June 13, 2018

Attn: Kathleen McHugh, Director
United States Department of Health and Human Services
Administration for Children and Families
Policy Division
330 C Street SW
Washington, DC 20024

Via electronic correspondence at CBComments@acf.hhs.gov

Re: RIN 0970–AC72, Adoption and Foster Care Analysis and Reporting System; Advance Notice of Proposed Rulemaking, 83 Fed. Reg. 11,449 (Mar. 15, 2018)

Dear Director McHugh,

Thank you for the opportunity to submit comments on the Advanced Notice of Proposed Rulemaking regarding the Adoption and Foster Care Analysis Reporting System (AFCARS) for Title IV-B and Title IV-E as they relate to the Indian Child Welfare Act of 1978 (ICWA). We recommend that the Administration for Children and Families (ACF) continue to implement the AFCARS data collection system, which is necessary to fulfill the administration's statutory obligations and to protect American Indian and Alaska Native (AI/AN) children.

We are a group of law professors with longstanding academic expertise in federal Indian law, family law, and administrative law.[1] Our experience includes litigating ICWA cases in state and Tribal court; researching the nationwide application of ICWA, and the data collection, or lack thereof, about AI/AN children in state child welfare systems; and researching and litigating administrative law cases. Given our academic expertise and practical interests in ICWA, we submit these comments to highlight the significant problems that revision of the AFCARS regulations could pose for Indian children, families, and Tribes.

Put simply, the lack of consistent data about AI/AN children in the child welfare system has been one of the biggest threats to ICWA compliance. Recognizing this problem, ACF promulgated a final rule revising the AFCARS regulations in 2016. *See* Adoption and Foster Care Analysis and Reporting System, 81 Fed. Reg. 90,524 (Dec. 14, 2016) [hereinafter, "Final Rule"]. In promulgating the Final Rule, ACF recognized that "some states, tribes, national organizations, and federal agencies [had] stated that ICWA is the 'gold standard' of child welfare practice and its implementation and associated data collection will likely help inform efforts to improve outcomes for all children and families in state child welfare systems." *Id.* at 90,527. ACF therefore concluded that the "benefits [of data collection] outweigh the burden associated with collecting and reporting the additional data." *Id.* at 90,528.

[1] The Appendix identifies the signatories to this comment. We submit this comment in our individual capacities, not on behalf of our institutions.

There have been no material changes since 2016 in the facts or circumstances that supported ACF's conclusion to adopt data elements related to ICWA. Therefore, under well-established principles of administrative law, there is no reasonable basis for ACF to revisit this conclusion, much less to revise the AFCARS regulations to eliminate the ICWA-related data elements. To eliminate or to reduce the ICWA-related data elements would be to undermine the "gold standard" of child welfare practices and to undermine outcomes for all children and families in state welfare systems. We therefore urge ACF to retain the ICWA-related data elements of the AFCARS regulations.

I. The AFCARS Data Elements Are Crucial To Implementation Of ICWA

Congress enacted ICWA in 1978 to address the practice of state entities removing a large number of AI/AN children from their homes without an understanding of traditional American Indian child-rearing practices. In adopting ICWA, Congress created a "'gold standard' of child welfare practices," one that is a model for improving outcomes for all children and families in state welfare systems. Final Rule, 81 Fed. Reg. at 90,527. ACF's Final Rule adopted ICWA-related data elements that are crucial to implementing this "gold standard" for child welfare systems.

Throughout the 1960s and 1970s, AI/AN children were six times more likely to be placed in foster care than other children. *See* H.R. Rep. No. 95-1386, at 9 (1978). Surveys conducted at the time found that in states with large Native American populations, 25 to 35 percent of all Native American children were removed from their homes and placed in foster care or adoptive homes at one time during their lives. *Id.*

This pattern has continued to the present day. As of 2003, for example, in both Alaska and South Dakota, over 60 percent of the children placed in foster care were AI/AN children. *See* U.S. Gov't Accountability Office, GAO-05-290, Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States 13 (2005).

