

RECOMMENDED ACTION MEMO

Agency: Department of Justice, Office for Victims of Crime
Topic: Use of VOCA Funds for Community Violence Intervention
Date: November 2020

Recommendation: Amend the Victims of Crime (VOCA) Rule to:

- (1) ensure that a higher percentage of VOCA funds are used for underserved populations**
- (2) frame community violence intervention programs as a direct service for which VOCA victim assistance funds may be used**
- (3) clarify the definition of “crime victim and victim of crime” to include victims who have also perpetrated crimes**

I. Summary

Description of recommended executive action:

In 2016, the Obama administration promulgated a [regulation](#) designed to codify Victims of Crime Act (VOCA) Victim Assistance Program guidelines and implement statutory directives. One directive requires VOCA state administering agencies to make VOCA victim assistance funds available for “programs which serve previously underserved populations of victims of violent crime,”¹ among other things. That regulation ensures that at least 10% of each year’s VOCA victim assistance grants received by states and eligible territories be used for this purpose.² While this regulation was a step in the right direction, the percentage of each grant allocated to services that assist underserved victims of violent crime should be increased to reflect the extent to which violent crime, and gun violence in particular, disproportionately affects communities of color.

The regulation also codified the program guidelines’ list of allowable direct service costs, most of which are substantially similar to those in the Guidelines with the inclusion of a few additional services. While the regulation does not frame the list of direct service costs as exhaustive, community violence intervention (CVI) programs, programs that address the needs of gun violence victims in underserved communities of color most impacted by gun violence, should be included in the list of direct services for which VOCA victim assistance funds may be used.

Finally, the regulation also codified the definition of “crime victim and victim of crime,” leaving the definition “broad.”³ This definition should be revised to clarify that victims of crime may also perpetrate crimes, and services provided to them shall be eligible for victim assistance funding.

¹ 42 U.S.C. § 10603 (re-codified at 34 U.S.C. § 20103); 28 C.F.R. § 94.101 - 122 (2019).

² 28 C.F.R. § 94.104 (2019).

³ Victims of Crime Act Victim Assistance Grant Program, 81 Fed. Reg. 44,515, 44,518 (July 8, 2016).

While more provisions were included in the regulation, the three discussed above are the focus of the recommendation expanded upon throughout this memo.

Overview of process and time to enactment

The VOCA Victim Assistance Program is administered by the Office for Victims of Crime (OVC) of the US Department of Justice's Office of Justice Programs. The OVC director is granted rulemaking authority pursuant to 34 USC § 20110(a) to "carry out any function of the Director" related to the VOCA Victim Assistance Program.⁴ As such, the OVC would follow the notice-and-comment rulemaking process, pursuant to Section 553 of the Administrative Procedure Act (APA), to increase the percentage of each year's grant allocated to previously underserved victims of violent crime, list CVI programs as a direct service for which victim assistance funds may be used, and expand the definition of "crime victim."⁵

The APA requires that federal agencies issue rules through the notice-and-comment rulemaking (NCRM) process.⁶ To amend the current VOCA victim assistance rule, the OVC will be required to issue a notice of proposed rulemaking (NPRM), provide a period for receiving public comments, respond to significant received comments (by either modifying the proposed rule or addressing substantive comments directly), and publish the final rule in the Federal Register. A rule generally goes into effect 30 days after it is published.⁷ This multi-phase process generally extends for a year.

II. Current state

The Victims of Crime Act authorizes OVC to provide grants from the Crime Victims Fund (CVF) to states and eligible territories for crime victims through crime victim assistance programs.⁸ VOCA victim assistance funds may be used for services, including but not limited to efforts that respond to the immediate emotional, psychological, and physical needs of crime victims; assist victims to stabilize their life after victimization; facilitate crime victims' participation in the criminal justice system and other public proceedings related to the crime; and restore a measure of security and safety for the victim.⁹

⁴ See 42 U.S.C. § 10605 (re-codified at 34 U.S.C. § 20111). See also 28 C.F.R. 94.101(b) (2019); 42 U.S.C. § 10603 (re-codified at 34 U.S.C. § 20103).

⁵ There may be additional amendments to the 2016 Final Rule for which the Administration may want to seek guidance through an Advanced NPRM.

⁶ 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.

⁷ Congressional Research Service, "An Overview of Federal Regulations and the Rulemaking Process," January 7, 2019, <https://crsreports.congress.gov/product/pdf/IF/IF10003>.

