

July 6, 2021

Shalanda Young
Acting Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503
Submitted via *regulations.gov*

RE: Methods and Leading Practices for Advancing Equity and Support for Underserved Communities Through Government (OMB-2021-0005)

To Whom It May Concern,

We are grateful for the opportunity to provide comments to the Office of Management and Budget (“OMB”) on the above-captioned notice. *See* 86 Fed. Reg. 24,029 (May 05, 2021). Consistent with OMB’s instructions, we confirm that these comments are in response to Areas 1, 2, 3, and 4 of the notice—specifically on the aspects of each related to the collection of data.

The undersigned are scholars affiliated with the Williams Institute, a center at the UCLA School of Law 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

As OMB is aware, a recent executive order requires that OMB assess whether federal agency policies and actions advance equity, measured by the extent to which underserved communities face barriers to benefits and opportunities available through those agency efforts.² The order defines the subject communities broadly, expressly including LGBT populations within its scope.³ Williams Institute research has shown that LGBT people face unique challenges within a number of contexts across the life course as compared to their non-LGBT peers. These include evidence of high rates of poverty and unemployment; worse mental and physical health outcomes; barriers to receiving formal and informal health care and other support and services; and experiences of discrimination based on SOGI. In some cases, LGBT people

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 Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

³ *Id.*

report experiences with discrimination and other negative outcomes at rates consistent with those reported by people of color—with LGBT people of color often reporting their own unique and significant experiences with marginalization.

The undersigned write to communicate the importance of sustained attention to LGBT people by federal agencies as part of their efforts to advance equity in light of this research, and, in particular, to stress the need for improved SOGI data collection by the federal government. A limited number of data collections conducted or otherwise required by federal agencies collect SOGI information. Notably, research in areas where the federal government serves as regulator is often restricted to the experiences of same-sex, cohabitating couples given the limited range of measures required by agencies for collection—and despite the broad authority regularly granted to agencies by Congress to engage in such activities. These limitations impede researchers’ ability to measure progress on reducing SOGI-related disparities, improving the health and wellbeing of LGBT people, and combating anti-LGBT discrimination in violation of federal law.

In Part I, we briefly provide key demographic information on LGBT people living in the United States. In Part II, we discuss research on health and other disparities reported between LGBT and non-LGBT populations. Similarly, in Part III, we discuss research illustrating the widespread stigma, discrimination, harassment, and violence faced by LGBT people. In Part IV, we note problems in existing federal data collections that restrict efforts to capture data on LGBT populations and their experiences. Finally, in Part V we provide recommendations consistent with our research to allow federal agencies to assess whether their programs and activities are advancing equity for LGBT people.

I. Demographic Information on LGBT People

There are nearly 13 million LGBT people age 13 and older living in the United States.⁴ Younger people are more likely than older people to identify as LGBT, including 15.9% of young adults in Generation Z (born 1997–2002).⁵ The number of youth identifying or perceived by their peers as gender nonconforming is likely much higher; a Williams Institute study found that 27% of California youth—approximately 796,000 students—identify or are perceived as gender nonconforming.⁶

We estimate that 4.5% of the U.S. adult population, or approximately 11 million people, identifies as LGBT.⁷ This includes approximately 1.4 million adults who are transgender.⁸

⁴ KERITH J. CONRON & SHOSHANA K. GOLDBERG, WILLIAMS INST., LGBT PEOPLE IN THE US NOT PROTECTED BY STATE NON-DISCRIMINATION STATUTES 1 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-ND-Protections-Update-Apr-2020.pdf>.

⁵ Jeffrey M. Jones, *LGBT Identification Rises to 5.6% in Latest U.S. Estimate*, GALLUP (Feb. 24, 2021), <https://news.gallup.com/poll/329708/lgbt-identification-rises-latest-estimate.aspx>.

⁶ BIANCA D.M. WILSON, SOON KYU CHOI, JODY L. HERMAN, TARA L. BECKER, & KERITH J. CONRON, WILLIAMS INST., CHARACTERISTICS AND MENTAL HEALTH OF GENDER NONCONFORMING ADOLESCENTS IN CALIFORNIA 2 (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/GNC-Youth-CA-Dec-2017.pdf>.