Congress has recognized that the United States must do better by AI/AN children if it is to fulfill its responsibilities towards Indians. As Congress has found, "the States, [in] exercising their recognized jurisdiction over Indian child custody proceedings . . ., have often failed to recognize the essential tribal relations of Indian people and cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). Based upon this finding, Congress has made it "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." *Id.* § 1902. ICWA represents Congress's effort to fulfill the "[f]ederal responsibility to Indian people," also known as the federal trust responsibility, by creating procedures and practices to keep Indian families together when possible. *Id.* § 1901. In implementing ICWA, the Executive Branch must similarly fulfill this trust responsibility. *See Cohen's Handbook of Federal Indian Law*, § 5.04[3][a] (Nell Jessup Newton ed., 2012) (explaining that "courts have applied the trust responsibility to limit federal administrative action").

To fulfill the United States' responsibilities to Indian children, families, and Tribes, the federal government and states need adequate data on the adoption and foster care of AI/AN children. Lack of adequate data was a challenge when Congress enacted ICWA and remains a fundamental stumbling block today. Gathering data to demonstrate the need for ICWA's enactment was "an 'ordeal,' as [Bertram] Hirsch put it in 1974. . . . Hirsch first requested that the BIA provide data about the numbers of fostered and adopted Indian children for the last five to ten years. . . . The BIA had not compiled this information. . . . Some state agencies claimed they did not keep statistics

on Indian children." Margaret Jacobs, *A Generation Removed* 103 (2014). Today, the lack of adequate data remains a barrier to ICWA's implementation. Individual state court judges make decisions case-by-case, as if their decisions affect only one Indian child, when in truth Indian children continue to be removed at numbers disproportional to their representation in the population. *Disproportionality Rates for Children of Color in Foster Care — June 2015 Technical Assistance Bulletin*, Nat'l Council of Juv. and Family Court Judges 9-10 (2015), *at* http://www.ncjfcj.org/sites/default/files/NCJFCJ%202013%20Dispro%20TAB%20Final.pdf. Without data collection and reporting on AI/AN children, there is no way to tell how changes in federal policies are helping or hurting AI/AN children.

In 2016, ACF recognized the need for ICWA-related data elements to implement federal statutory law. It recognized first that Section 479 of the Social Security Act (SSA) authorized the revision of the AFCARS regulations to include data elements on AI/AN children. Section 479 *mandates* that the Department of Health and Human Services (HHS) adopt a system that "shall . . . (i) assess (on a continuing basis) the incidence, characteristics, and status of adoption and foster care in the United States, and (ii) develop appropriate national policies with respect to adoption and foster care." 42 U.S.C. § 679(a)(1). In addition, HHS provides direct Title IV-E funding to Tribes and Tribal child and family service programs under the Fostering Connections to Success and Increasing Adoption Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (codified as amended in scattered sections of 42 U.S.C.). Together, these statutory provisions require a data collection system that is "national" and "continuing" in scope, including with respect to AI/AN children. This system must help track the demographics, status, and characteristics of all children in foster care and adoption populations. As ACF recognized in 2016, leaving ICWA-related data out of AFCARS would continue to undermine implementation of title IV-E and ICWA. *See, e.g.*, Final Rule, 81 Fed. Reg. at 90,536 (concluding that "data elements related to whether ICWA applies *are essential* because application of ICWA triggers procedural and substantive protections and this data will provide a *national* number of children in the out-of-home care reporting population to whom ICWA applies") (emphases added).

In particular, ACF agreed with commentators that "collecting ICWA-related data in AFCARS will:

> 1. provide data on core ICWA requirements such as 'active efforts' and placement preferences, as well as assess how the child welfare system is working for Indian children as defined by ICWA, families and communities;
> 2. facilitate access to culturally-appropriate services to extended families and other tribal members who can serve as resources and high quality placements for tribal children;
> 3. help address and reduce the disproportionality of AI/AN children in foster care; and
> 4. provide avenues for collaboration between states and tribes that are more meaningful and outcome driven, including policy development, technical assistance, training and resource allocation as a result of having reliable data available."

