

June 21, 2022

Trade and Commercial Regulations Branch  
Office of Trade  
U.S. Customs and Border Protection  
90 K Street NE, 10th Floor  
Washington, DC 20229-1177  
Submitted via *regulations.gov*

**RE: Request for Information on U.S. Customs and Border Protection Processes, Programs, Regulations, Collections of Information and Policies Pursuant to 19 CFR Part I (RIN 2022-08664)**

To Whom It May Concern,

We are grateful for the opportunity to provide comments to U.S. Customs and Border Protection (“CBP”) regarding its above-captioned request for information on potential regulatory and other activity it might consider undertaking in light of certain recent executive orders. *See* 87 Fed. Reg. 24,185 (April 22, 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 disparities and discrimination experienced by 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.<sup>1</sup>

We write in response to the request by CBP for comments on the extent to which “existing agency processes, programs, regulations, collections of information, and policies . . . [p]erpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups . . . .”<sup>2</sup> More specifically, we write to recommend that CBP consider regulatory and other activity aimed at providing clarity and removing inconsistencies with respect to non-discrimination requirements it enforces that encompass SOGI discrimination. In Part I, we provide a review of relevant research on LGBT people and their experiences with ongoing SOGI discrimination in the U.S. In Part II, we review available CBP materials on existing non-discrimination requirements to highlight inconsistencies in how they discuss SOGI, and note how same might be revised consistent with the law to instead provide meaningful

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<sup>1</sup> *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>.

<sup>2</sup> 87 Fed. Reg. at 24,186.

guidance to the public, CBP employees, and other entities subject to CBP’s regulations—and in turn likely advance equity for LGBT people interacting with CBP and its agents.

## **I. Research Shows Ongoing Discrimination Experienced by LGBT People in the U.S.**

LGBT-identified people comprise approximately 4.5% of the U.S. adult population.<sup>3</sup> We estimate that approximately 11 million adults in the U.S. identify as LGBT, including approximately 1.3 million adults who are transgender.<sup>4</sup>

Similar to the country as a whole, the population of LGBT adults in the U.S. is demographically diverse. For example, drawing from Gallup Daily Tracking data collected between 2015 and 2017, we’ve previously estimated that 58% of LGBT adults are female.<sup>5</sup> Similarly, we estimate that 21% of LGBT adults identify as Latino/a or Hispanic, 12% as Black, and 5% as more than one race.<sup>6</sup> And, in a recent study, we documented evidence consistent with other population-based samples that Latinx people, American Indian or Alaska Native, and biracial/multiracial groups appear more likely than White people to identify as transgender.<sup>7</sup>

A longstanding body of research reflects that LGBT people in the U.S. report experiences with public and private discrimination related to their SOGI. In *Obergefell v. Hodges*, the Supreme Court observed that gay men and lesbians have been “prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.”<sup>8</sup> The Seventh Circuit has similarly explained that “homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world[.]”<sup>9</sup> And, with respect to transgender people, the District of Columbia Court of Appeals has observed that “[t]he hostility and discrimination that transgender individuals face in our society today is well-documented.”<sup>10</sup>

Research suggests that LGBT people experience discrimination at rates similar to those reported by individuals belonging to other marginalized groups. In a series of studies drawing from state-level data on non-discrimination laws in public accommodations, housing, and employment providing protections for LGBT people, we found that such laws are used by LGBT people at rates similar to the use of race-based non-discrimination laws by people of color, and

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<sup>3</sup> KERITH J. CONRON & SHOSHANA K. GOLDBERG, WILLIAMS INST., ADULT LGBT POPULATION IN THE UNITED STATES 1 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Adult-US-Pop-Jul-2020.pdf>.

<sup>4</sup> JODY L. HERMAN, ANDREW R. FLORES & KATHRYN K. O’NEILL, WILLIAMS INST., HOW MANY ADULTS AND YOUTH IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 4 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf>.

<sup>5</sup> *LGBT Demographic Data Interactive*, WILLIAMS INST. (January 2019), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#demographic>.

