

May 11, 2018

Jennifer Truman
Bureau of Justice Statistics
810 Seventh Street, NW
Washington, D.C. 20531
VIA EMAIL: Jennifer.Truman@ojp.usdoj.gov

RE: National Crime Victimization Survey (83 Fed. Reg. 15624)

Dear Ms. Truman,

We write to vigorously oppose the removal of the sexual orientation and gender identity items for 16- and 17-year-old respondents to the National Crime Victimization Survey (NCVS). The undersigned are **forty-seven scholars** of various disciplines—community psychology, demography, economics, law, medicine, public health, political science, public policy, psychology, social epidemiology, among others—who have extensive experience studying sexual and gender minorities (SGM) in the United States, including with respect to violence and discrimination against lesbian, gay, bisexual, and transgender adults and youth. The undersigned also have particular expertise on collecting sexual orientation and gender identity data on population-based surveys, including from adolescents.

The undersigned have long worked productively with federal agencies to improve data collection on the U.S. population, and many of the undersigned co-authored widely-cited best practices for the collection of sexual orientation and gender identity information on population-based surveys. These best practices—the “SMART” and “GenIUSS” reports—directly informed the inclusion of measures of sexual orientation and gender identity on the NCVS by the Bureau of Justice Statistics (BJS).¹ Many of the undersigned are scholars at or affiliated with the Williams Institute, an academic research center at UCLA School of Law dedicated to conducting rigorous and independent research on sexual orientation and gender identity. The undersigned have published extensively on issues related to SGM adults and youth, including using data collected by federal and state agencies, including BJS.²

¹ Sexual Minority Assessment Research Team (SMART), Williams Institute, *Best Practices for Asking Questions about Sexual Orientation on Surveys* (2009), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/SMART-FINAL-Nov-2009.pdf> [hereinafter SMART Report]; Gender Identity in U.S. Surveillance (GenIUSS) Group, Williams Institute, *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/geniuss-report-sep-2014.pdf> [hereinafter GenIUSS Report].

² See, e.g., Ilan H. Meyer et al., Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011-2012, 107 *Am. J. of Pub. Health* 267 (2017); Lara Stemple et al., Sexual victimization perpetrated by women: Federal data reveal surprising prevalence, 34 *Aggression & Violent Behavior* 302 (2017); Lara Stemple & Ilan H. Meyer, The sexual victimization of men in America: new data challenge old assumptions, 104 *Am. J. of Pub. Health* e19 (2014); Bianca D.M. Wilson et al., Disproportionality and Disparities among Sexual Minority Youth in Custody, 46 *J. Youth & Adolescence* 1547 (2017).

In this comment, we discuss the importance of expanding and improving federal data collection on sexual orientation and gender identity, and the importance of collecting such data for youth respondents to the NCVS. If BJS stops collecting sexual orientation and gender identity data from youth respondents, the quality, utility, and clarity of the information to be collected via the NCVS will be adversely impacted. We also address the purported justification BJS has offered for raising the age from 16 to 18 for the sexual orientation and gender identity questions on the NCVS, and conclude that it is groundless—not only because the NCVS and other surveys show that adolescents can and are willing to answer sexual orientation and gender identity questions, but also because these items are no more sensitive than other questions on the NCVS. BJS, therefore, appears to be acting arbitrarily, capriciously, and without a rational basis.

The Federal Government and BJS Should Expand and Improve Federal Data Collection on SGM Populations

As BJS is aware, the vast majority of federal data collections do not ask respondents to identify their sexual orientation and gender identity, among other demographic items. For this reason, the Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys has cogently explained that “there remains a lack of data on the characteristics and well-being” of SGM populations, and that “[i]n order to understand the diverse need of SGM populations, *more representative and better quality data need to be collected.*”³ Without such data, public policymakers, law enforcement agencies, and service providers—including federal agencies tasked with promoting the security and well-being of our nation’s people—are hindered in their efforts to adequately serve SGM populations, including LGBT youth. So too are community organizations, state and local governments, researchers, and others working to better understand and lessen the unique and common vulnerabilities facing LGBT people.