Final Rule, 81 Fed. Reg. at 90,527. ACF reached these conclusions after a comprehensive notice and comment process, one in which Indian Tribes, child welfare organizations, and several states supported the ICWA-related data elements. *Id.*

When promulgating the AFCARS revisions, ACF did not consider the benefits of ICWA-related data elements in a vacuum. Far from it. Instead, the agency comprehensively

considered the benefits *and* the burdens of including ICWA-related data elements in AFCARS. It concluded that the benefits outweighed the burdens, finding, among other things, that (i) there "may be confusion" among the states in how and when ICWA applies, which ICWA-related data elements would help resolve; (ii) it was "unclear" whether states are complying with ICWA because of lack of ICWA-related data elements, which, of course, ICWA-related data elements would help address; and (iii) the majority of states that commented supported the ICWA-related data elements. Final Rule, 81 Fed. Reg. at 90,528. In other words, ACF found that ICWA-related data elements were necessary to implement federal statutory law and the United States' trust responsibility towards Indians.

ACF did not, however, ignore concerns about regulatory burdens in revising AFCARS in 2016. Indeed, the agency modified its proposed ICWA-related data elements in several respects. Final Rule, 81 Fed. Reg. at 90,528. And in response to comments from states and Indian Tribes, ACF coordinated its AFCARS revisions with the Bureau of Indian Affairs' 2016 rulemaking implementing ICWA. *See id.* These changes, the agency concluded, would "allow the state title IV-E agency more flexibility, alleviate some of the burden and other concerns identified by states, help target technical assistance . . ., and improve practice and national data on all children who are in foster care." *Id.*

ACF's ICWA-related data elements are consistent with Congress's mandate to create a *national* and *continuing* data collection system that ensures that the best interests of all children, including AI/AN children, are protected by adoption and foster care systems. Collecting this data, as ACF concluded, will allow an assessment of the current state and adoption of AI/AN children and thus aid in the development of future national policies concerning ACF programs.

In short, less than two years ago ACF carefully considered the benefits and burdens and adopted a tailored set of ICWA-related data elements in order to fulfill its statutory responsibilities. Its reasonable and well-reasoned revisions to AFCARS were based upon up-to-date data and a comprehensive rulemaking process in which all interested parties, including states, fully aired their concerns. Its "streamlined" approach thus addressed concerns about regulatory burdens while still achieving benefits for AI/AN children. Final Rule, 81 Fed. Reg. at 90,566 (explaining how agency addressed concerns of states about regulatory burdens).

II. There Is No Reasonable Basis For ACF To Eliminate Or To Reduce The ICWA-Related Data Elements It Just Adopted In 2016

Nothing material has changed in the facts or circumstances underlying ACF's adoption of the ICWA-related data elements in its revisions to AFCARS in 2016. Accordingly, there would be no reasonable basis for the agency to reverse course by eliminating or reducing those elements.

ACF has requested comment on "the [AFCARS] data elements and their associated burden." 83 Fed. Reg. at 11,450. This request for comment, ACF has explained, is based upon the President's Executive Order 13,777, which directs agencies to establish Regulatory Reform Task Forces to review regulatory burdens and to recommend modification or elimination of existing regulations. *See id.*

Neither Executive Order 13,777 nor anything else in federal law authorizes ACF to make an about-face from its prior policy without a reasonable basis for the reversal of course. Rather, ACF has well-established obligations under federal administrative law to stay the course unless it can provide a reasoned and reasonable basis for a change in policy.