<sup>6</sup> *Id.*

<sup>7</sup> HERMAN, FLORES & O’NEILL, *supra* note 4, at 6.

<sup>8</sup> 135 S. Ct. 2584, 2596 (2015).

<sup>9</sup> *Baskin v. Bogan*, 766 F.3d 648, 663 (7<sup>th</sup> Cir. 2014); *see also Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012) (“It is easy to conclude that homosexuals have suffered a history of discrimination.”), *aff’d*, 570 U.S. 744 (2013).

<sup>10</sup> *Brooksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014).

the use of sex-based non-discrimination laws by women.<sup>11</sup> Additionally, research suggests that individuals belonging to particular groups may be more likely to file certain types of discrimination claims. For example, in a study of over 9,000 charges filed with the Equal Employment Opportunity Commission (the “EEOC”) or an analogous state or local agency, researchers noted particularly high filing rates of sexual orientation-based charges by African American workers and men, and gender identity-based charges by White workers and women.<sup>12</sup>

While social acceptance and the legal rights of LGBT people in the U.S. have generally improved over the past few decades (in some places more than others), ample research confirms that anti-LGBT stigma and discrimination remain widespread, and that certain disparities only continue to widen, in particular when factoring in the compounding effects of discrimination faced along intersectional dimensions of race, ethnicity, sex, and other aspects of identity, alongside SOGI. Anti-LGBT stigma and discrimination has been documented through a variety of sources, including in court cases, administrative complaints, and media reports; below, we discuss research derived from survey data.

The Williams Institute previously conducted two large LGBTQ-specific<sup>13</sup> population-based national surveys through the NIH-funded Generations (HD078526) and TransPop (HD090468) studies on sexual and gender minority people, respectively.<sup>14</sup> Using these data, we found that, as adults, more than one-third of LGBTQ people have been hit, beaten, or physically or sexually assaulted; been robbed or had property stolen; or had an object thrown at them.<sup>15</sup> Similarly, more than half of LGBTQ people report having experienced threats of violence, and

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<sup>11</sup> CHRISTY MALLORY AND BRAD SEARS, WILLIAMS INST., EVIDENCE OF DISCRIMINATION IN PUBLIC ACCOMMODATIONS BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY: AN ANALYSIS OF COMPLAINTS FILED WITH STATE ENFORCEMENT AGENCIES, 2008-2014 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Public-Accomm-Discrimination-Feb-2016.pdf>; CHRISTY MALLORY AND BRAD SEARS, WILLIAMS INST., EVIDENCE OF HOUSING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY: AN ANALYSIS OF COMPLAINTS FILED WITH STATE ENFORCEMENT AGENCIES, 2008-2014 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Discrimination-US-Feb-2016.pdf>; CHRISTY MALLORY AND BRAD SEARS, WILLIAMS INST., EVIDENCE OF EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY: AN ANALYSIS OF COMPLAINTS FILED WITH STATE ENFORCEMENT AGENCIES, 2008-2014 (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Employment-Discrimination-US-Oct-2015.pdf>.

<sup>12</sup> M. V. LEE BADGETT, AMANDA K. BAUMLE, & STEVEN BOUTCHER, CTR. FOR EMP. EQUITY, EVIDENCE FROM THE FRONTLINES ON SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION (2018), <https://www.umass.edu/employmentequity/evidence-frontlines-sexual-orientation-and-gender-identity-discrimination>; see also Amanda K. Baumle et al., *New Research on Sexual Orientation and Gender Identity Discrimination: Effect of State Policy on Charges Filed at the EEOC*, 67 J. HOMOSEXUALITY 1135 (2019).

<sup>13</sup> Consistent with the literature on sexual and gender minority people, “LGBTQ”—with the Q representing questioning or queer—is often used to capture individuals, generally youth, who identify their SOGI using such terms, including those whose identities are less developed or more fluid. Certainly, adults question their SOGI and can identify as queer. See, e.g., *6% of Non-Transgender Sexual Minority Adults in the US Identify as Queer*, WILLIAMS INST. (Jan. 22, 2020), <https://williamsinstitute.law.ucla.edu/press/sexual-minority-queer-press-release>. However, few studies relevant to this comment include measures to allow for the identification and analysis of LGBT adults who specifically identify as queer or questioning; hence, we generally use “LGBT” when discussing sexual and gender minority adults unless supported by the underlying study.