Among the federal statistical agencies, BJS has been a leader on this important topic. The NCVS was the first population-based federal survey to measure transgender identity and status, and was one of the first such surveys to measure sexual orientation identity. Since July 2016, the NCVS has included sexual orientation and gender identity measures for respondents age 16 and over.⁴ Based on information that BJS has released publicly, we understand that these items were performing well on the NCVS and that they did not adversely impact the NCVS in any way that would support their removal. We commend you and your colleagues for these specific efforts to add sexual orientation and gender identity items to the NCVS (among other surveys BJS conducts, such as the National Inmate Survey and the National Survey of Youth in Custody), as well as your general leadership in advancing knowledge about SGM populations through federal data collections.

³ Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys, *Toward A Research Agenda For Measuring Sexual Orientation And Gender Identity In Federal Surveys: Findings, Recommendations, And Next Steps 2* (2016), https://s3.amazonaws.com/sitesusa/wp-content/uploads/sites/242/2014/04/SOGI_Research_Agenda_Final_Report_20161020.pdf (emphasis added).

⁴ Bureau of Justice Statistics, National Crime Victimization Survey: NCVS-1 Basic Screen Questionnaire 7-8 (2016), https://www.bjs.gov/content/pub/pdf/ncvs16_bsq.pdf [hereinafter NCVS Questionnaire].

In 2017 and 2018, however, we have witnessed a disturbing pattern of the federal Executive branch reversing or limiting data collections related to sexual orientation and gender identity. For example, in 2017, the U.S. Department of Justice and other federal agencies withdrew requests to the U.S. Census Bureau to add sexual orientation and gender identity measures to the American Community Survey (ACS) and the Decennial Census.⁵ Adding such demographic items to the ACS and the Census, the Department of Justice had previously explained in 2016, was legally authorized and necessary for enforcing civil rights laws, among other reasons.⁶ The latest proposal by BJS to stop collecting certain sexual orientation and gender identity information on the NCVS fits within this alarming trend to not collect vital information about our nation’s people. These data are necessary not only for fully understanding SGM populations and the disparities they face, but also for sound public policymaking, enforcement activities, and the delivery of services and programming, among other reasons.

Collecting Sexual Orientation and Gender Identity Data From Youth Respondents to the NCVS Should Be Continued

We are deeply concerned that BJS is now proposing to stop collecting sexual orientation and gender identity data from 16- and 17-year-old respondents to the NCVS without a sufficient scientific basis for doing so, rather than expanding and improving federal data collection related to SGM populations. These data—which are voluntarily reported and confidentially collected—would provide crucial information about criminal victimization of youth by sexual orientation and gender identity.

The NCVS is one of two main sources of data on crime in the United States and “is the nation’s primary source of information on criminal victimization.”⁷ The NCVS is a vital source of national data on policy-relevant subjects related to hate violence, sexual and other forms of assault, intimate-partner violence, robbery, property crimes, experiences with the criminal justice system, and other criminal victimization subjects. As such, the NCVS provides critical data “for the analysis of victimization risk, consequences of victimization, and responses to crime.”⁸ This information is invaluable to policymakers at all levels of government, law enforcement agencies, social service providers, and communities to understand and prevent violence and crime, and impacts the allocation of federal and state funding for crime prevention and crime victim services.

⁵ See Letter from Tom Carper and Kamala Harris, U.S. Senators, to John H. Thompson, Director, U.S. Census Bureau (May 22, 2017), https://www.carper.senate.gov/public/_cache/files/de7e0915-ea9f-4c51-a2d5-f3ee4abe0bf3/2017-05-22-carper-harris-letter-to-census-bureau-re-new-subjects-press-.pdf.

⁶ See *id.*; Hansi Lo Wang, Census Bureau Caught in Political Mess Over LGBT Data, *NPR* (July 18, 2017), <https://www.npr.org/2017/07/18/536484467/census-bureau-found-no-need-for-lgbt-data-despite-4-agencies-requesting-it>.

⁷ Bureau of Justice Statistics, Data Collection: National Crime Victimization Survey (NCVS), <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=245> (last accessed May 5, 2018).

⁸ Lynn Langton et al., Second Major Redesign of the National Crime Victimization Survey, 16 *Criminology & Public Policy* 1049, 1049 (2017).