⁸ 34 U.S.C. § 20103(c)(1). The funds available in the Crime Victims Fund come from criminal fines, forfeited bonds, penalties, and special assessments. Additionally, gifts, bequests, and donations from private entities may also be deposited. Congressional Research Service, "The Crime Victims Fund: Federal Support for Victims of Crime," April 2, 2020, <https://crsreports.congress.gov/product/pdf/R/R42672>.

⁹ 34 U.S.C. § 20103(d)(2); 28 C.F.R. § 94.102, 94.119 (2019).

Prior to the 2016 regulation, the OVC published program guidelines in the Federal Register to help states distribute their VOCA victim assistance funds.¹⁰

Relevant Obama administration action

The Obama administration promulgated the 2016 regulation codifying and updating the VOCA Victim Assistance Program guidelines (guidelines). Relevant to the recommendations herein, the 2016 regulation codified the guidelines' allocation of 10% of each year's VOCA victim assistance grant to "underserved victims of violent crimes,"¹¹ but declined to increase the percentage of funding allocated to underserved victims of violent crimes, reasoning that the 10% allocation "balances the need for stability in state victim assistance funding with the need to ensure State victim assistance programs are responsive to emerging needs."¹²

Notably, the 2016 regulation expanded the criteria for identifying previously underserved populations, requiring states to consider the type of crime the victim experiences, or demographic characteristics of the victim, or both,¹³ as opposed to solely the type of crime, which had been the criteria in the guidelines (though states were "encouraged to also identify gaps in available services by victims' demographic characteristics"¹⁴). The regulation, however, removed the examples of potential previously underserved victim populations that were in the guidelines¹⁵ because such populations in jurisdictions "may change over time. . . ."¹⁶ While not listed in the regulation, examples of victim populations often underserved in 2016 were provided by the OVC, including survivors of homicide victims, victims of hate and bias crimes, victims of gang violence, and victims of violent crime in high crime urban areas (who the OVC has identified as underserved by type of crime they experience and demographic characteristics of victims),¹⁷ among others.¹⁸

The regulation also codified the list of direct services for which victim assistance funds may be used, while explicitly stating the list was not comprehensive. Most of the services were retained from the guidelines; however, a few services were added or expanded upon, including adding forensic interviews, transitional housing, and relocation expenses (which had been expressly prohibited in the guidelines) as allowable services, and expanding the proceedings for which funds can be used to facilitate participation to include any public proceedings arising from the

¹⁰ Victims of Crime Act Victim Assistance Grant Program, 62 Fed. Reg. 19,607, 19,614 (April 22, 1997); Victims of Crime Act Victim Assistance Grant Program, 81 Fed. Reg. 44,515, 44,518, 44,519, 44,523 (July 8, 2016). See also US Department of Justice, Office of Justice Programs, Office for Victims of Crime, "Side-by-Side Comparison of the VOCA Victim Assistance Guidelines and Rule," accessed October 27, 2020, <https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/comparison-VOCA-victim-assistance-guidelines-and-final-rule.pdf>.

¹¹ 28 C.F.R. § 94.104(c) (2019).

¹² Victims of Crime Act Victim Assistance Grant Program, 81 Fed. Reg. 44,515, 44,519 (July 8, 2016).

¹³ 28 C.F.R. § 94.104(c) (2019).

¹⁴ Victims of Crime Act Victim Assistance Grant Program, 62 Fed. Reg. 19,607, 19,614 (April 22, 1997).

¹⁵ Victims of Crime Act Victim Assistance Grant Program, 62 Fed. Reg. 19,607, 19,614 (April 22, 1997).

¹⁶ Victims of Crime Act Victim Assistance Grant Program, 81 Fed. Reg. 44,515, 44,519 (July 8, 2016).

¹⁷ Victims of Crime Act Victim Assistance Grant Program, 81 Fed. Reg. 44,515, 44,519 (July 8, 2016).

¹⁸ Victims of Crime Act Victim Assistance Grant Program, 81 Fed. Reg. 44,515, 44,519 (July 8, 2016).

crime (e.g. juvenile justice hearings and civil commitment proceedings), as opposed to solely criminal justice proceedings.

Finally, the 2016 regulation codified the guidelines' definition of "crime victim and victim of crime," rejecting commenters' request to provide examples to illustrate coverage of a broad range of harms, stating that the "definition has been sufficiently broad to encompass the harm from various crimes on a wide and diverse range of individuals."¹⁹

VOCA Victim Assistance Program under the Trump administration

The OVC has not published any guidelines, notices of proposed rulemaking, proposed rules, or final rules for the VOCA Victim Assistance Program since 2016. However, related to the recommendation herein to increase the percentage of funding allocated for previously underserved victims of violent crimes, a 2019 audit by the US Office of the Inspector General found that as of February 2018, "many States had substantial balances remaining from their [fiscal year] 2015" VOCA victim assistance grant.²⁰ Collectively, states had approximately \$599 million in unused VOCA victim assistance funds,²¹ funding that could go to more eligible crime victim assistance programs. (Funding not used within four years is returned to the Crime Victim Fund from which it was withdrawn.)

