discretion by (1) relying on a wholly inapposite Executive Order from 2017, and (2) resting on the
7 mistaken assumption that HHS has no statutory authority to collect the comprehensive
8 demographic data from States. To the contrary, 42 U.S.C. § 622(b)(9) explicitly requires States to
9 report on “the specific measures taken by the State to comply with the Indian Child Welfare Act.”

10 The comprehensive data collection that HHS had required in 2016 but abandoned in 2020
11 provides Congress (among others) with an essential tool to inform policymaking that promotes the
12 stability of foster youth placements. This is especially so because research shows that LGBTQ+
13 and Native American youth experience disproportionately high rates of instability (for instance,
14 frequently cycling through multiple foster families) and discrimination in foster care. The data
15 also helps Congress oversee the efficacy of foster care programs; identify the most pressing
16 problems regarding not only child welfare but also other inequities of which foster placements are
17 often a lagging indicator; direct resources more effectively, including the \$10 billion spent
18 annually to support state welfare programs; understand how the intersection of issues like sexual
19 orientation and race affects experiences and outcomes to inform broader policymaking efforts; and
20 work to ameliorate many of the problems that drive youth into homelessness, involvement with
21 the juvenile justice system, sexual exploitation, and other traumatic experiences.

22 By rescinding key data collection elements concerning LGBTQ+ and American
23 Indian/Alaska Native youth, the 2020 Final Rule will thus deprive Congress of crucial information
24 to inform its legislative, budgetary, and agency oversight efforts—in particular, efforts to
25 comprehensively support state implementation of the ICWA—and address the discrimination and
26 other systemic inequities suffered by these vulnerable populations. Reinstatement of the genuinely
27 “comprehensive” data collection required by the 2016 Final Rule is essential to help Congress
28

1 (among other policymaking bodies and stakeholders) identify the most pressing challenges facing
2 youth and families, direct resources more effectively, and reduce negative outcomes for youth.

3 ARGUMENT

4 **I. HHS’s Rescission of the 2016 Data Collection Requirements Rests on an 5 Unreasonable and Irrational Application of the Statute.**

6 HHS’s rescission of the 2016 data collection requirements pertaining to LGBTQ+ and
7 American Indian/Alaska Native foster youth rests on an unreasonable and irrational application of
8 the Social Security Act. This statutory interpretation is at odds with Congress’s intent when it
9 passed the provision now codified at 42 U.S.C. § 679(c)(3)—as evidenced by both the plain
10 statutory text and contemporaneous statements from a bipartisan group of members of Congress
11 during relevant congressional debates. As the statutory language and the legislative record make
12 clear, Congress understood that collecting “comprehensive” data, including a wide range of
13 demographic characteristics of foster youth, is essential to promote the stability of foster youth
14 placements. HHS’s reliance on a wholly inapposite Executive Order and its mistaken belief that
15 it lacks the statutory authority to collect this data from state agencies fail to salvage the agency’s
16 flawed and arbitrary application of the statute.

17 **A. The Social Security Act Requires HHS to Collect Comprehensive Information 18 Regarding Demographic and Other Characteristics of Adoptive and Foster 19 Children.**

20 HHS’s rescission of the 2016 Final Rule runs counter to Congress’s clear intent, as
21 expressed in the broad language of the Social Security Act. Framed in sweeping terms, the Act
22 (as amended in 1986 to add the provision quoted below) directs HHS to develop a data collection
23 system to “provide comprehensive national information” concerning adoption and foster care,
24 including the types of information required by the 2016 Final Rule that HHS rescinded in 2020:

- 24 (A) the *demographic characteristics* of adoptive and foster children and their
25 biological and adoptive or foster parents,
- 26 (B) the *status of* the foster care population (including the number of children in
27 foster care, length of placement, type of placement, availability for adoption, and
28 goals for ending or continuing foster care),
- (C) the number and *characteristics of* (i) children placed in or removed from foster

1 care, (ii) children adopted or with respect to whom adoptions have been terminated,
2 and (iii) children placed in foster care outside the State which has placement and
3 care responsibility,

4 (D) the extent and nature of assistance provided by Federal, State, and local
5 adoption and foster care programs and the *characteristics* of the children with
6 respect to whom such assistance is provided; and

7 (E) the annual number of children in foster care who are identified as sex trafficking
8 victims (i) who were such victims before entering foster care; and who were such
9 victims while in foster care . . .