With respect to the addition of the sexual orientation and gender identity items to the NCVS, BJS researchers have explained that “[t]hese statuses have been identified by researchers and policy makers as factors affecting victimization risk, but the nature, source, and direction of risk for [SGM populations] are not well estimated or understood.”⁹ Indeed, according to BJS’s Langton et al. “although few national surveys have been used to measure the social and economic well-being of the [LGBT] population, research findings have shown that LGBT persons are at risk of experiencing certain types of victimization at equal or higher rates as heterosexual persons.”¹⁰ Importantly, then, “[t]he addition of these new demographic measures to the [NCVS] will allow for assessment of their association with victimization.”¹¹ In addition, inclusion of these items on the NCVS “allow for the identification and examination of groups that have been identified as populations historically underserved by criminal justice agencies.”¹²

The inclusion of sexual orientation and gender identity measures on the NCVS is further supported because “sexual orientation and gender identity [are] protected statuses under federal hate crime legislation, and the 2013 reauthorized Violence Against Women Act (VAWA) included language to prohibit discrimination in the administration of victim services as a result of actual or perceived LGBT status.”¹³ As Langton et al. has further explained:

Nevertheless, the inclusion of gender identity on the NCVS in 2016 marks the first time a national household survey has been used to collect such data. Without this quantitative, nationwide data, it is impossible to ascertain whether conditions have improved for these historically underserved groups. There are other policy-relevant needs for the inclusion of sexual orientation and gender identity, in particular, on the NCVS. For instance, in the President’s Task Force on 21st Century Policing Interim Report, the need to examine the relationship between LGBT status and the measures collected through the NCVS Police Public Contact Survey on the nature of police contacts and the perceived fairness and legitimacy with which they are carried out is highlighted. The inclusion of these demographic variables on the NCVS opens up the possibility of examining this relationship.¹⁴

All of these justifications for measuring sexual orientation and gender identity on the NCVS apply with equal force to youth. Indeed, existing research indicates that LGBT youth are especially vulnerable to crime, violence, and bullying—and that such violence is not lessening. For example, the National Youth Risk Behavior Survey conducted by the CDC in 2015 showed

⁹ *Id.* at 1057.

¹⁰ *Id.* (citing Christopher Krebs et al., Bureau of Justice Statistics, *Campus Climate Survey Validation Study* (2016); National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV Affected Intimate Partner Violence in 2014* (2015); Mikel L. Walters et al., National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Findings on Victimization by Sexual Orientation* (2013)).

¹¹ Langton et al., *supra* note 8, at 1057.

¹² *Id.*

¹³ *Id.* at 1057-58 (internal citations omitted) (citing 18 U.S.C. § 249(2); 34 U.S.C. § 12291(b)(13)(A)).

¹⁴ *Id.* at 1058 (internal citation omitted).

that, among other findings, 10% of LGB students, compared with 5% of heterosexual students, reported being threatened or injured with a weapon on school property, and 34% of LGB students, compared with 19% of heterosexual students, reported being bullied on school property.¹⁵ According to the largest survey of transgender and gender non-conforming people to date, nearly a quarter (24%) of respondents reported being physically attacked, and 13% reported being sexually assaulted, when they were in primary or secondary school, because people thought they were transgender.¹⁶

If BJS's proposal to raise the age to 18 for respondents being asked the sexual orientation and gender identity items is adopted, the government and the public will lose an invaluable resource for understanding and addressing violence against not only LGBT youth but *all* youth in terms of sexual orientation and gender identity. Furthermore, because many LGBT people (perhaps especially youth) avoid reporting experiences of violence and crime to law enforcement,¹⁷ the other principal federal data collection on crime (the FBI's Uniform Crime Reporting system) insufficiently captures the scope and dimensions of violence against LGBT people.¹⁸ Asking youth respondents to the NCVS about their sexual orientation and gender identity would help fill this void because the NCVS asks about unreported crimes and would inform our understanding of why LGBT "victims do not report to the police . . ." ¹⁹ Thus, collection of sexual orientation and gender identity data from youth on the NCVS would provide a fuller picture of crime and violence in the United States, and would help improve law enforcement, the criminal justice system more broadly, violence-reduction policies and programming, and victim services.