⁷ 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>. More recent data collected by Gallup following our study indicate that this percentage has risen to 5.6% of the U.S. adult population. See Jones, *supra* note 5.

⁸ CONRON & GOLDBERG, *supra* note 7.

Among the youth population (ages 13–17), we estimate that nearly 2 million people (9.5%) identify as LGBT.⁹ Approximately 150,000 of these youth are transgender.¹⁰ Finally, we estimate that there are approximately 700,000 same-sex, cohabitating couples in the United States.¹¹ Among these couples, 513,000 are married.¹²

II. LGBT People Report Disparities Relevant to Government Programs and Activities

LGBT people consistently report economic, health, and other disparities when compared to their cisgender, heterosexual peers. The Williams Institute recently developed the first LGBTQ population-based national dataset for the United States, developed through our Generations and TransPop studies on sexual and gender minority people, respectively.¹³ Across these two studies, we found that LGBTQ people are:

- more likely to report unemployment when compared to the national average (8.1% of LGBTQ vs. 4.1% nationally at the end of 2017).¹⁴ Additionally, LBQ cisgender women (48.3%) and transgender people (47.7%) were more likely than GBQ cisgender men (31.5%) to be living in a low-income household; all three groups reported rates higher than that of the general U.S. population (30.4%).¹⁵
- likely to experience housing instability, with more than 15% of all LGBTQ people reporting moving residences three or more times in a two-year period;¹⁶
- likely to report having symptoms consistent with serious mental illness (e.g., depression, anxiety, or substance use disorders), with 38.9% of transgender people, 31.6% of LBQ cisgender women, and 17.7% of GBQ cisgender men reporting same;¹⁷ and
- experiencing a high prevalence of lifetime suicide ideation, attempted suicide, and non-suicidal self-injury across all groups.¹⁸ The highest proportion of lifetime suicide attempts was among transgender people (42%), compared with the percentages among LBQ cisgender women (31.6%) and GBQ cisgender men (21.5%).¹⁹

These findings are consistent with those of past studies, including those utilizing governmental data. For example, our recent research using data from the CDC's Behavioral Risk Factor

⁹ KERITH J. CONRON, WILLIAMS INST., LGBT YOUTH POPULATION IN THE UNITED STATES 1 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Youth-US-Pop-Sep-2020.pdf>.

¹⁰ JODY L. HERMAN, ANDREW R. FLORES, TAYLOR N.T. BROWN, BIANCA D.M. WILSON, & KERITH J. CONRON, WILLIAMS INST., AGE OF INDIVIDUALS WHO IDENTIFY AS TRANSGENDER IN THE UNITED STATES 4 (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Age-Trans-Individuals-Jan-2017.pdf>.

¹¹ *See generally Same-Sex Couples*, WILLIAMS INST., <https://williamsinstitute.law.ucla.edu/subpopulations/same-sex-couples/> (last visited July 2, 2021).

¹² CHRISTY MALLORY & BRAD SEARS, WILLIAMS INST., THE ECONOMIC IMPACT OF MARRIAGE EQUALITY FIVE YEARS AFTER *OBERGEFELL V. HODGES* 2 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Economic-Impact-SS-Marriage-May-2020.pdf>.

¹³ 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>.

¹⁴ *Id.* at 11.

¹⁵ *Id.* at 10–11.

¹⁶ *Id.* at 11.

¹⁷ *Id.* at 32.