The Administrative Procedure Act (APA) directs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this long-standing requirement, an agency must consider all relevant aspects of a problem, including both the benefits and costs of regulation, when altering its policy. An agency, in other words, "is correct to look at the costs as well as the benefits" of its regulations. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 54 (1983). But an agency's assessment of costs and benefits must not be arbitrary. *See id.* at 55. While political elections have consequences, it is not enough for an agency changing course to cite the policy preferences of a new presidential administration. *See id.* at 55-56 (concluding agency had acted arbitrarily in adopting policy change following presidential election without reasoned explanation for its change).

The Supreme Court has made clear its concern with agencies that make an about-face from their prior policies. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009); *id.* at 537 (Kennedy, J., concurring); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). In particular, as Justice Anthony Kennedy recently made clear in an opinion for the Court, an agency may not change course without (i) "'show[ing] that there are good reasons for the new policy,'" (ii) explaining why it is "'disregarding facts and circumstances that underlay or were engendered by the prior policy,'" and (iii) addressing "'serious reliance interests'" that have come to rest on its prior policy. *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Fox Television*, 556 U.S. at 515-16).

By engaging in a one-sided assessment of the burdens of the ICWA-related data elements, ACF would violate this basic requirement of the APA. The request for comment addresses only regulatory burdens, without any apparent consideration of the regulatory benefits that ACF has already found will result from the AFCARS revisions. Such a one-sided approach is not consistent with the agency's obligation to act reasonably when changing regulatory policy.

It is not enough, in other words, for the agency to revisit the regulatory burdens it already considered when promulgating the AFCARS regulations in 2016. ACF specifically found that the "benefits [of data collection] outweigh the burden associated with collecting and reporting the additional data." Final Rule, 81 Fed. Reg. at 90,528. Now ACF apparently intends to reconsider the sorts of comments on regulatory burdens that it already received and considered. *See* 83 Fed. Reg. at 11,450. But a one-sided reconsideration of regulatory burdens would be unreasonable, particularly because there has been no material change in the underlying facts and circumstances.

It is still true, as it was in 2016, that there "may be confusion" among the states about how and when ICWA applies. Final Rule, 81 Fed. Reg. at 90,527. It is still true, as it was in 2016, that it is unclear whether states are fulfilling their obligations under ICWA, due to a lack of ICWA-related data. *Id.* It is still true, as it was in 2016, that ICWA-related data elements will address these problems. *Id.* Moreover, it is still true, as it was in 2016, that the federal government has a statutory obligation to ensure that there is a national and continuing data collection system that protects the

best interests of all children, including AI/AN children, who are in foster care or adoptive placements.

It is *also* still true that the AFCARS regulation reflects ACF's careful balancing of benefits and burdens through a tailored set of data collection and reporting requirements. Apparently, all that has changed is the President's direction to review regulatory burdens. And while the agency may review regulatory burdens under Executive Order 13,777, it may not reverse course under the APA unless there is a reasonable basis for doing so based upon consideration of all aspects of the problem, including regulatory benefits.

To reverse course now by eliminating the ICWA-related data elements would single out AI/AN children and families for special disfavor in the AFCARS scheme. Doing so would not only violate the APA's requirement of reasoned decision-making; it would also violate the federal government's trust responsibility. The trust responsibility, which arises from treaties and the government-to-government relationships between Indian Tribes and the United States, requires the United States to treat Indians with the care and faithfulness of a fiduciary. *See, e.g.*, *Seminole Nation v. United States*, 316 U.S. 296, 297 (1942) (explaining that the federal government "has charged itself with moral obligations of the highest responsibility and trust [towards Indian Tribes, and its] conduct . . . should therefore be judged by the most exacting fiduciary standards"). This responsibility is enforceable against federal administrative agencies. *See Cohen's Handbook*, *supra*, § 5.04[3][a]. Under elementary trust law, a fiduciary cannot single out the beneficiaries of a trust for special disfavor, but rather must loyally and carefully pursue their interests. *See, e.g.*, *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 Cornell L. Rev. 621, 657-58 (2004) (discussing trustee's duty of impartiality). Having concluded that the ICWA-related data elements are necessary to ensure protection of the best interests of AI/AN children, it would now be an arbitrary and capricious violation of the United States' trust responsibility to single out AI/AN children for special disfavor by eliminating those elements.