The proposed removal of the sexual orientation and gender identity items for 16- and 17-year-old respondents to the NCVS is troubling for another reason. The NCVS is the parent survey for several other surveys that include youth respondents, such as the School Crime

¹⁵ Laura Kann et al., Sexual Identity, Sex of Sexual Contacts, and Health-Related Behaviors Among Students in Grades 9-12—United States and Selected Sites, 2015, 65 *Morbidity & Mortality Weekly Report* 1, 11, 15 (Aug. 12, 2016), <https://www.cdc.gov/mmwr/volumes/65/ss/pdfs/ss6509.pdf>.

¹⁶ Sandy E. James et al., *The Report of the 2016 U.S. Transgender Survey* 132 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

¹⁷ See Langton et al., *supra* note 8, at 1050 ("[C]ertain victims [of serious violent crime] may be less likely to report to police. The gay and lesbian community, undocumented residents, and other vulnerable populations, for example, may be less likely to seek help after an experience out of fear of retribution. This selectivity can bias the description and understanding of these crime events.").

¹⁸ See *id.* ("The hidden figure of crime not reported to the police severely limits the use of police statistics for understanding the magnitude of crime, and introduces a potential distortion into our understanding of who is at risk for victimization. This hidden figure constitutes a substantial proportion of crime, particularly among many of the crimes of most concern to the public. Overall, approximately half of serious violent crime—rape, robbery, and aggravated assault—goes unreported to law enforcement with just 1 in 3 rape victims, 2 in 3 intimate partner victims, and 2 in 3 victims of firearm violence reporting their victimizations (Planty and Truman, 2013; Truman and Langton, 2015)."); see also Sophie Bjork-James, What the latest FBI data do and do not tell us about hate crimes in the US, *The Conversation* (Nov. 2017) (discussing the incompleteness of the FBI's hate crimes data with one major reason being that "only 41 percent of hate crimes are reported [to law enforcement, and] only 10 percent are then confirmed by law enforcement investigators as hate crimes).

¹⁹ Langton et al., *supra* 8, at 1051.

Supplement²⁰ and the Police Public Contact Survey.²¹ If sexual orientation and gender identity data from youth respondents to the NCVS are not collected, policymakers, law enforcement, and others will be denied information about LGBT youth’s interactions with police and other information collected through surveys supplemental to the NCVS.

We urge BJS to maintain its collection of sexual orientation and gender identity data from NCVS respondents 16 years and older. For all of the reasons above, these data improve the quality, utility, and clarity of the NCVS data. They also help ensure that LGBT youth are better protected from violence and better served when victimized, and they help create more effective, evidence-based policies and interventions aimed at reducing violence and crime.

BJS’s Proposed Action is Not Justified

The only justification that BJS has offered for the proposed action is “the potential sensitivity of these questions for adolescents.”²² Not only has BJS failed to offer any scientific evidence related to the actual administration of the NCVS to support this purported rationale, this rationale is belied by BJS’s own reported experience with the NCVS that the sexual orientation and gender identity items, and especially the gender identity items, were performing well. Moreover, BJS statisticians reported that cognitive testing conducted prior to 2016 revealed “that teens ages 16 to 17 are able to understand and answer these [sexual orientation and gender identity] questions without difficulty.”²³

The notion that sexual orientation and gender identity questions are potentially so sensitive for 16- and 17-year-olds as to justify the removal of these items is also belied by the fact that numerous other population-based surveys and studies have successfully collected these data from adolescents for years. Indeed, as the SMART report explained, “[s]exual orientation questions have been asked on large-scale school-based surveys of adolescents around the world since the mid-1980’s.”²⁴ For example, BJS’s own National Survey of Youth in Custody (NSYC) includes a measure of sexual orientation,²⁵ and has provided a wealth of important information about disproportionate incarceration and victimization of sexual minority youth in custody.²⁶

²⁰ National Center for Education Statistics, Crime and Safety Surveys, <https://nces.ed.gov/programs/crime/surveys.asp> (last accessed May 9, 2018).

²¹ Bureau of Justice Statistics, Data Collection: Police Public Contact Survey (PPCS), <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=251> (last accessed May 5, 2018).

²² 83 Fed. Reg. 15634, 15635 (Apr. 11, 2018).

²³ Jennifer L. Truman, *Testing Sexual Orientation and Gender Identity Questions for the National Crime Victimization Survey 4* (Apr. 1, 2016) (presentation at Population Association of America’s 2016 Annual Meeting), available at <https://paa.confex.com/paa/2016/meetingapp.cgi/Paper/9224> (last accessed May 9, 2018).