10 42 U.S.C. § 679(c)(3)(A)-(E) (emphasis added). Congress thereby envisioned that the data
11 collection system (now known as “AFCARS”) would cast a wide net, covering various
12 “demographic characteristics of adoptive and foster children and their biological and adoptive or
13 foster parents,” “the status of the foster care population,” and “the number and characteristics of”
14 “children placed in [and] removed from foster care.” Notably, unlike other statutory schemes, this
15 statute makes no attempt to limit the types of demographic data or characteristics called for. For
16 example, Congress could have expressed its interest in only specifically enumerated, narrow
17 categories (such as age or place of birth). It did not do so, instead using broad and generic terms
18 (“demographic characteristics,” “status of,” and “characteristics of”) to indicate Congress’s intent
19 to obtain a rich data collection comprising numerous elements. *See e.g., United States v. Ahlers*,
20 305 F.3d 54, 59–60 (1st Cir. 2002) (“[W]hen Congress uses certain words in one part of a statute,
21 but omits them in another,” we “presume that this differential draftsmanship was deliberate”).
22 This, moreover, is confirmed by Section 679(c)(3)’s explicit mandate for “comprehensive”
23 national information,³ and the Ninth Circuit’s instruction that “[t]he Social Security Act ‘is
24 remedial and its humanitarian aims *necessitate that it be construed broadly and applied liberally.*’”
25 *Stephens v. U.S. R.R. Ret. Bd.*, 704 F.3d 587, 591 (9th Cir. 2012) (quoting *Adams v. Weinberger*,
26 521 F.2d 656, 659 (2d Cir. 1975)) (emphasis added).

27 ³ The Merriam-Webster Dictionary defines the word “comprehensive” as “covering completely or
28 broadly; inclusive.” Merriam Webster online, <https://www.merriam-webster.com/dictionary/comprehensive>.

1 Although the statutory language is sufficiently clear to manifest Congress’s intent,⁴ the
2 broad scope of the data collection requirement envisioned by Congress is only further underscored
3 by the legislative history leading up to the passage of the 1986 statutory amendments that added
4 Section 679(c)(3) to the Act. *See, e.g., City of Oakland v. Wells Fargo & Co.*, 972 F.3d 1112,
5 1125 (9th Cir. 2020) (“Even though the text of the statute is sufficient to establish [Congress’s
6 intent] to be very broad, we also look at the FHA’s legislative history to discern what Congress
7 intended the statute’s remedial aims to be.”); *United States v. Article of Drug, Bacto-Unidisk*, 394
8 U.S. 784, 798 (1969) (holding there were “[s]trong indications from legislative history that
9 Congress intended” that the Food, Drug and Cosmetic Act be read to allow a broad definition of
10 “drugs”).

11 For example, on June 25 and July 10, 1985, the U.S. Senate Committee on Labor and
12 Human Resources held hearings on barriers to adoption in the United States. At the outset of the
13 June 25 hearing, Senator Orrin Hatch (then the Chairman of the Committee) noted that certain
14 children, including those from minority groups, encountered heightened problems in the foster
15 care system,⁵ including “barriers . . . which prevent these children from being adopted into
16 families.”⁶ Among those problems, Senator Hatch identified “the lack of reliable data on the
17 characteristics and numbers of children in foster care.”⁷ During the same hearing, Senator Paul
18 Simon agreed, emphasizing that “[a]s we consider the barriers, such as inadequate data to identify
19 the children who are available for adoption, . . . we ought to consider each individual child’s needs
20

21 ⁴ *See, e.g., Schroeder v. United States*, 793 F.3d 1080, 1082–83 (9th Cir. 2015) (“It is well
22 established that the ‘starting point in discerning congressional intent is the existing statutory text’
23 and ‘when the statute’s language is plain, the sole function of the courts—at least where the
disposition required by the text is not absurd—is to enforce it according to its terms.’”) (quoting
Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004)).

24 ⁵ S. Hrg. 99-288, Barriers to Adoption, Hearings Before the Committee on Labor and Human
25 Resources, U.S. Senate, 99th Congress, First Session on Examination of the Barriers to Special
26 Needs Adoption, Focusing on the Policies of Public and Private Welfare Departments, June 25,
1985, at 2.

