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Amy Lauger
Supervisory Statistician
Institutional Research and Special Projects Unit
Bureau of Justice Statistics
810 Seventh Street NW
Washington, DC 20531
Submitted via *email* to Amy.Lauger@usdoj.gov

RE: Agency Information Collection Activities; Proposed eCollection eComments Requested; Reinstatement, With Change, of Previously Approved Collection: National Inmate Survey in Jails (NIS-4J) (RIN 2022-08158)

To Whom It May Concern,

We are grateful for the opportunity to provide comments to the Bureau of Justice Statistics (the “Bureau”) on its above-captioned notice announcing its intent to submit a request for reinstatement, with change, of a previously-approved data collection instrument to be utilized as part of the next iteration of the National Inmate Survey in Jails (the “NIS-4J”). *See* 87 Fed. Reg. 22,942 (April 18, 2022).

The undersigned are scholars affiliated with the Williams Institute at the UCLA School of Law. The Williams Institute is dedicated to conducting rigorous and independent research on sexual orientation and gender identity (“SOGI”), including on the demographics and experiences of lesbian, gay, bisexual, and transgender (“LGBT”) people. The Williams Institute collects and analyzes original data, as well as analyzes governmental and private data, and has long worked with federal agencies to improve data collection on the U.S. population. These efforts include producing widely-cited best practices for the collection of SOGI information on population-based surveys.¹

We write in response to the Bureau’s request for comment on whether the proposed modifications are “necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility[.]” and to “[e]valuate the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used[.]”² Specifically, we write to commend the Bureau for its inclusion of SOGI measures in the proposed instrument.

The NIS-4J is the only comprehensive vehicle to monitor the safety of incarcerated persons in jails, in that it collects anonymous information directly from that population using

¹ *See, e.g.*, GENDER IDENTITY IN U.S. SURVEILLANCE (GENIUSS) GROUP, WILLIAMS INST., BEST PRACTICES FOR ASKING QUESTIONS TO IDENTIFY TRANSGENDER AND OTHER GENDER MINORITY RESPONDENTS ON POPULATION-BASED SURVEYS (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Survey-Measures-Trans-GenIUSS-Sep-2014.pdf>; SEXUAL MINORITY ASSESSMENT RESEARCH TEAM (SMART), WILLIAMS INST., BEST PRACTICES FOR ASKING QUESTIONS ABOUT SEXUAL ORIENTATION ON SURVEYS (2009), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Best-Practices-SO-Surveys-Nov-2009.pdf>.

² 87 Fed. Reg. at 22,943.

appropriate data collection methods. Without these data to shed light on individuals' experiences, researchers and policymakers would have little knowledge about the sexual victimization of LGBT people in jails. Likewise, these data are vital for the Bureau and other agencies' monitoring and enforcement of safety provisions as required under the Prison Rape Elimination Act of 2003.³ This information is therefore needed if appropriate public policy and regulatory interventions are to be developed.

LGBT people have higher levels of interaction with law enforcement and the juvenile justice system in adolescence⁴ and adulthood.⁵ Findings from our analyses of data collected through previous iterations of this survey (National Inmate Survey, NIS, 2011–12) show that sexual minority adults are over-represented among incarcerated persons.⁶ In addition to the Bureau's own findings,⁷ other data about both sexual minority and transgender incarcerated people have shown that these populations experience higher levels of sexual victimization while incarcerated than their heterosexual and/or cisgender counterparts.⁸

Accurately identifying LGBT incarcerated people is critical in order to study and address differential rates of incarceration and victimization among that population. We therefore commend the Bureau for continuing its groundbreaking efforts to identify sexual minority survey respondents, and for proposing a modified approach to identifying transgender respondents to the NIS-4J when compared to previous iterations of the survey.⁹ As scholars who have extensive experience studying LGBT populations, it is our opinion that the demand of the NIS-4J data collection is reasonable and that this burden is offset by the benefits of knowledge gained about the safety and health of incarcerated populations.

As noted above, our research using data collected through previous iterations of this survey has found that experiences with sexual victimization—as well as consensual sexual behavior and solitary segregation—are more prevalent among LGBT people experiencing incarceration. In order to enhance the public health value of the NIS-4J data, we therefore

³ *National Inmate Survey*, BJS.GOV (May 26, 2009), <https://bjs.ojp.gov/data-collection/national-inmate-survey-nis>.