²⁴ SMART Report, *supra* note 1, at 24 (citing various surveys).

²⁵ Bureau of Justice Statistics, Data Collection: National Survey of Youth In Custody (NSYC), <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=321> (last visited May 5, 2018); Bureau of Justice Statistics, NYSC Questionnaire—Younger Youth 5 (2011) https://www.bjs.gov/content/pub/pdf/nsyc_yy12.pdf; Bureau of Justice Statistics, NYSC Questionnaire—Older Youth, 5 (2011), https://www.bjs.gov/content/pub/pdf/nsyc_oy12.pdf.

²⁶ See, e.g., Alan J. Beck et al., Bureau of Justice Statistics, *Facility-level and individual-level correlates of sexual victimization in juvenile facilities, 2012*, NCJ Publication No. 249877 (2016), <https://www.bjs.gov/content/pub/pdf/flilcsvjf12.pdf>; Wilson et al., *supra* note 2.

The CDC’s National Youth Risk Behavior Risk Survey (discussed above) successfully includes respondents as young as 13 and has included sexual orientation measures since 2015.²⁷ In 2015, more than 15,500 youth from across the country filled out the YRBS survey on their own, anonymously at school.²⁸ Even before that, an increasing number of jurisdictions included sexual orientation measures on their YRBSs since the mid-1990s.²⁹ The National Longitudinal Study of Adolescent to Adult Health (Add Health), a longitudinal study of a nationally representative sample of adolescents in grades 7-12 in the United States during the 1994-1995 school year, included sexual orientation attraction and partner gender questions in both the baseline wave and Wave II (1996), when respondents were largely below the age of 18. Analysis of Add Health data has indicated, for example, disparities in experiences of violence among adolescents reporting same-sex, both-sex, and other-sex romantic attraction.³⁰ The National Survey of Family Growth (NSFG), which includes respondents as young as 15, has included a sexual orientation behavior measure for many years.³¹ The California Health Interview Survey has asked youth about their gender expression since 2015.³² There are many more examples of surveys and studies that have successfully collected sexual orientation and gender identity data from youth, including the L.A. Foster Youth Study (which included adolescents as young as 12).³³ Each of the surveys and studies provides invaluable information about SGM youth that have impacted policy making and programming in a variety of settings.

Furthermore, population-based surveys have shown that younger people are more likely to identify as LGBT than older people at every age group.³⁴ This is probably due to lesser sense of social stigma and/or greater openness and comfort with sharing sexual and gender identities publicly. For all of these reasons, BJS’s pure speculation about the “potential sensitivities” of youth cannot justify the proposed action here.

We recognize that sexual orientation and gender identity questions may be sensitive for some people. Importantly, however, there is no reason to believe they are *more* sensitive than

²⁷ Kann et al., *supra* note 15, at 2.

²⁸ *Id.* at 3-4.

²⁹ *Id.* at 2; *see also* Laura Kann et al., Sexual Identity, Sex of Sexual Contacts, and Health-Risk Behaviors Among Students in Grades 9–12 — Youth Risk Behavior Surveillance, Selected Sites, United States, 2001–2009, 60 *Morbidity & Mortality Weekly Report* 1, 2-3 (June 6, 2011), <https://www.cdc.gov/mmwr/pdf/ss/ss60e0606.pdf>.

³⁰ Stephen T. Russell et al., Same-Sex Romantic Attraction and Experiences of Violence in Adolescence, 91 *Am. J. of Pub. Health* 903 (2001).

³¹ *See* Anjani Chandra et al., Sexual Behavior, Sexual Attraction, and Sexual Identity in the United States: Data From the 2006–2008 National Survey of Family Growth, 36 *National Health Statistics Reports* 1 (Mar. 3, 2011), <https://www.cdc.gov/nchs/data/nhsr/nhsr036.pdf>.

³² *See* Bianca D.M. Wilson et al., Williams Institute & UCLA Center for Health Policy Research, *Characteristics and Mental Health of Gender Nonconforming Adolescents in California* (2017), <http://healthpolicy.ucla.edu/publications/Documents/PDF/2017/gncadolescents-factsheet-dec2017.pdf>.