¹⁸ *Id.*

¹⁹ *Id.*

Surveillance System (“BRFSS”) found that about one in three (29.4%) of both cisgender bisexual women and transgender adults were living in poverty prior to the COVID-19 pandemic.²⁰ These experiences appear to be particularly pronounced for LGBT people of color, with even higher rates of poverty reported by LGBT Black (30.8%), Hispanic (37.3%), and American Indian or Alaska Native (32.4%) adults.²¹

Our recent research on the impact of the COVID-19 pandemic on U.S. adults suggests that LGBT adults, particularly LGBT people of color and gender minority people, have been placed disproportionately at risk for negative outcomes. For example, in one study, we found that LGBT respondents were more likely than their non-LGBT counterparts to be laid off (12.4% vs. 7.8%) or furloughed (14.1% vs. 9.7%) from their jobs; to report problems affording basic household goods (23.5% vs. 16.8%); and to report problems paying their rent or mortgage (19.9% vs. 11.7%).²² LGBT people of color were more than twice as likely to report that their ability to pay for household goods got worse (28.7% vs. 14.2%) and were over three times as likely to report that their ability to pay their rent or mortgage (26.3% vs. 8.8%) got worse as compared to non-LGBT White people.²³ More than half (63.1%) of LGBT people of color reported being very concerned about their ability to pay their bills, as compared to 42.4% of LGBT White and 33.2% of non-LGBT White people.²⁴ In a separate report, we estimated that 137,600 transgender people lack health insurance; 450,000 transgender people had not gone to a doctor in the past year because they could not afford it; and 319,800 transgender adults had one or more medical conditions putting them at increased risk of serious illness related to COVID-19, including asthma, diabetes, heart disease, and HIV.²⁵

III. LGBT People Report Widespread Experiences with Stigma and Discrimination

LGBT people have faced a long history of stigmatization and discrimination in the United States across a range of contexts. 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.”²⁶ The Seventh Circuit has similarly explained that “homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world[.]”²⁷ Regarding transgender people, the District of Columbia Court of Appeals has

²⁰ M. V. LEE BADGETT, SOON KYU CHOI, AND BIANCA D.M. WILSON, WILLIAMS INST., LGBT POVERTY IN THE UNITED STATES: A STUDY OF DIFFERENCES BETWEEN SEXUAL ORIENTATION AND GENDER IDENTITY GROUPS 2 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf>.

²¹ *Id.* at 13.

²² BRAD SEARS, KERITH J. CONRON, & ANDREW R. FLORES, WILLIAMS INST., THE IMPACT OF THE FALL 2020 COVID-19 SURGE ON LGBT ADULTS IN THE US 3 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/COVID-LGBT-Fall-Surge-Feb-2021.pdf>.

²³ *Id.* at 10.

²⁴ *Id.*

²⁵ JODY L. HERMAN & KATHRYN O’NEILL, WILLIAMS INST., VULNERABILITIES TO COVID-19 AMONG TRANSGENDER ADULTS IN THE U.S. 1–2 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-COVID19-Apr-2020.pdf>.

²⁶ 135 S. Ct. 2584, 2596 (2015).

²⁷ *Baskin v. Bogan*, 766 F.3d 648, 663 (7th 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).

observed that “[t]he hostility and discrimination that transgender individuals face in our society today is well-documented.”²⁸

While social acceptance and the legal rights of LGBT people in the United States have generally improved over the past few decades, ample research confirms that LGBT people continue to experience persistent and pervasive stigma and discrimination, including harassment and violence, in all areas of life. Anti-LGBT stigma and discrimination has been documented across a variety of sources, including court cases, administrative complaints, media reports, and of course through surveys.

For example, an analysis of data collected in 2019 through the Youth Risk Behavior Survey (“YRBS”)—a nationally representative survey of high school students conducted by the Centers for Disease Control and Prevention (“CDC”)—found that 39.5% of LGB students, compared with 22.2% of heterosexual students, reported being bullied on school property.²⁹ Our analysis of a separate nationally representative survey found that LGB people were significantly more likely to report negative workplace experiences than their heterosexual peers, with 60% of LGB people reporting being fired from or denied a job and 48% reporting being denied a promotion or receiving a negative evaluation, compared to 40% and 32% respectively among heterosexuals.³⁰ And, 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,³¹ even when the lender, county, loan amount, purpose of the loan, income of the applicants, and level of risk were all the same.³²

Research suggests that LGBT people may 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 the use of sex-based non-discrimination laws by women.³³ For example, we found

²⁸ *Brooksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014).