<sup>14</sup> ILAN H. MEYER, BIANCA D.M. WILSON & KATHRYN O’NEILL, WILLIAMS INST., LGBTQ PEOPLE IN THE US: SELECT FINDINGS FROM THE GENERATIONS AND TRANSPop STUDIES 1 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Generations-TransPop-Toplines-Jun-2021.pdf>.

<sup>15</sup> *Id.* at 17–18.

approximately 3 out of 4 having been verbally insulted or abused.<sup>16</sup> Looking more broadly at adverse life events, we found that 48% percent of transgender people, 39% of GBQ cisgender men, and 38% of LBQ cisgender women had been fired or been denied a job at least once as adults.<sup>17</sup> These findings are consistent with a recent study conducted by the Williams Institute, drawing from data collected in May of 2021, which found that one-third (31.1%) of LGBT respondents reported experiencing discrimination or harassment based on their SOGI in the workplace within the past five years.<sup>18</sup>

Data collected through government-sponsored collections of information similarly indicate that LGBT people are likely to encounter discrimination across the life course. For example, an analysis of data collected in 2019 through the Youth Risk Behavior Survey—a nationally representative survey of high school students conducted by the Centers for Disease Control and Prevention—found that 32.0% of LGB students, compared with 17.1% of heterosexual students, reported being bullied on school property.<sup>19</sup> Additionally, 11.9% of LGB students—compared with 6.3% of heterosexual students—reported being threatened or injured with a weapon on school property.<sup>20</sup> Likewise, in a study drawing from federal data on mortgages backed by the Federal Housing Administration, researchers found that same-sex male couples of every racial configuration were significantly less likely to have their applications accepted compared to White heterosexual couples,<sup>21</sup> even when the lender, county, loan amount, purpose of the loan, income of the applicants, and level of risk were all the same.<sup>22</sup>

Studies suggest that such experiences with discrimination often create an expectation among LGBT people of future SOGI-based discrimination, in turn influencing one’s behavior and willingness to seek services. For example, among respondents to our Generations and TransPop studies, one-third of sexual minorities and almost two-thirds of transgender people reported worrying about being negatively judged in interactions with a health care provider.<sup>23</sup> Likewise, results from a 2020 survey of members of the National Association of Gay and Lesbian Real Estate Professionals show that 57% of respondents believed that their LGBT clients’ fear of experiencing discrimination during the buying process had an impact on LGBT homeownership levels<sup>24</sup>—which are reported as being below those of their cisgender,

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 19.

<sup>18</sup> BRAD SEARS, CHRISTY MALLORY, ANDREW R. FLORES & KERITH J. CONRON, WILLIAMS INST., LGBT PEOPLE’S EXPERIENCES OF WORKPLACE DISCRIMINATION AND HARASSMENT 13 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf>.

<sup>19</sup> Kathleen C. Basile et al., Ctrs. for Disease Control & Prevention, *Interpersonal Violence Victimization Among High School Students — Youth Risk Behavior Survey, United States, 2019*, 69 MORBIDITY & MORTALITY WKLY. REP. 28, 31 (2020), <https://www.cdc.gov/healthyouth/data/yrbs/pdf/2019/su6901-H.pdf>. These results were noted as being statistically significant. *Id.*

<sup>20</sup> Michelle M. Johns et al., Ctrs. for Disease Control & Prevention, *Trends in Violence Victimization and Suicide Risk by Sexual Identity Among High School Students — Youth Risk Behavior Survey, United States, 2015–2019*, 69 MORBIDITY & MORTALITY WKLY. REP. 19, 23 (2020), <https://www.cdc.gov/healthyouth/data/yrbs/pdf/2019/su6901-H.pdf>.