³³ *See* Bianca D.M. Wilson et al., Williams Institute, *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles* (2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf.

³⁴ Gary J. Gates, Gallup, *In US, More Adults Identifying as LGBT* (2017), <http://www.gallup.com/poll/201731/lgbt-identification-rises.aspx>.

many of the questions on the NCVS. The NCVS, by its very nature, concerns sensitive topics, and respondents provide personal, potentially sensitive information about their race, disability, age, sex, and whether they have been victim to different types of violence, including rape and sexual assault. Indeed, as BJS correctly explained in its March 2018 statement supporting the extension of the NCVS:

The NCVS asks about experiences such as rape and other types of victimization that may be sensitive for some respondents. Given the objective of the NCVS--to estimate the amount of victimization in the Nation--this is necessary as BJS would not be able to provide a complete picture of nonfatal violent victimization without asking about such experiences. NCVS interviewers receive training and guidance on how to ask sensitive questions. The importance of estimating crime levels, as well as the potential value of detailed information about victimization for designing crime prevention strategies, is explained to any respondent who seems hesitant to answer. All respondents have the option of refusing to answer any question.³⁵

There is no rational basis to single out the questions on sexual orientation and gender identity as warranting special concern about “sensitivity.” Indeed, the Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys has explained that “[m]ost surveys incorporating SOGI items have not found higher nonresponse rates than other ‘sensitive’ questions, such as personal or household income.”³⁶ Not only that, according to the Working Group, “[the] perceived sensitivity of questions can affect the willingness of survey practitioners to include SOGI questions even when inclusion of these measures would support agency mission and data needs.”³⁷ That appears to be what’s happening here, but that perception is not justified based on the record we have seen.

But single out the sexual orientation and gender identity items for discriminatory treatment is just what BJS is doing. A review of the operative NCVS questionnaire reveals that the *only* items that are *not* asked of 16 and 17 year olds but are asked of adults—besides the sexual orientation and gender identity items, if BJS’s proposal is adopted—relate to active duty

³⁵ NCVS OMB Supporting Statement Part A, at 23 (Mar. 20, 2018), *available at* https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201803-1121-001.

³⁶ 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* (2016), https://s3.amazonaws.com/sitesusa/wp-content/uploads/sites/242/2014/04/WorkingGroupPaper1_CurrentMeasures_08-16.pdf [hereinafter *Current SO/GI Measures*]; *see also* Elizabeth M. Saewyc, et al., Measuring sexual orientation in adolescent health surveys: Evaluation of eight school-based surveys, 35 *J. of Adolescent Health* 345.e1, 345.e12 (2004) (“These studies indicate that orientation items, although sensitive questions, are no more sensitive or more likely to be skipped than other sexual risk behavior questions. This finding can reassure researchers and school administrators who are concerned that such items might be too sensitive for most students to answer, and who worry that nonresponse rates will render the results inaccurate and of limited use.”).

³⁷ Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys, *Evaluations of Sexual Orientation and Gender Identity Survey Measures: What Have We Learned?* (2016), https://s3.amazonaws.com/sitesusa/wp-content/uploads/sites/242/2014/04/Evaluations_of_SOGI_Questions_20160923.pdf.

military service, but that limitation makes sense given age requirements for active duty service.³⁸ The only other age limitation on the questionnaire also has nothing to do with concerns for “potential sensitivity” of the items for youth respondents; rather, the item concerns being able to do errands alone because of a physical or mental condition.³⁹

What is more, even if the sexual orientation and gender identity questions on the NCVS are sensitive for some respondents, the questions are voluntary, so no respondent is forced to answer these questions. These questions also have “don’t know” and “something else” or “none of these” response options, giving respondents options for responding to these questions if they are uncomfortable disclosing or unsure about their sexual orientation or gender identity.⁴⁰ In addition, responses to the questions are highly confidential and are strongly protected under federal law.