⁴ Bianca D.M. Wilson et al., *Disproportionality and Disparities Among Sexual Minority Youth in Custody*, 46 J. YOUTH & ADOLESCENCE 1547–61 (2017), <https://doi.org/10.1007/s10964-017-0632-5>; Angela Irvine & Aisha Canfield, *Reflections on New National Data on LGBTQ/GNCT Youth in the Justice System*, 7 LGBTQ POL'Y J. 27–36 (2017), <https://lgbtq.hkspublications.org/2018/01/29/reflections-on-new-national-data-on-lgbq-gnct-youth-in-the-justice-system>; Brett G. Stoudt et al., *Growing Up Policed in the Age of Aggressive Policing Policies*, 56 N.Y.L. SCH. L. REV. 1331–70, https://digitalcommons.nyls.edu/nyls_law_review/vol56/iss4/4.

⁵ SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY, *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 14–15* (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

⁶ Ian H. Meyer et al., *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011–2012*, 107 AM. J. PUB. HEALTH 267–73 (2017), <https://doi.org/10.2105/AJPH.2016.303576>.

⁷ ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, *SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12, SUPPLEMENTAL TABLES: PREVALENCE OF SEXUAL VICTIMIZATION AMONG TRANSGENDER ADULT INMATES* (2014), https://bjs.ojp.gov/content/pub/pdf/svpjri112_st.pdf.

⁸ Meyer et al., *supra* note 6; JODY L. HERMAN ET AL., WILLIAMS INST., *PREVALENCE, CHARACTERISTICS, AND SEXUAL VICTIMIZATION OF INCARCERATED TRANSGENDER PEOPLE IN THE UNITED STATES: RESULTS FROM THE NATIONAL INMATE SURVEY (NIS-3)* (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Incarceration-Violence-Oct-2016.pdf>.

⁹ For our analysis of the methodological constraints of that previous approach, please see our earlier comments on the NIS-4J, available at Williams Institute Scholars, *Comment Letter on Proposed National Inmate Survey in Jails* (June 3, 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Comment-NIS-Jails-Jun-2020.pdf>.

recommend adding questions about mental and physical health consequences of sexual victimizations to the survey. We also recommend studying the characteristics and mental health consequences of consensual sexual behavior in jails, and studying the impact of protective and punitive solitary segregation.

In addition, in conducting our analysis of data previously collected through the National Inmate Survey, we learned that one of the challenges, related to transgender respondents, was that interviewers were required to choose a gendered survey version; that is, a male or female form version.¹⁰ This is because of the survey items that required the respondent to identify which body parts were involved in a sexual victimization episode, if it were present. Thus, for example, transgender women were given male survey formats if they were in a male facility. We recommend that BJS design questionnaires for the NIS-4J that are appropriate for transgender men and transgender women respondents, and that transgender inmates be assigned the questionnaire that correctly and sensitively applies to them.

Research on federal implementations of SOGI measures suggests that respondents are unlikely to consider SOGI information to be particularly sensitive, and would therefore provide such information if asked.¹¹ Similarly, studies suggest that sexual minority people are not a population that is difficult to survey.¹² Questions measuring sexual orientation have been included on federal surveys for over two decades,¹³ including in large-scale, population-based surveys administered by the U.S. Census Bureau and by other agencies.¹⁴ Questions used to identify transgender respondents have been included on state and investigator-led surveys for some time, with more common use of both sexual orientation and gender identity questions, including in federal surveys, over the last decade.¹⁵ The federal government has long engaged in its own review of best practices for the measurement of SOGI, including through its Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender

¹⁰ This appears to be maintained for the NIS-4J, see, e.g., BUREAU OF JUSTICE STATISTICS, ATTACHMENT F, PAPI COMBINED VERSION 2 (2022) (providing instructions that male inmates receive an instrument with certain text, and that female inmates receive the instrument with different text).

¹¹ See, e.g., Sean Cahill et al., *Do Ask, Do Tell: High Levels of Acceptability by Patients of Routine Collection of Sexual Orientation and Gender Identity Data in Four Diverse American Community Health Centers*, 9 PLOS ONE 1 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4157837/pdf/pone.0107104.pdf>.

¹² See, e.g., Nancy Bates et al., *Are Sexual Minorities Hard-to-Survey? Insights from the 2020 Census Barriers, Attitudes, and Motivators Study (CBAMS) Survey*, 35 J. OFFICIAL STATS. 709 (2019), <https://sciendo.com/article/10.2478/jos-2019-0030>.

¹³ See FEDERAL INTERAGENCY WORKING GROUP ON IMPROVING MEASUREMENT OF SEXUAL ORIENTATION AND GENDER IDENTITY IN FEDERAL SURVEYS, CURRENT MEASURES OF SEXUAL ORIENTATION AND GENDER IDENTITY IN FEDERAL SURVEYS 3 (2016), https://cpb-us-e1.wpmucdn.com/sites.northwestern.edu/dist/3/817/files/2017/01/WorkingGroupPaper1_CurrentMeasures_08-16-1xnai8d.pdf.