²⁹ 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, 33 (2020), <https://www.cdc.gov/healthyouth/data/yrebs/pdf/2019/su6901-H.pdf>. These results were noted as being statistically significant. *Id.*

³⁰ ILAN H. MEYER, WILLIAMS INST., EXPERIENCES OF DISCRIMINATION AMONG LESBIAN, GAY AND BISEXUAL PEOPLE IN THE US 1 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Discrimination-Work.pdf>.

³¹ 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>.

³² *Id.* at 5.

³³ 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

that nationally and on average regarding public accommodations, approximately four complaints of SOGI discrimination are filed for every 100,000 LGBT adults each year, compared to approximately three complaints of race discrimination filed for every 100,000 adults of color, and one complaint of sex discrimination filed for every 100,000 women.³⁴ Similarly, the aforementioned study on mortgages noted a possible pattern: across sexes, same-sex pairs where both applicants were Black were the least likely to be approved (-7.5 percentage points from the White heterosexual baseline for male pairs), followed by Black/White interracial pairs, White/Black interracial pairs, and then finally by White pairs reporting the highest rates.³⁵ Additionally, information on claims related to anti-LGBT discrimination may be of particular relevance in attempting to address the discrimination experiences of other marginalized groups. For example, in a study of over 9,000 charges filed with the Equal Employment Opportunity Commission or an analogous state or local agency, it was noted that there were particularly high filing rates by African American workers and men for sexual orientation charges, and by women and White workers for gender identity charges.³⁶

Experiences with discrimination 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,³⁷ 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

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>.

³⁴ Our study on housing discrimination found that on average, approximately three complaints of SOGI discrimination are filed for every 100,000 LGBT adults each year, compared to approximately five complaints of race discrimination filed for every 100,000 adults of color, and one complaint of sex discrimination filed for every 100,000 women. And, in employment, we found that nationally and on average, approximately 4.6 complaints of SOGI discrimination are filed for every 10,000 LGBT workers each year, compared to approximately 4.9 complaints of race discrimination filed for every 10,000 workers of color, and 3.7 complaints of sex discrimination filed for every 10,000 female workers. See studies cited *supra* note 33.

³⁵ Dillbary & Edwards, *supra* note 31, at 53. As noted by the study authors, these findings suggest the existence of a statistically significant "primary applicant" effect when same-sex couples apply for FHA-backed mortgages, wherein an interracial same-sex couple appears more likely to have their application approved when the White partner is the primary applicant as opposed to the Black partner. *Id.*

³⁶ 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).

³⁷ 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>.

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.³⁸

IV. Existing Federal Data Collections Often Fail to Properly Measure SOGI

Federal agencies are uniquely positioned to engage in data collection on a range of subjects impacting the lives and wellbeing of people in the United States.³⁹ At times, these agencies' collections serve as the only available vehicle through which to monitor certain subjects and populations using appropriate data collection methods.⁴⁰ Often, agencies justify their collections by noting that the burden associated with collecting these data is outweighed by the vital knowledge gained on the subjects and populations covered by federal data collections.⁴¹

Despite research as discussed above consistently noting that LGBT people have long faced inequities and other barriers relevant to several government programs and activities, many data collections approved by OMB are often limited in the SOGI information they collect.⁴² Without quality data from the federal government on the experiences of LGBT people, researchers and policymakers in certain contexts may be restricted in their ability to develop appropriate statutory, regulatory, and other interventions, and in turn to assess whether any such interventions by the government have meaningfully advanced equity for this specific population.

For example, only eight of the over 150 data sources used to monitor progress toward Healthy People 2020 objectives include SOGI questions⁴³ —though more specifically, they include only questions on sexual orientation. While data from these sources have certainly been

³⁸ 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>.