Instead of ceasing to ask youth to voluntarily and confidentially disclose their sexual orientation and gender identity on the NCVS, BJS should instead focus on ways to improve data collection and make it easier for youth to respond to these critical questions. Because the NCVS is, moreover, going through a major redesign, we encourage BJS to explore improvements to the administration of the NCVS, such as utilizing common survey practices that provide respondents greater privacy—particularly when asking adolescents questions at home. For example, the NSYC and NSFG are self-administered using a computer to afford respondents privacy.⁴¹ BJS has stated that it is currently “examining the feasibility of using self-administered approaches . . . [which would] increase privacy for respondents.”⁴²

BJS Appears To Be Acting Arbitrarily, Capriciously, and Without a Rational Basis

In light of the foregoing, BJS’s purported justification for its proposed action appears to be arbitrary, capricious, and baseless. The unfolding of this proposal buttresses that conclusion. As noted above, BJS has been collecting sexual orientation and gender identity information on the NCVS since July 2016, following extensive testing. In December 2017, BJS sought public comment on the NCVS, and the version of the instrument at that time included the measures of sexual orientation and gender identity for 16- and 17-year-olds.⁴³ On March 19, 2018, BJS again sought comments on the NCVS, and that version of the survey also maintained the sexual orientation and gender identity measures for 16- and 17-year-olds.⁴⁴ Thus, until at least March

³⁸ See NCVS questionnaire, *supra* note 4, at 8 (Items 88-89).

³⁹ *Id.* at 7 (Item 170b).

⁴⁰ See also SMART Report, *supra* note 1, at 9.

⁴¹ See, e.g., Current SO/GI Measures, *supra* note 36, at 20 (discussing audio computer-assisted self-interviewing and privacy); SMART Report, *supra* note 1, at 17-23, 26-27 (discussing privacy and other administration considerations when asking sexual orientation questions); GenIUSS Report, *supra* note 1, at 19-26 (discussing privacy and other administration considerations when asking gender identity questions).

⁴² NCVS OMB Supporting Statement Part A, *supra* note 35, at 18.

⁴³ See 82 Fed. Reg. 57295 (Dec. 4, 2017).

⁴⁴ See 83 Fed. Reg. 12030 (Mar. 19, 2018); see also NCVS Core Attachments with Table of Contents (Mar. 20, 2018), https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201803-1121-001.

19, BJS had no concern about potential sensitivity of the sexual orientation and gender identity items for older adolescents warranting their removal. Indeed, on March 20, 2018, BJS reiterated in its supporting statement to OMB that “it felt that important near term changes [including adding sexual orientation and gender identity items] could be made to improve the relevance and utility of the NCVS without affecting the victimization rates.”⁴⁵

“In response to the federal register submission,” BJS reported on March 20 that it received one comment from the New York State Office of Victim Services “suggesting additional questions related to victim services and expanding response categories for not reporting to police.”⁴⁶ Thus, as of March 20, BJS received no comments raising an issue with the sexual orientation and gender identity items.

Nonetheless, on April 11, 2018, BJS abruptly announced the proposed removal of the sexual orientation and gender identity measures for 16 and 17 year olds. In the mere three weeks between March 19 and April 11, it is implausible that BJS adequately considered the issues based on new, sufficient evidence, and it may have been impermissible for BJS to do so. This timeline further indicates that BJS is acting arbitrarily, capriciously, and without a valid scientific or rational foundation.

If BJS Adopts Its Proposal, It Must Conduct Replacement Research

If BJS adopts its proposal, it should conduct—or fund others to conduct—research about criminal victimization of LGBT youth to replace the information that will go missing from the NCVS. Such research could be done through various methodologies, and the Williams Institute would welcome the opportunity to assist in that effort.

Meeting Request

We respectfully request a meeting with BJS Director Jeffrey Anderson to discuss the scientific foundation of BJS’s proposed action, and to discuss the concerns and issues raised in this comment. To arrange this meeting, please contact Adam Romero at romero@law.ucla.edu.

Conclusion

For all of the reasons above, BJS should continue to collect sexual orientation and gender identity data from respondents to the NCVS aged 16 and over. Should BJS remove these items for 16 and 17 year olds, BJS should conduct or fund replacement research. We request a meeting with BJS Director Anderson to discuss the issues raised herein. Thank you for your consideration. Please direct any correspondence to romero@law.ucla.edu.

⁴⁵ NCVS OMB Supporting Statement Part A, *supra* note 35, at 21.

⁴⁶ *Id.* at 16.

Respectfully Submitted,

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President, on behalf of the Officers
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