27 ⁶ *Id.*

28 ⁷ *Id.*

1 when placing him or her.”⁸ Thus, in enacting the 1986 amendments to the Act that included the
2 data collection requirement now codified in Section 679(c)(3), Congress squarely focused on
3 improving data collection concerning the characteristics of children in foster care and waiting to
4 be adopted in order to improve the outcomes for these children.

5 The final Senate Report on the 1986 amendments also reflected these concerns “pertaining
6 to the incidence and characteristics of foster care and adoptions in this country.”⁹ The report noted
7 that “[a]t the present time, the major source of such data is a voluntary system operated by a non-
8 governmental entity” which “lacks authority to establish or enforce reporting standards which
9 would assure completeness and uniformity of data.”¹⁰ Consequently, the report indicated, an
10 amendment to the Act would require HHS “to create an advisory committee to identify the national
11 needs for data relating to adoption and foster care and to evaluate alternative ways of collecting
12 such data *on a comprehensive basis.*” (Emphasis added).¹¹

13 Furthermore, HHS’s own initial interpretation of the Act confirms Congress’s broad intent
14 for the data collection. Specifically, in preparing a 1989 report pursuant to Section 679(c)(3),¹²
15 HHS noted its intent to “encompass the population of *all* children,”¹³ and made clear that the
16 requisite data for each child in foster care should include “demographic information (e.g., date of
17 birth, sex, race, ethnicity, nationality).”¹⁴ By using “e.g.,” HHS understood this to be a non-
18 exhaustive list of various different characteristics. HHS added that “racial/ethnic categories would
19 be consistent with those reported in the U.S. Census, with special provisions to identify Indian
20

21 _____
22 ⁸ *Id.* at 4.

23 ⁹ Senate Report 99-520, Medicare and Medicaid Patient and Program Protection Act of 1986, 99th
Congress, Oct. 2, 1986, at 51.

24 ¹⁰ *Id.*

25 ¹¹ *Id.*

26 ¹² Adoption and Foster Care Data Collection, Report of the Secretary Department of Health and
Human Services to the Congress of the United States, U.S. Department of Health and Human
Services (May 26, 1989) (“HHS 1989 Report”).

27 ¹³ *Id.* at 11 (emphasis added).

28 ¹⁴ *Id.* at 2.

1 children, consistent with the Indian Child Welfare Act of 1978.”¹⁵ And it placed this broad
 2 understanding of the demographics covered in the context of the overriding goal of AFCARS:
 3 “The intent of the data collection system is to make information on adoption and foster care
 4 available for Federal policy purposes.”¹⁶

5 Given Section 679(c)(3)’s expansive language and the legislative and agency history
 6 confirming Congress’s intent to create a comprehensive data collection that will enhance the
 7 stability of disadvantaged youth in foster care, at a minimum, it was incumbent on HHS in 2020
 8 to cogently explain why it should *not* interpret the statutorily required “demographics” and
 9 “characteristics” of foster youth to include information about their LGBTQ+ and American
 10 Indian/Alaska Native status. HHS, however, failed to do so, instead relying heavily on cost-saving
 11 arguments focused on perceived reporting burdens (which the agency in any event overstated)
 12 rather than HHS’s obligation to comply with its statutory mandate. HHS’s rescission of the 2016
 13 Final Rule (which appropriately required the inclusion of such demographic information) was
 14 therefore arbitrary and capricious. *See, e.g., Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm*
 15 *Mut. Auto. Ins. Co.*, 463 U.S. 29, 34 (1983) (agency’s rescinding of rule requiring passive restraints
 16 in automobiles was arbitrary and capricious for failure to provide a reasoned explanation justifying
 17 revocation).

18 **B. HHS’s Arguments in Support of Rescission Fail.**

19 The agency’s other rationales for jettisoning the 2016 Final Rule fare no better. First, HHS
 20 justified its rescission by pointing to President Trump’s Executive Order No. 13777.¹⁷ *See* 85 Fed.
 21 Reg. 28,410 (May 12, 2020) (final rule). But that Executive Order is wholly inapposite. By its
 22 express terms, the Executive Order directs agencies to identify regulations that (i) eliminate jobs,
 23 or inhibit job creation; (ii) are outdated, unnecessary, or ineffective; (iii) impose costs that exceed
 24

25 _____
 26 ¹⁵ *Id.*

27 ¹⁶ *Id.* at 14.