In fact, there is no basis for reversing course by eliminating the ICWA-related data elements. If anything, the only changes since 2016 require ACF to stay the course. Since 2016, states have relied upon the 2016 AFCARS regulations by beginning to implement them. California, for example, has already proceeded far down the path of implementing ACF's data collection requirements. In addition, Indian Tribes have relied upon the 2016 regulations by working with local and state governments to implement the data elements. For example, some Tribes have developed and updated intergovernmental agreements based upon the ICWA-related data elements and the 2016 BIA regulations.

ACF should not, therefore, reconsider regulatory burdens in a vacuum. A one-sided consideration of regulatory burdens is not a "good reason[]" for reversing course. *See Encino Motorcars*, 136 S. Ct. at 2126 (internal quotation marks omitted). And such a one-sided consideration would ignore ACF's findings and conclusions in 2016. *See id.* It would be particularly unreasonable for ACF to reverse course based upon reconsideration of regulatory burdens, given that states and Indian Tribes have relied upon the well-reasoned, carefully-tailored 2016 Final Rule. *See id.*

III. ACF's Request For Comments Does Not Address Important Aspects Of The Problem Of Protecting AI/AN Children

ACF has requested comment specifically on five questions. Yet none of these questions addresses important aspects of the problem of protecting AI/AN children or provides a basis for reversing course by changing the 2016 Final Rule.

1. Identify the data elements, non-ICWA-related, that are overly burdensome for state and tribal title IV-E agencies and explain why. Please be specific in identifying the data elements and provide a rationale for why collecting and reporting this information is overly burdensome . . . .

No comment.

2. Previously, we received comments regarding burden and the system changes needed to report the ICWA-related data elements of the 2016 SNPRM. We would like to receive more detailed comments on the specific limitations we should be aware of that states will encounter in reporting the ICWA-related data elements in the final rule. Please be specific in identifying the data elements and provide a rationale for why this information is overly burdensome. If possible, provide specific costs and burden estimates related to the following areas: a. The number of children in foster care who are considered Indian children as defined in ICWA. . . .

This request for comment underscores the necessity for the ICWA-related data elements. States are still in the process of implementing ACF's 2016 Final Rule. Because there has not been a national data reporting requirement until recently, states are not in a position to respond to this question with accurate data. Many states simply have not been accurately collecting data on AI/AN children in their foster care and adoptive placement systems. Nor have they been collecting accurate data on the individual ICWA-related data points. As a result, this request for comment invites inaccurate data and thus will lead to arbitrary decision-making if ACF responds by eliminating or reducing the ICWA-related data elements based upon it.

3. Previously, we received comments that particular data elements did not lend themselves to national statistics and were best assessed with qualitative methods such as case review. Please provide specific recommendations on which data elements in the regulation to retain that are important to understanding and assessing the foster care population at the national level. Also, provide a rationale for your suggestion that may include its relevance to monitor compliance with the title IV-B and IV-E programs or another strong justification for using the data at the national level.

There is no reasonable basis for the agency to reconsider the conclusions it already reached regarding these comments. In 2016, ACF considered this concern. *See* Final Rule, 81 Fed. Reg. at 90,526. And it concluded that this concern did not provide a basis for revising the Final Rule because doing so would undermine a "vital part of ICWA's requirements." *Id.* at 90,556. Nothing has changed about ICWA's requirements. Therefore, reconsidering the same comments about case review would not provide a reasonable basis for changing the AFCARS regulation.