³⁹ JENNIFER M. ORTMAN & KAREN L. PARKER, FED. COMM. STATISTICAL METHODOLOGY, WHY DO FEDERAL AGENCIES ASK ABOUT SEXUAL ORIENTATION AND GENDER IDENTITY (SOGI) ON SURVEYS? (2021), https://nces.ed.gov/FCSM/pdf/FCSM_21_01_062221.pdf.

⁴⁰ See, e.g., NAT'L ACADS. OF SCIENCES, ENG'G, & MED., UNDERSTANDING THE WELL-BEING OF LGBTQI+ POPULATIONS 10–11 (Charlotte J. Patterson et al. eds., 2020), <https://www.nap.edu/read/25877/chapter/2#10> (recommending that OMB reconvene the Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys and charge it with developing government-wide standards for the collection of SOGI and intersex status data as a means of providing “researchers, policy makers, and practitioners [with] accurate, consistent, and representative population-level data that describe [LGBT] populations in all their complexity.”).

⁴¹ See, e.g., OFC. OF CIVIL RIGHTS, DEP'T OF EDUC., OMB SUPPORTING STATEMENT A.PC60.07 01 20 2 (2020), <https://omb.report/icr/201909-1870-001/doc/94884501> (justifying a new administration of the Civil Rights Data Collection despite the COVID-19 pandemic, and making same mandatory for all public schools in the United States, on the basis that it is the only source for data on civil rights violations in schools).

⁴² See generally Kellan E. Baker et al., *Ensuring That LGBTQI+ People Count — Collecting Data on Sexual Orientation, Gender Identity, and Intersex Status*, 384 NEW ENG. J. MED. 1184 (2021), <https://www.nejm.org/doi/full/10.1056/NEJMp2032447>.

⁴³ See Williams Institute Scholars, Comment Letter on Proposed Review of the National Health Interview Survey (June 15, 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Comment-NHIS-Jun-2020.pdf>.

used across a number of studies to identify health disparities experienced by sexual minority people,⁴⁴ researchers are left unable to make any assessments on gender minority people using these sources, or even on sexual minority people with respect to the panoply of subjects exclusive to the over 140 remaining sources. And, even when questions measuring SOGI are present in data collections, they can often present methodological problems based on the inconsistent use of differing terms, and/or by being separated from other demographic measures.⁴⁵

As another example, several government surveys collect demographic data about same-sex couples who are cohabitating.⁴⁶ While helpful in generating knowledge about an estimated 2 million LGBT adults,⁴⁷ relying on these surveys would leave gaps in our knowledge about the experiences of the nearly 11 million LGBT people who are not living in same-sex, cohabitating couple households.⁴⁸ And, this is often accomplished through a marital status question,⁴⁹ which may further limit which same-sex couples are actually being captured in any resulting data.

Research indicates that gender minority people face particularly pronounced health and other inequities. However, data from many government surveys do not allow researchers to determine whether a respondent is transgender at all, limiting some studies to being based on administrative records and/or potentially non-representative samples.⁵⁰ Some surveys may employ designs which provide insufficient clarity to transgender respondents on questions related to sex, and could in turn lead to errors in reporting even when questions are asked.⁵¹ Other surveys may conflate transgender women and girls with transgender men and boys in contexts where it may be necessary and appropriate to allow for their classification into separate

⁴⁴ See *id.* (reviewing the 56 published studies analyzing sexual orientation data from the National Health Interview Survey since same began to be collected in 2013).

⁴⁵ NAT'L ACADS. OF SCIENCES, ENG'G, & MED., *supra* note 45, at 2.

⁴⁶ These examples include a number of surveys managed by the U.S. Census Bureau, including the American Community Survey, the American Housing Survey, and the Current Population Survey. See U.S. CENSUS BUREAU, THE AMERICAN COMMUNITY SURVEY 3 (2020), <https://www2.census.gov/programs-surveys/acs/methodology/questionnaires/2020/quest20.pdf?#> (noting that respondents may indicate that the second person in the shared survey is their “same-sex husband/wife/spouse”); U.S. CENSUS BUREAU, 2019 AMERICAN HOUSING SURVEY INSTRUMENT ITEMS 29 (2019), <https://www2.census.gov/programs-surveys/ahs/2019/2019%20AHS%20Items%20Booklet.pdf?#> (same); U.S. CENSUS BUREAU, BASIC CPS ITEMS BOOKLET DEMOGRAPHIC ITEMS 4, <https://www2.census.gov/programs-surveys/cps/techdocs/questionnaires/Demographics.pdf> (last visited July 2, 2021) (same).