28 ¹⁷ Exec. Order No. 13777, Enforcing the Regulatory Reform Agenda, 82 Fed. Reg. 12,285 (Feb. 24, 2017).

1 benefits; (iv) create a serious inconsistency or otherwise interfere with regulatory reform initiatives
2 and policies; (v) are inconsistent with the requirements of section 515 of the Treasury and General
3 Government Appropriations Act, 2001 (44 U.S.C. § 3516); or (vi) derive from or implement
4 Executive Orders or other Presidential directives that have been subsequently rescinded or
5 substantially modified. None of these criteria apply to the 2016 Final Rule, nor has HHS offered
6 any meaningful explanation of how they do. Importantly, the agency cannot resort to the “catchall”
7 cost/benefit analysis contemplated by the third factor, because it has offered no accounting of
8 either the costs or the benefits of the 2016 Final Rule. Under these circumstances, HHS’s
9 perfunctory assertion that it does not “have a sufficient justification, or a rational basis, for
10 retaining the data elements proposed for removal” cannot pass muster. 85 Fed. Reg. at 28,411.
11 HHS has it backwards. Having (rationally) adopted comprehensive data collection rules in 2016,
12 as Congress intended, HHS was required to rationally explain why its 2020 rescission of that rule
13 is necessary and consistent with the governing statute. *See, e.g., State Farm Mut. Auto. Ins. Co.*,
14 463 U.S. at 34.

15 HHS’s disavowal of its own statutory authority also misses the mark. *See* 85 Fed. Reg. at
16 28,412. The statute unequivocally requires states, in order to be eligible for payments, to “have a
17 plan for child welfare services which has been developed jointly *by the Secretary* and the
18 [designated] State agency” and “contain[s] a description, developed after consultation with tribal
19 organizations . . . in the State, of the specific measures taken by the State to comply with the Indian
20 Child Welfare Act.” 42 U.S.C. § 622(a); *see also id.* § 622(b)(9). Moreover, the Social Security
21 Act requires HHS to collect data on both “the status of the foster care population” and “the extent
22 and nature of assistance provided by Federal, State, and local adoption and foster care programs
23 and the characteristics of the children with respect to whom such assistance is provided.”
24 42 U.S.C. § 679(c)(3)(B); *see also id.* § 679(c)(3)(D). Indeed, only five years earlier, HHS
25 acknowledged that it had this statutory authority only to inexplicably disavow that authority in
26
27
28

1 2020.¹⁸

2 **II. HHS’s Rescission of the 2016 Final Rule Will Deprive Congress of Crucial**
 3 **Information to Inform its Legislative Efforts.**

4 The AFCARS data collection is an invaluable tool not just for federal and state agencies
 5 tasked with assisting the foster care system, but also for Congress. If HHS’s arbitrary rescission
 6 of the 2016 Final Rule is allowed to stand, Congress (including *amici*) will be deprived of this
 7 critical tool for its legislative reform efforts and input into federal and state policymaking.

8 Since the landmark Social Security Act of 1935 authorized the first federal grants for child
 9 welfare services, Congress has played a vital role in safeguarding the interests of children and
 10 young people placed in foster care. Indeed, of the approximately \$30 billion that state agencies
 11 spent on child welfare in 2016, nearly 40% of those funds were supplied by federal programs. *See*
 12 Congressional Research Service, Child Welfare: Purposes, Federal Programs, and Funding (Jan.
 13 11, 2021), *available at* [https://www.everycrsreport.com/files/2021-01-](https://www.everycrsreport.com/files/2021-01-11_IF10590_f9fc2b5b272820a0a2ae9051b5758e724a7f4361.pdf)
 14 [11_IF10590_f9fc2b5b272820a0a2ae9051b5758e724a7f4361.pdf](https://www.everycrsreport.com/files/2021-01-11_IF10590_f9fc2b5b272820a0a2ae9051b5758e724a7f4361.pdf) (“2021 CRS Report”). For
 15 Fiscal Year 2021, Congress provided at least \$11.6 billion in support for programs dedicated solely
 16 to child welfare purposes via the Consolidated Appropriations Act, 2021 (P.L. 116-260), including
 17 regular annual funding and supplemental COVID-19-related funding.