<sup>21</sup> J. Shahar Dillbary & Griffin Edwards, *An Empirical Analysis of Sexual Orientation Discrimination*, 86 U. CHI. L. REV. 1, 53 (2019), <https://lawreview.uchicago.edu/publication/empirical-analysis-sexual-orientation-discrimination>.

<sup>22</sup> *Id.* at 5.

<sup>23</sup> MEYER, WILSON & O’NEILL, *supra* note 14, at 27.

<sup>24</sup> NAT’L ASS’N OF GAY & LESBIAN REAL ESTATE PROFS., LGBT REAL ESTATE REPORT 2020–21 at 13 (2020), <https://naglerep.com/wp-content/uploads/2020/07/2020-21-lgbt-real-estate-report.pdf>.

heterosexual counterparts.<sup>25</sup> Studies indicate that this fear becomes salient early in life among LGBT people,<sup>26</sup> at times informed by the conduct of service providers and other officials. For example, among respondents to GLSEN’s 2019 National School Climate Survey, 7.3% of LGBTQ students reported being disciplined by school staff after reporting their own victimization.<sup>27</sup> Likewise, LGBTQ youth experiencing homelessness frequently report being asked to leave emergency shelters after revealing their SOGI.<sup>28</sup>

Experiences with discrimination also adversely impact LGBT people’s health, financial security, well-being, and dignity, driving well-documented health disparities between LGBT and non-LGBT populations as articulated in the “minority stress” research literature. The minority stress model, which the Institute of Medicine has recognized as a core perspective for understanding LGBT health,<sup>29</sup> describes how LGBT people experience chronic stress stemming from their stigmatization. While certain stressors—such as loss of a job—are ubiquitous in society, experienced by LGBT and non-LGBT people alike, LGBT people are uniquely exposed to stress arising from anti-LGBT stigma and prejudice. Prejudice leads LGBT people to experience *excess* exposure to stress compared with non-LGBT people who are not exposed to anti-LGBT prejudice (all other factors being equal). This excess stress exposure confers an elevated risk for certain mental and physical health conditions. For example, according to a 2017 nationally representative survey among LGBT people who experienced SOGI discrimination in the workplace and other settings in the past year, 68.5% reported that discrimination at least somewhat negatively affected their psychological well-being; 43.7% reported that discrimination negatively impacted their physical well-being; 47.7% reported that discrimination negatively impacted their spiritual well-being; 52.8% reported that discrimination negatively impacted their work environment; and 56.6% reported that it negatively impacted their neighborhood and community environment.<sup>30</sup>

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<sup>25</sup> ADAM P. ROMERO, SHOSHANA K. GOLDBERG & LUIS A. VASQUEZ, WILLIAMS INST., LGBT PEOPLE AND HOUSING AFFORDABILITY, DISCRIMINATION, AND HOMELESSNESS 11–13 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf>.

<sup>26</sup> See, e.g., GEORGETOWN UNIVERSITY CENTER FOR CHILD AND HUMAN DEVELOPMENT, SAMHSA, PRACTICE BRIEF - PROVIDING SERVICES AND SUPPORTS FOR YOUTH WHO ARE LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUESTIONING, INTERSEX OR TWO-SPIRIT 2 (2008), <https://www.samhsa.gov/sites/default/files/lgbtqi2-s-practice-brief.pdf> (noting that LGBTQ youth “may fear disclosing their identities and, as a result, may be inhibited from seeking the supports and therapeutic resources they need. Youth who are afraid to be open about their identity, or ‘come out,’ may be less likely to report their experiences and needs to providers and others in a service system.”).

<sup>27</sup> JOSEPH G. KOSCIW ET AL., GLSEN, THE 2019 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER YOUTH IN OUR NATION’S SCHOOLS 34, [https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web\\_0.pdf](https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf).

<sup>28</sup> See generally *Homelessness and Housing*, YOUTH.GOV, <https://youth.gov/youth-topics/lgbtq-youth/homelessness> (last accessed June 15, 2022).

<sup>29</sup> INSTITUTE OF MEDICINE, THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING 20 (2011), <https://www.ncbi.nlm.nih.gov/books/NBK64806>.