⁴⁷ 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-NHIS-Jun-2020.pdf>.

⁴⁸ *Id.*; see also <https://news.gallup.com/poll/329975/one-lgbt-americans-married-sex-spouse.aspx> (providing recent estimates from Gallup that 7.1% of LGBT adults live with a same-sex domestic partner, while 9.6% are married to a same-sex spouse).

⁴⁹ See, e.g., examples discussed *supra* note 46.

⁵⁰ See, e.g., JODY L. HERMAN, BIANCA D.M. WILSON, & TARA BECKER, WILLIAMS INST., DEMOGRAPHIC AND HEALTH CHARACTERISTICS OF TRANSGENDER ADULTS IN CALIFORNIA: FINDINGS FROM THE 2015-2016 CALIFORNIA HEALTH INTERVIEW SURVEY 1–2 (2017), <http://healthpolicy.ucla.edu/publications/Documents/PDF/2017/transgender-policybrief-oct2017.pdf>.

⁵¹ WILLIAMS INSTITUTE SCHOLARS, SEXUAL ORIENTATION AND GENDER IDENTITY (SOGI) ADULT MEASURES RECOMMENDATIONS FAQs 4–5 (2020), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/SOGI-Measures-FAQ-Mar-2020.pdf>; RACHEL E. MORGAN ET AL., FED. COMM. ON STATISTICAL METHODOLOGY, UPDATES ON TERMINOLOGY OF SEXUAL ORIENTATION AND GENDER IDENTITY SURVEY MEASURES 7–12 (2020), https://nces.ed.gov/FCSM/pdf/FCSM_SOGI_Terminology_FY20_Report_FINAL.pdf.

subpopulations.⁵² Some surveys approved by OMB are issued in gendered versions,⁵³ and may lead some LGBT respondents—in particular transgender and gender nonconforming people—to receive questionnaires which omit relevant questions (or include inappropriate ones).

These methodological problems persist despite history suggesting that SOGI can be reliably measured through federal data collections. Existing research on federal implementation of SOGI measures suggests that respondents are unlikely to consider SOGI information to be particularly sensitive, and would therefore provide such information if asked.⁵⁴ Similarly, studies suggest that sexual minority people are not a population that is difficult to survey.⁵⁵ Questions measuring sexual orientation have been included on federal surveys for over two decades,⁵⁶ including in large-scale, population-based surveys administered by the U.S. Census Bureau and other agencies.⁵⁷ Questions used to identify transgender respondents have been included on state and investigator-led surveys for some time, with more common use of both SO and GI questions over the last decade.⁵⁸ 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 Identity in Federal Surveys organized through the Federal Committee on Statistical Methodology.⁵⁹ And indeed, knowledge gained from studies employing such questions has been critical, at times allowing for the assessment of and responses to SOGI-based health and other inequities.⁶⁰

V. Recommendations

The President's equity executive order notes that agencies are to engage in efforts on behalf of populations that have been "historically underserved, marginalized, and adversely affected by persistent poverty and inequality."⁶¹ The foregoing research identifying persistent

⁵² GENIUSS GROUP, *supra* note 1, at 49.

⁵³ See, e.g., *National Survey of Family Growth*, CDC.GOV, (Oct. 20, 2020), https://www.cdc.gov/nchs/nsfg/nsfg_2017_2019_questionnaires.htm.

⁵⁴ 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/ponc.0107104.pdf>.

⁵⁵ 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>.

⁵⁶ 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.