18 In requiring broad and detailed data collections, Congress “intended [AFCARS] to yield
 19 information that will enable policymakers to ‘track’ children in care and find out the reasons why
 20 children enter foster care, how long children stay in foster care, and what happens to children while
 21 in foster care as well as after they leave foster care.” 142 Cong. Rec. H8829-02, H.R. Rep. 104-
 22 725; *see also* H.R. Rep. No. 99-1012 at 419 (1986), as reprinted in 1986 U.S.C.C.A.N. 3868, 4064
 23 (reflecting congressional purpose to “disseminate . . . research and data [on issues concerning

24 _____
 25 ¹⁸ Compare Adoption and Foster Care Analysis and Reporting System, 80 Fed. Reg. 17,713 (April
 26 2, 2015) (“[W]e have determined that there is authority under the statute (section 479(c) of the
 27 Act) to collect ICWA-related data in AFCARS.”) with Adoption and Foster Care Analysis and
 28 Reporting System, 85 Fed. Reg. 28,410, 28,412 (May 12, 2020) (“[S]ection 422(b)(9) of the Act
 does not provide the legal authority for HHS to collect ICWA-related data in AFCARS.”).

1 adoption and foster care] as it becomes available to all those who voluntarily seek this
2 information”); *see also* HHS 1989 Report at 14 (“The intent of the data collection system is to
3 make information on adoption and foster care available for Federal policy purposes.”).

4 As a result, Congress and other policymakers rely on AFCARS data “to inform the Child
5 and Family Service Review process.” 108 H. Hrg. 92984 (Jan. 28, 2004) (108th Cong., 2nd Sess.).
6 AFCARS is thus one of the “principal mechanisms for Federal oversight” of the child welfare
7 system, “providing a national picture of child maltreatment and foster care.” *Id.*¹⁹ Moreover,
8 Congress utilizes AFCARS data to assess compliance with the ICWA, which establishes robust
9 family, cultural, and tribal protections for Native American children placed into the foster care
10 system. Before Congress required a national and comprehensive data collection in AFCARS,
11 state-reported data was woefully incomplete and relied on a hodgepodge of inconsistent
12 methodologies, definitions, and assumptions—thereby diminishing the value of the available data
13 and hindering informed policymaking. Complete and comprehensive AFCARS data is thus an
14 essential part of Congress’s oversight role over ACF and the many state and local child welfare
15 programs across the nation that receive federal funding.

16 Indeed, HHS has previously acknowledged the value of this critical data set. As the agency
17 explained in its preamble to the 2016 Final Rule, it used AFCARS data for many complementary
18 purposes, including:

- 19 • Draw[ing] national statistics and trends about the foster care and adoption populations for
20 assessing the current state of foster care and adoption.
- 21 • Complet[ing] the annual Child Welfare Outcomes Report to Congress (section 479A of the
22 Act).
- 23 • Develop[ing HHS] budgets. . . .
- 24 • Develop[ing] appropriate national policies with respect to adoption and foster care; and

25 ¹⁹ Opening Statement of Sen. Ron Wyden, 115 S. Hrg. 587 at 3-4 (Mar. 20, 2018) (115th Cong.,
26 2nd Sess.), <https://www.finance.senate.gov/imo/media/doc/36115.pdf> (“In order to evaluate
27 whether our foster care programs are succeeding at protecting vulnerable kids and giving them a
28 chance to get ahead, the Federal Government needs key information from the States, because they
run the individual programs.”)

- 1 • Address[ing] the unique needs of Indian children as defined by ICWA in foster care or who
2 exit to adoption, and their families.²⁰

3 Unless the 2020 Final Rule is overturned, Congress will also be deprived of critical
4 “comprehensive” data to inform its future legislative efforts and direct resources to help place
5 young people (including LGBTQ+ and American Indian/Alaska Native populations) in stable and
6 caring foster environments. As HHS itself recognized in justifying the 2016 Final Rule, “more
7 comprehensive information” would “inform national policies with respect to adoption,
8 guardianship, and foster care,” particularly as to vulnerable groups, such as LGBTQ+ and
9 American Indian/Alaska Native youth. *Id.* at 90,525. For example, child welfare data can assist
10 with identifying the factors leading to the overrepresentation of these demographics within the
11 foster care system, disparate treatment, and more negative outcomes, including sex trafficking,
12 abuse and neglect, placement instability, homelessness, juvenile-justice involvement, psychiatric
13 hospitalization, and housing in group homes rather than family environments.²¹ AFCARS data
14 helps Congress engage in policymaking that is not only better informed, but more equitable. In
15 particular, Congress can use this robust, comprehensive national dataset to better understand and
16 situate the real-world experiences of their LGBTQ+ and American Indian/Alaska Native youth
17 constituents within larger social and policy developments.