<sup>30</sup> Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People’s Lives in Both Subtle and Significant Ways*, CTR. FOR AM. PROGRESS (May 2, 2017), <https://www.americanprogress.org/issues/lgbtq-rights/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways>.

## II. Research Supports CBP’s Robust Implementation of SOGI Non-Discrimination Requirements

CBP’s request for information provides that, in considering potential regulatory and other activity, it is particularly interested in learning about its “processes, programs, regulations, information collections, forms, required documentation, guidance and/or policies that perpetuate systemic barriers to opportunities and benefits for people of color and/or other underserved groups,”<sup>31</sup> as defined in a recent executive order related to equity.<sup>32</sup> Notably, in defining “equity,” that order expressly names “lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons” among the populations that have historically experienced denials of “consistent and systematic fair, just, and impartial treatment” by laws, policies, and institutions.<sup>33</sup>

In light of the aforementioned body of research detailing persistent stigma and discrimination faced by LGBT people, including while in the course of employment and while attempting to obtain services, in the U.S., it would be consistent with that equity executive order for CBP to review its existing implementation of applicable non-discrimination requirements to ensure that any protections against SOGI discrimination are being fully carried out consistent with the law, including related reporting requirements. Doing so would also be consistent with another recent executive order regarding non-discrimination.

Specifically, under the terms of Executive Order 13988,<sup>34</sup> agency heads are required to engage in a review of their existing regulations, guidance, and programs to implement the Supreme Court’s decision in *Bostock v. Clayton County*.<sup>35</sup> There, the Court held that the prohibition on sex discrimination contained within Title VII of the Civil Rights Act of 1964 (“Title VII”)<sup>36</sup> encompasses SOGI discrimination. Notably, the Court’s reasoning in *Bostock* was premised on general principles applicable to contexts outside of employment,<sup>37</sup> leading agencies to implement that decision with respect to both Title VII and other civil rights laws they enforce that prohibit discrimination because of sex.<sup>38</sup>

Like other executive branch employees, employees of CBP are currently required to “adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.”<sup>39</sup> As the applicable authorities

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<sup>31</sup> 87 Fed. Reg. at 24,189.

<sup>32</sup> Exec. Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009 (Jan. 20, 2021).

<sup>33</sup> 86 Fed. Reg. at 7009.

<sup>34</sup> Exec. Order 13988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023 (Jan. 20, 2021).

<sup>35</sup> 140 S. Ct. 1731 (2020).

<sup>36</sup> 42 U.S.C. § 2000e-2(a).

<sup>37</sup> *Bostock* at 1738 (noting the Court’s deference to the “ordinary public meaning” of the terms contained within Title VII—in particular, its prohibition on discrimination “because of . . . sex”—in determining whether SOGI discrimination is encompassed within said terms).

<sup>38</sup> See, e.g., Equal Credit Opportunity (Regulation B); Discrimination on the Bases of Sexual Orientation and Gender Identity, 86 Fed. Reg. 14,363, 14,365 (Mar. 16, 2021) (Equal Credit Opportunity Act); Memorandum from Pamela S. Karlan, Principal Deputy Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to Federal Agency Civil Rights Directors and General Counsels (Mar. 26, 2021) (Title IX).

<sup>39</sup> 5 CFR 2635.101(b)(13).

invoked by this provision include Title VII, alongside other statutes that can be read to prohibit SOGI discrimination in line with the reasoning in *Bostock*, CBP should consider review of its existing regulations and other materials to ensure they provide sufficient notice and guidance to employees on the scope of these requirements as they relate to SOGI discrimination.