⁵⁷ For example, the CDC through both the BRFSS and YRBS as detailed *supra* asks that respondents report their sexual orientation; the BRFSS also includes a question asking whether respondents identify as transgender. See *2019 BRFSS Survey Data and Documentation*, CDC.GOV (Aug. 31, 2020), https://www.cdc.gov/brfss/annual_data/annual_2019.html; *Questionnaires | YRBS*, CDC.GOV (Nov. 17, 2020), <https://www.cdc.gov/healthyyouth/data/yrbs/questionnaires.htm>.

⁵⁸ Williams Institute Scholars, *supra* note 47.

⁵⁹ See generally *Measuring Sexual Orientation and Gender Identity Research Group*, FED. COMM. STAT. METHODOLOGY (2018), <https://nces.ed.gov/FCSM/SOGI.asp>.

⁶⁰ See *supra* note 44 and accompanying text.

⁶¹ 86 Fed. Reg. at 7009.

stigmatization, discrimination, harassment, and violence against LGBT people in a range of settings, and noting significant resulting consequences for their health and wellbeing across the life course, suggests that LGBT populations are undoubtedly such a group. However, as suggested above, our knowledge on meaningful interventions for LGBT people can often be limited based on the scope of SOGI- and LGBT-related questions asked or otherwise required by agency collections, given that these collections are so frequently positioned as the only authoritative source for data on certain issues and populations. Additionally, inequities long reported by LGBT populations have likely been exacerbated by the COVID-19 pandemic, meaning that efforts to address equity tied to SOGI may require data collection specifically focused on measuring the impact of same.

Notably, a number of recently issued executive orders have included requirements related to SOGI and LGBT populations. One order⁶² calls on agencies to fully implement the Supreme Court's decision in *Bostock v. Clayton County* that prohibitions on sex discrimination encompass discrimination on the basis of SOGI.⁶³ Another directs the Department of Education, in consultation with the Department of Justice, to engage in additional enforcement of Title IX of the Education Amendments of 1972, including within that an order "to account for the significant rates at which students who identify as lesbian, gay, bisexual, transgender, and queer (LGBTQ+) are subject to sexual harassment" in schools.⁶⁴ Similarly, a memorandum directs efforts to address "systemic barriers to safe, accessible, and affordable housing for people of color, immigrants, individuals with disabilities, and lesbian, gay, bisexual, transgender, gender non-conforming, and queer (LGBTQ+) individuals."⁶⁵

Alongside the equity executive order, together these actions suggest that it would be consistent with the priorities of the administration for agencies to engage in sustained efforts to add measures for SOGI, including of sex assigned at birth, to federally-funded, -coordinated, and/or -required collections of data. And, in particular, that they do so consistent with existing and forthcoming research on sampling and the designs of SOGI measures to ensure that the resulting data can be used to fill gaps in knowledge, and in turn advance equity for LGBT populations nationwide.

VI. Conclusion

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

⁶² Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

⁶³ 140 S. Ct. 1731 (2020).

⁶⁴ Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity, Exec. Order. No. 14,021, 86 Fed. Reg. 13,803 (Mar. 08, 2021).

⁶⁵ Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, Presidential Memorandum, 86 Fed. Reg. 7487 (Jan. 26, 2021).

Respectfully Submitted,

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

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

Alexis S. Anderson, B.A.
Kirkland Summer Law Fellow
The Williams Institute
UCLA School of Law

M. V. Lee Badgett, Ph.D.
Williams Distinguished Scholar
The Williams Institute
UCLA School of Law
Professor of Economics
University of Massachusetts Amherst

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

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

Natalie Fox, B.A.
Palm Summer Law Fellow
The Williams Institute
UCLA School of Law

Zack Hampel, B.A.
Walter Summer Law Fellow
The Williams Institute
UCLA School of Law

Winston Luhur, B.S.
Research Assistant
The Williams Institute
UCLA School of Law

Kathryn O'Neill, M.P.P.
Peter J. Cooper Public Policy Fellow
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

Namrata S. Verghese, B.A, M.A.
Haber Summer Law Fellow
The Williams Institute
UCLA School of Law