Gun violence in underserved communities of color

Nowhere is the gun violence crisis more evident than in our underserved communities of color, [where homicide rates often reach 10 times the national average](#).²² Young Black men are especially vulnerable—the chance of a Black American family losing a son to a bullet is 62% greater than losing him to a car accident. Black men, an often underserved population, constitute 6% of the US population but account for 50% of all gun homicides, which are violent crimes, each year. The rate of gun injuries is 10 times higher for Black children and teens than it is for white children and teens.²³

¹⁹ Victims of Crime Act Victim Assistance Grant Program, 81 Fed. Reg. 44,515, 44,518 (July 8, 2016).

²⁰ US Department of Justice, Office of the Inspector General, "Review of the Office of Justice Programs' Efforts to Address Challenges in Administering the Crime Victims Fund Programs," July 2019, <https://www.oversight.gov/sites/default/files/oig-reports/a1934.pdf>.

²¹ US Department of Justice, Office of the Inspector General, "Review of the Office of Justice Programs' Efforts to Address Challenges in Administering the Crime Victims Fund Programs," July 2019, <https://www.oversight.gov/sites/default/files/oig-reports/a1934.pdf>.

²² Giffords, "Community Violence," accessed July 15, 2020, <https://giffords.org/issues/community-violence/>.

²³ The rate of non-fatal shootings is 51.1 per 100,000 people for young black Americans versus 5.0 per 100,000 people for young whites. Arthur R. Kamm, Violence Policy Center, and Amnesty International, "African-American Gun Violence Victimization in the United States, Response to the Periodic Report of the United States to the United Nations Committee on the Elimination of Racial Discrimination," June 30, 2014, http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17803_E.pdf.

This high concentration of violence creates a vicious cycle.²⁴ A study of adolescents participating in a community violence intervention program showed that 26% of participants had witnessed a person being shot and killed, while *half* had lost a loved one to gun violence.²⁵ The impact of this is compounded because exposure to firearm violence—being shot, being shot at, or witnessing a shooting—doubles the probability that a young person will commit a violent act within two years.²⁶ In other words, exposure to violence perpetuates further violent behavior, creating a chain of killing and violence that will continue, absent an intervention.

Research and case studies have shown that through a combination of low-cost, CVI programs and much-needed firearms policy reforms, gun violence rates in communities of color can be cut in half in as little as two years. VOCA victim assistance funding can supplement funds available for those CVI programs. VOCA funds have been directed toward such programs in the past, indicating that this is an area that has the OVC’s support and has been considered within its ambit.²⁷

Community violence intervention programs

[Community violence intervention programs](#) are coordinated violence reduction initiatives that use evidence-based strategies such as hospital-based violence intervention, evidence-based street outreach, and group violence intervention to reduce gun violence.²⁸ Our recommendation focuses on the use of VOCA funds for the first two programs. As such, hospital-based violence intervention and evidence-based street outreach are briefly described below. CVI programs provide services that will help to prevent reinjury and recidivism by intervening in the cycle of violence.

1. **Hospital-based violence intervention programs (HVIPs)** focus on reaching high-risk individuals who have been recently admitted to a hospital for treatment of a serious violent injury. The HVIP strategy calls for screening patients based on predetermined criteria to identify those individuals most at risk for re-injury, and then connecting qualifying candidates with trained, culturally competent case managers who provide their clients with intense oversight and assistance, both in the hospital and in the crucial months following the patient’s release. In 2018, Congress encouraged states to use

²⁴ Giffords Law Center to Prevent Gun Violence, “Intervention Strategies,” accessed July 15, 2020, <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/intervention-strategies/>.

²⁵ Jonathan Purtle et al., “Scared safe? Abandoning the Use of Fear in Urban Violence Prevention Programmes,” *Injury Prevention*, 21, no. 2 (2015): 140–141, doi: 10.1136/injuryprev-2014-041530.

²⁶ Jeffery B. Bingenheimer, Robert T. Brennan, and Felton J. Earls, “Firearm Violence, Exposure and Serious Violent Behavior,” *Science* 308 (2005): 1323–1326.