4. Previously we received comments noting concerns with variability in some of the data elements across states and within jurisdictions. Please provide specific suggestions to simplify data elements to facilitate the consistent collection and reporting of AFCARS data. Also, provide a rationale for each suggestion and how the simplification would still yield pertinent data.

Here too, the request for comment underscores the necessity for staying the course by implementing the Final Rule. ACF adopted the Final Rule in part to *establish* uniformity of application nationally. ACF considered concerns about variability across jurisdictions and made appropriate modifications to the rule to address these concerns. *See, e.g.*, Final Rule, 81 Fed. Reg. at 90,542. There is no reasonable reason to revisit that carefully tailored approach.

5. Previously we received comments questioning the utility, reliability, and purpose of certain data elements at the national level. Provide specific recommendations on which data elements in the regulation to remove because they would not yield reliable national information about children involved with the child welfare system or are not needed for monitoring the title IV-B and IV-E programs. Please be specific in identifying the data elements and provide a rationale for why this information would not be reliable or is not necessary.

This request for comment similarly reflects a one-sided approach to the problem. Collection of ICWA-related data points is tied to existing federal statutory law. The 2016 Final Rule's ICWA-related data elements do not, therefore, create any additional burden beyond what federal statutes already require. That is their fundamental utility and purpose.

The SSA requires AFCARS to "provide comprehensive national information" regarding "the extent and nature of assistance provided by Federal, State, and local adoption and foster care programs and the characteristics of the children with respect to whom such assistance is provided." 42 U.S.C. § 679(c)(3)(d). Not only does this encompass Title IV–B agencies, but also Title IV–E agencies, through which HHS provides direct Title IV–E funding to Tribes and Tribal child and family service programs under the Pub. L. 110-351.

ACF's 2016 Final Rule supports the requirements for Title IV-B agencies in ICWA data reporting, as seen in the Program Instruction (PI) documents issued by HHS. HHS has defined "Title IV–E Agency" as "the State or Tribal agency administering or supervising the administration of the title IV–B and title IV–E plans." Tribal Child Welfare, 77 Fed. Reg. 896, 926 (Jan. 6, 2012). Under this definition, Title IV–B agencies may also be Title IV–E agencies. In addition, the data elements include information that is already readily available through the case files of the Title IV-E agencies.

HHS has required states to address certain ICWA-related issues under their Title IV-B state plans for ICWA through a PI document. *See Program Instruction*, Admin. For Children and Families, U.S. Dep't of Health and Human Servs., ACYF-CB-PI-14-03 (2014). In this PI, HHS required states to include in their Child and Family Services Plans (CFSP) "a description, developed in consultation with Indian tribes in the state, of the specific measures taken by the state to comply with the [ICWA]." *Id.* at 6. HHS also required "[s]tates without federally recognized tribes within their borders . . . [to] still consult with tribal representatives." *Id.*

Requiring states to collect data on the numbers of AI/AN children in care will provide the needed data set for states to base their assertions in the CFSPs. Under section 479 of the SSA, the ACF possesses the requisite authority to collect ICWA-related data. 42 U.S.C. § 679. ACF's 2016 Final Rule is the first federal data elements requirement designed to provide detailed information on ICWA implementation. Comprehensive collection of these data elements tied to ICWA's requirements will grant Tribes, states, and federal agencies the ability to develop a more detailed understanding of the trends in out-of-home placement and barriers to permanency for AI/AN children. Establishing these data elements will provide AI/AN children the same opportunities to benefit from the data that other

children currently have, and will better inform responses addressing the unique issues facing Tribal children in both policy and practice.

Thank you for the opportunity to comment on ACF's proposed reconsideration of the 2016 Final Rule. We hope that our comments are helpful to ensure that ACF does not revisit, much less reverse, that Rule based upon a one-sided reexamination of the regulatory burdens that it has already considered and addressed through its carefully tailored Final Rule.

Appendix*

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* We submit this comment in our individual capacities, not on behalf of our institutions. Institutional affiliations are listed for identification purposes only.