18 Finally, Congress has a responsibility to ensure that the more than \$11 billion in funds
19

20 ²⁰ Adoption and Foster Care Analysis and Reporting System, 81 Fed. Reg. 90,524, 90,525 (Dec.
21 14, 2016); *see also* Adoption and Foster Care Analysis and Reporting System, 81 Fed. Reg. 20,283,
22 20,284 (April 7, 2016) (“ACF proposes to collect ICWA-related data on AI/AN children in child
23 welfare systems . . . to develop future national policies concerning ACF programs that affect Indian
24 children under the Act, and to meet federal trust obligations under established federal policies.”).

25 ²¹ *See, e.g.*, Tanya A. Cooper, *Racial Bias in American Foster Care: The National Debate*, 97(2)
26 Marq. L. Rev. 215 (2013), <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=5190&context=mulr>; Laura Baams, PhD, Bianca D.M. Wilson, PhD & Stephen T. Russell, PhD,
27 *LGBTQ Youth in Unstable Housing and Foster Care*, 143(3) *Pediatrics* e20174211 (Mar. 2019),
28 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6398424/>; Megan Martin, Leann Down and Rosalynd Erney, *Out of the Shadows: Supporting LGBTQ Youth in Child Welfare through Cross-System Collaboration* at 8-9, Center of the Study of Social Policy (May 2016), <https://cssp.org/wp-content/uploads/2018/08/Out-of-the-Shadows-Supporting-LGBTQ-youth-in-child-welfare-through-cross-system-collaboration-web.pdf>.

1 supporting child welfare programs is allocated appropriately. *See* 2021 CRS Report. Currently,
2 the principal means through which Congress allocates this money are (i) title IV–E of the Social
3 Security Act, which partially reimburses states for providing foster care, adoption assistance, and
4 guardianship assistance, and (ii) title IV–B, which provides grants to states and tribes for child
5 welfare services that protect children from abuse or neglect, preserve and reunite families, and
6 promote and support adoption. *See* 42 U.S.C. §§ 621, 624, 670, 674. Data related to child welfare
7 is critical for raising awareness and building bipartisan support and agreement on relevant funding
8 priorities.

9 ***

10 The statutory text, context, and legislative history discussed above demonstrate that
11 Congress did not enact AFCARS to serve as a mere bureaucratic mechanism with little real-world
12 utility. Quite to the contrary, Congress created AFCARS to serve as a critical tool for policymakers
13 and stakeholders in the foster care system. It is an extremely valuable input for forward-thinking,
14 data-driven policymaking—and a guiding force in identifying funding priorities. The data
15 collections that HHS abruptly eliminated last year are critical to improving outcomes for LGBTQ+
16 and American Indian/Alaska Native youth both within and beyond the U.S. foster care system.
17 Unless the 2016 Final Rule is reinstated, Congress (in addition to child welfare agencies, tribes,
18 and organizations serving foster youth) will lack a full and accurate picture of marginalized
19 populations in the system, paving the way for underinformed and ideologically-driven
20 policymaking, inadequate oversight, unchecked discrimination, and unaddressed inequities in
21 safety, health, and long-term outcomes for foster youth.

22 CONCLUSION

23 This Court should grant Plaintiffs’ motion for summary judgment and further grant
24 Plaintiffs’ request for declaratory and injunctive relief by declaring unlawful and setting aside the
25 2020 Final Rule on the ground that it violates the Administrative Procedure Act.

1 DATED: May 19, 2021

Respectfully submitted,

2 DLA PIPER LLP (US)

3 By: /s/ Peter Karanjia

4
5 Peter Karanjia (D.C. Bar No. 1016633)
(*pro hac vice* application pending)

6 Paul Schmitt (D.C. Bar No. 1007680)
(*on the brief*)

7 Melissa Turcios (D.C. Bar No. 1030901)
(*on the brief*)

8 Ariel Diamond (D.C. Bar No. 1644801)
(*on the brief*)

9 DLA PIPER LLP (US)
10 500 Eighth Street, N.W.
11 Washington, D.C. 20010
12 peter.karanjia@dlapiper.com
13 Tel.: (202) 799-4135
14 Fax: (202) 863-7855