¹⁴ Thom File & Jason-Harold Lee, *Phase 3.2 of Census Bureau Survey Questions Now Include SOGI, Child Tax Credit, COVID Vaccination of Children*, U.S. Census Bureau (Aug. 05, 2021), <https://www.census.gov/library/stories/2021/08/household-pulse-survey-updates-sex-question-now-asks-sexual-orientation-and-gender-identity.html>; *2019 BRFSS Survey Data and Documentation*, CDC.GOV (Aug. 31, 2020), https://www.cdc.gov/brfss/annual_data/annual_2019.html; *Questionnaires | YBRS*, CDC.GOV (Nov. 17, 2020), <https://www.cdc.gov/healthyyouth/data/yrbs/questionnaires.htm>.

¹⁵ Williams Institute Scholars, Comment Letter on Proposed Basic Demographic Items for the Current Population Survey (March 22, 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Comment-CPS-Mar-2021.pdf>.

Identity in Federal Surveys organized through the Federal Committee on Statistical Methodology.¹⁶

The federal government has also supported others' research on this topic, including by funding the research of an ad hoc panel formed by the National Academies of Sciences, Engineering, and Medicine focused on SOGI-related methodological issues (the "NASEM Panel").¹⁷ The NASEM Panel recently released a consensus study report offering guidance and best practices for collecting data on SOGI, as well as on variations in sex characteristics, in population-based surveys, as well as clinical and administrative settings.¹⁸ The NASEM Panel's report also provides guiding principles for such data collection, specifically inclusiveness, precision, respecting autonomy, collecting only necessary data, and a dedication to confidentiality.¹⁹ Notably, the measures recommended by the NASEM Panel are consistent with those proposed by the Bureau here.

As scholars with experience in measurement development and testing, we would recommend that the Bureau assess the performance of SOGI measures, and all other demographic items, and to make revisions as needed. Likewise, we note our concern with potential harm to respondents due to breach of confidentiality and request that the Bureau ensure that all data are collected and reported using all appropriate privacy standards. All entities responsible for NIS-4J data collection ought to ensure the confidentiality of respondents' information.

Thank you for your consideration. Please direct any correspondence, including questions, to vasquezl@law.ucla.edu.

Respectfully Submitted,

Luis A. Vasquez, J.D.
Arnold D. Kassoy Scholar of Law
The Williams Institute
UCLA School of Law

Ilan H. Meyer, Ph.D.
Williams Distinguished Senior Scholar of Public Policy
The Williams Institute
UCLA School of Law

¹⁶ See generally *Measuring Sexual Orientation and Gender Identity Research Group*, FED. COMM. STAT. METHODOLOGY (2018), <https://nces.ed.gov/FCSM/SOGL.asp>.

¹⁷ *Measuring Sex, Gender Identity, and Sexual Orientation for the National Institutes of Health*, NAT'L ACADEMIES OF SCIENCES, ENGINEERING, & MED., <https://www.nationalacademies.org/our-work/measuring-sex-gender-identity-and-sexual-orientation-for-the-national-institutes-of-health> (last accessed May 03, 2022).

¹⁸ NAT'L ACADEMIES OF SCIENCES, ENGINEERING, & MED., *MEASURING SEX, GENDER IDENTITY, AND SEXUAL ORIENTATION* (2022), <https://nap.nationalacademies.org/catalog/26424/measuring-sex-gender-identity-and-sexual-orientation>.

¹⁹ *Id.* at S-4.

Kathryn K. O'Neill, M.P.P.
Peter J. Cooper Public Policy Fellow
The Williams Institute
UCLA School of Law

Christy Mallory, J.D.
Legal Director and Daniel H. Renberg Senior Scholar of Law
The Williams Institute
UCLA School of Law

Brad Sears, J.D.
Founding Executive Director and David S. Sanders Distinguished Scholar of Law & Policy
The Williams Institute
Associate Dean of Public Interest Law
UCLA School of Law

Andrew R. Flores, Ph.D.
Visiting Scholar
The Williams Institute
UCLA School of Law
Assistant Professor of Government
American University

Jody L. Herman, Ph.D.
Reid Rasmussen Senior Scholar of Public Policy
The Williams Institute
UCLA School of Law

Kerith J. Conron, ScD, MPH
Blachford-Cooper Distinguished Scholar and Research Director
The Williams Institute
UCLA School of Law

Lara Stemple, J.D.
Assistant Dean for Graduate Studies and International Student Programs
UCLA School of Law

Todd Brower, LL.M., J.D.
Judicial Education Director
The Williams Institute
UCLA School of Law
Professor of Law
Western State College of Law

William J. Tentindo, J.D.
Daniel H. Renberg Law Fellow
The Williams Institute
UCLA School of Law