Notably, while CBP already maintains various policy documents and other guidance related to non-discrimination, including several materials specific to equal employment opportunity and the protections provided to CBP employees under Title VII, they often lack clarity on or are otherwise inconsistent in detailing the state of protections against SOGI discrimination enforced by CBP. For example, CBP maintains an official policy statement on anti-discrimination and harassment that calls for zero tolerance against any unfavorable treatment due to an individual's membership in a protected class;<sup>40</sup> however, this document fails to state which classes are protected, or under which statutes or other legal authorities those protections are derived. Conversely, one of the frequently asked questions pages on the CBP website intended for members of the public provides that civil rights complaints will be investigated if alleged on the basis of, among other protected classes, "sexual orientation, and gender identity."<sup>41</sup> However, a larger page maintained by CBP on "Diversity and [Equal Employment Opportunity] Frequently Asked Questions" contradicts this in listing applicable "[p]rotected classes [that] are based on federal law or Executive Order" and including sex and sexual orientation, but not gender identity.<sup>42</sup>

Such inconsistencies appear particularly prevalent in materials intended to provide CBP employees with information on equal employment opportunity protections. For example, a recently issued poster indicates that CBP's Privacy and Diversity Office reviews employee discrimination complaints if based on sex or sexual orientation, but is silent as to the treatment of those alleging gender identity discrimination specifically.<sup>43</sup> Likewise, CBP's official policy against bias-motivated conduct as provided in its Standards of Conduct indicates that actions based on others' sexual orientation and sex are prohibited, but says nothing regarding those motivated by gender identity.<sup>44</sup> A page CBP maintains on the filing of complaints by employees indicates in one area that sex discrimination "includ[es] pregnancy, gender identity, and sexual stereotyping" with no mention of sexual orientation; and when discussing mediation, that same page outlines protected classes as including sex and sexual orientation, but not gender identity.<sup>45</sup>

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<sup>40</sup> Memorandum from Troy A. Miller, Acting Commissioner, to All CBP Employees (Dec. 01, 2021), [https://www.cbp.gov/sites/default/files/assets/documents/2021-Dec/Anti-Discrimination%20and%20Anti-Harassment%20Policy%20Statement\\_Dec%202021.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2021-Dec/Anti-Discrimination%20and%20Anti-Harassment%20Policy%20Statement_Dec%202021.pdf).

<sup>41</sup> *What Happens When A Member Of The Public Alleges That His Or Her Civil Rights Or Civil Liberties Have Been Violated Or That He/She Has Been Subjected To Racial Profiling?*, CBP.gov (May 24, 2022), <https://www.cbp.gov/faqs/what-happens-when-member-public-alleges-his-or-her-civil-rights-or-civil-liberties-have-been>.

<sup>42</sup> *Diversity and EEO Frequently Asked Questions*, CBP.GOV, <https://www.cbp.gov/node/114443/printable/print> (last accessed June 15, 2022).

<sup>43</sup> CBP, EMPLOYMENT DISCRIMINATION POSTER (2020), [https://www.cbp.gov/sites/default/files/assets/documents/2020-Apr/CBP-Employment-Discrimination-Poster\\_Mar2020.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Apr/CBP-Employment-Discrimination-Poster_Mar2020.pdf).

<sup>44</sup> CBP, U.S. CUSTOMS AND BORDER PROTECTION STANDARDS OF CONDUCT 11 (2020), [https://www.cbp.gov/sites/default/files/assets/documents/2021-Jan/cbp-standards-conduct-2020\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2021-Jan/cbp-standards-conduct-2020_0.pdf).

<sup>45</sup> *EEO Complaint Process*, CBP.GOV, <https://www.cbp.gov/node/360628/printable/print> (last accessed June 15, 2022).

And, across all of these pages, CBP fails to reference the source of referenced equal employment opportunity protections, which may in turn lead employees to fail to understand the implications of the *Bostock* decision on those protections, i.e., that SOGI discrimination is encompassed by statutes prohibiting discrimination on the basis of sex, even if SOGI are not expressly listed in same, and in particular with respect to Title VII given its analysis in that case.