15 Elizabeth Callahan (Calif. Bar No. 323510)
16 DLA PIPER LLP (US)
17 555 Mission Street, Suite 2400
18 San Francisco, California 94105-2933
19 elizabeth.callahan@dlapiper.com
20 Tel.: (415) 836-2500
21 Fax: (415) 836-2501

22 *Attorneys for Amici Curiae Members of*
23 *Congress*

APPENDIX A

List of *Amici Curiae* Members of Congress

Senate

- Senator Ron Wyden, Chairman of the Senate Finance Committee, senior member of the Senate Energy and Natural Resources Committee, in addition to other roles;
- Senator Sherrod Brown, Chairman of Banking, Housing and Urban Affairs Committee, Chairman of the Social Security, Pensions, and Family Policy Subcommittee of the Finance Committee, in addition to other roles;
- Senator Tammy Duckworth, member of the Senate Armed Services Committee and Environmental and Public Works Committee, in addition to other roles;
- Senator Elizabeth Warren, member of the Senate Finance Committee and Committee on Banking, Housing & Urban Affairs, in addition to other roles; and
- Senator Sheldon Whitehouse, member of the Senate Finance Committee and Judiciary Committee, in addition to other roles.

House of Representatives

- Representative Karen Bass, Founding Member of the Congressional Caucus on Foster Youth, Member of the Congressional LGBTQ+ Equality Caucus;
- Representative Earl Blumenauer, Member of the Congressional Caucus Coalition on Adoption, Member of the Congressional Caucus on Human Rights;
- Representative Salud Carbajal, Member of the Congressional LGBT Equality Caucus;
- Representative Ed Case, Member of the Subcommittee for Indigenous Peoples of the United States on the House Natural Resources Committee;
- Representative Sean Casten, Member of the Congressional LGBTQ+ Equality Caucus;
- Representative Judy Chu, Vice Chair of the Congressional LGBTQ+ Equality Caucus, Member of the Congressional Caucus on Foster Youth;
- Representative David Cicilline, Co-Chair of the Congressional LGBTQ+ Equality Caucus, Member of the Congressional Caucus on Foster Youth;
- Representative Sharice Davids, Co-Chair of the Congressional LGBTQ+ Equality Caucus;

- 1 • Representative Danny K. Davis, Chairman of the Subcommittee for Worker and Family
2 Support on the House Ways and Means Committee;
- 3 • Representative Lloyd Doggett, Member of the House Budget Committee;
- 4 • Representative Ruben Gallego, Chairman of Subcommittee for Indigenous Peoples of the
5 United States on the House Natural Resources Committee, Vice Chair of the Congressional
6 LGBTQ+ Equality Caucus;
- 7 • Representative Raúl Grijalva, Member of the Congressional LGBTQ+ Equality Caucus;
- 8 • Representative Jahana Hayes, Member of the Congressional LGBTQ+ Equality Caucus;
- 9 • Representative Mondaire Jones, Co-Chair of the Congressional LGBTQ+ Equality Caucus;
- 10 • Representative Rho Khanna, Member of the House Oversight and Reform Committee;
- 11 • Representative Dan Kildee, Member of the Congressional Caucus on Foster Youth, Member
12 of the Congressional LGBTQ+ Equality Caucus;
- 13 • Representative, Brenda Lawrence, Co-Chair of the Congressional Caucus on Foster Youth;
- 14 • Representative Mark Pocan, Co-Chair of the Congressional LGBT+ Equality Caucus;
- 15 • Representative Alan Lowenthal, Vice Chair of the Congressional LGBTQ+ Equality
16 Caucus, Member of the Congressional Caucus on Foster Youth;
- 17 • Representative Grace Meng, Vice Chair of the Congressional LGBTQ+ Equality Caucus;
- 18 • Representative Grace Napolitano, Member of the Congressional Caucus on Foster Youth,
19 Member of the Congressional LGBTQ+ Equality Caucus;
- 20 • Representative Eleanor Holmes Norton, Member of the Congressional Caucus on Foster
21 Youth, Member of the Congressional LGBTQ+ Equality Caucus, Member of the
22 Congressional Caucus on Foster Youth; and
- 23 • Representative Alan Smith, Member of the Congressional Caucus on Foster Youth.

24
25
26
27
28