As CBP has indicated its interest in revising “regulations and/or policies that create duplication, overlap, complexity, or inconsistent requirements . . . affect[ing] equity,”<sup>46</sup> we recommend that CBP consider revising these and other relevant materials to provide CBP employees, any entities subject to such non-discrimination requirements through CBP’s regulations, and members of the public with clarity as to (1) the specific legal authorities that provide non-discrimination protections applicable to interactions with CBP and its agents; and (2) the specific protected bases covered by each applicable source of non-discrimination protections, including detailing when controlling decisions and interpretations, like *Bostock*, have confirmed the encompassing of classes beyond what might be outlined in the text of the underlying source. Such activity would be consistent with other federal agencies; for example, the Federal Aviation Administration recently amended its required assurance on civil rights for grantees to expressly list applicable civil rights statutes and their protected bases, including direct reference to SOGI discrimination being encompassed by laws prohibiting sex discrimination consistent with Executive Order 13988.<sup>47</sup> Likewise, the U.S. Department of Agriculture recently issued a final rule requiring that state agencies participating in its Supplemental Nutrition Assistance Program provide an assurance that they will comply with certain civil rights statutes, specifying that this would include a prohibition on discrimination “on the grounds of sex, including gender identity and sexual orientation . . . .”<sup>48</sup>

Finally, we offer our related recommendation that CBP review its processes for collecting and reporting data on employees’ discrimination complaints pursuant to the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (the “No FEAR Act”) to ensure that complaints of SOGI discrimination are not being excluded from same. The No FEAR Act states that agencies must provide employees with written notice of the legal protections they enjoy as federal employees, and that this notice be supplemented by agencies’ engaging in various forms of reporting on received complaints.<sup>49</sup> In passing the No FEAR Act, Congress shared its views that “notifying Federal employees of their rights under discrimination and whistleblower laws should increase Federal agency compliance with the law” and similarly that “requiring annual reports to Congress on the number and severity of discrimination and whistleblower cases brought against each Federal agency should enable Congress to improve its oversight over compliance by agencies with the law.”<sup>50</sup>

The No FEAR Act’s implementing regulations provide that agencies must issue quarterly reports on employees’ discrimination complaints consistent with guidelines and a template

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<sup>46</sup> 87 Fed. Reg. at 24,189.

<sup>47</sup> Airport Improvement Program (AIP) Grant Assurances, 87 Fed. Reg. 19,571 (Apr. 04, 2022); FAA, ASSURANCES: AIRPORT SPONSORS (2022), [https://www.faa.gov/airports/aip/grant\\_assurances/media/assurances-airport-sponsors-2022-05.pdf](https://www.faa.gov/airports/aip/grant_assurances/media/assurances-airport-sponsors-2022-05.pdf).

<sup>48</sup> 87 Fed. Reg. 35,857, to be codified at 7 CFR 272.2.

<sup>49</sup> Pub. L. No. 107–174, § 202, 116 Stat 566 (2002).

<sup>50</sup> Pub. L. No. 107–174, § 101, 116 Stat 566 (2002).

established by the EEOC.<sup>51</sup> While the EEOC's regulations call for such reporting on allegations of sex discrimination, they are silent as to the treatment of those specifically alleging SOGI discrimination.<sup>52</sup> However, neither the No FEAR Act nor its implementing regulations prohibit agencies from either disaggregating their reporting of sex discrimination allegations here to enumerate those which were based specifically on sexual orientation and/or gender identity,<sup>53</sup> or from otherwise including data on SOGI discrimination complaints as part of their sex discrimination reporting in light of our understanding of the protections provided by that provision of Title VII. We therefore recommend that CBP review its No FEAR Act processes to ensure that SOGI discrimination complaints are being accounted for throughout, including by providing adequate notice to employees as to the full scope of the protections that ultimately inform that reporting. Likewise, we recommend that CBP consider providing clarity however possible to employees and the public regarding its methodology for ensuring the inclusion of SOGI discrimination complaints in any reported data.

Thank you for your consideration. Please direct any correspondence, including questions, to [vasquezl@law.ucla.edu](mailto:vasquezl@law.ucla.edu).

Respectfully Submitted,

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<sup>51</sup> 29 CFR § 1614.703.

<sup>52</sup> 29 CFR § 1614.702(j).

<sup>53</sup> See 29 CFR § 1614.703(f) (providing that data on “bases of” and “issues of” discrimination should be reported following the order set out by the EEOC in listing same through another regulation, but noting only for the reporting on “issues of” discrimination that agencies are limited in listing out only what the EEOC provided for in that regulation).

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