²⁷ See US Department of Justice, Office of Justice Programs, Office for Victims of Crime, “Hidden Victims: Providing and Accessing Victim Services for Young Men of Color,” accessed July 15, 2020, <https://ovc.ojp.gov/funding/awards/2011-vf-gx-k027> (describing the original award OVC granted a violence interruption program in Crown Heights, Brooklyn, New York in 2011).

²⁸ Giffords Law Center to Prevent Gun Violence, “Intervention Strategies,” accessed July 15, 2020, <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/intervention-strategies/>.

VOCA funds toward hospital-based violence intervention programs²⁹ and “OVC developed a program and funded nine medical facilities that proposed to increase support to victims of crime, improve their outcomes, and reduce future victimizations.”³⁰

2. **Evidence-based street outreach** targets the individuals most at risk for perpetrating or becoming the victims of violence, at which point it is possible to interrupt and slow the spread of violence within the community. Evidence-based street outreach is built around three strategies: (1) the detection and peaceful resolution of potentially violent conflicts, (2) the identification and “treatment” of the highest risk individuals by connecting them with available services, and (3) mobilization of the local community in order to change social norms surrounding the use of violence.

III. Proposed action(s)

The OVC has noted that “victims of gang violence,” “victims of violent crime in high crime areas,” “victims of physical assault,” and “survivors of homicide victims,” are all “often underserved.”³¹ But many states have typically not used VOCA victim assistance funds to meaningfully invest in CVI programs working with victims of violence.³² To ensure VOCA victim assistance funds are available for CVI programs, programs that address the needs of gun violence victims in communities of color most impacted by gun violence, the incoming administration should draft and publish a NPRM, followed by a final rule that:

- (1) increases the percentage of funding allocated for services that assist previously underserved victims of violent crimes**

The OVC should increase the minimum percentage of funding allocated for services assisting previously underserved victims of violent crimes to 15%. Presently, VOCA state administering agencies are required to allocate a minimum of 10% of each year’s VOCA victim assistance grant to programs and projects specifically serving this population.³³ Increasing the percentage allocated for such programs will help direct funds to community programs serving victims of gun violence, which disproportionately impacts communities of color. As stated above, in 2018 there was nearly \$599 million in untouched VOCA victim assistance funding from the 2015 distribution, suggesting that funds exist for use by states, which could be directed to CVI

²⁹ 115th Congress (2017-2018), “House Report 115-704—Commerce, Justice, Science, and Related Agencies Appropriations Bill, 2019,” May 24, 2018, <https://www.congress.gov/congressional-report/115th-congress/house-report/704/1>.

³⁰ US Department of Justice, Office of Justice Programs, Office for Victims of Crime, “OVC FY 2019 VOCA Victim Assistance” Grant Solicitation, <https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/OVC-2019-15204.pdf>. See US Department of Justice, Office of Justice Programs, Office for Victims of Crime, “OVC FY 2018 Advancing Hospital-Based Victim Services” Grant Solicitation, <https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/OVC-2018-14048.pdf>

³¹ Victims of Crime Act Victim Assistance Grant Program, 81 Fed. Reg. 44,515, 44,519 (July 8, 2016).

³² Giffords, “MEMO: Protecting Americans from Community Violence during the COVID-19 Pandemic,” April 23, 2020, <https://giffords.org/press-release/2020/04/community-violence-covid/>.

³³ 28 C.F.R. § 94.104(c) (2019).

programs without taking funds away from crime victim assistance programs currently eligible for funding.³⁴

(2) add “community violence intervention programs” to 28 CFR § 94.119

The OVC should add “community violence intervention programs” to the list of direct services for which VOCA victim assistance funds may be used at 28 CFR § 94.119. Specifically, the OVC should add:

“(m) *Community violence intervention programs*: coordinated violence reduction initiatives that provide direct services to victims of violence who are most at risk of violence in order to reduce future [gun] violence. Initiatives use evidence-based strategies and include, but are not limited to:

(1) hospital-based violence intervention that focuses on reaching high-risk individuals who have been recently admitted to a hospital for treatment of a serious violent injury and connects these patients with trained, culturally competent case managers, who provide intense oversight and assistance both in the hospital and in the crucial months following the patient’s release

(2) evidence-based street outreach that focuses on the detection and peaceful resolution of potentially violent conflicts; the identification and “treatment” of the individuals most at risk for perpetrating or becoming the victims of violence by connecting them with available services; and the mobilization of the local community in order to change social norms surrounding the use of violence.”³⁵

(3) clarifies that the definition of “crime victim or victim of crime” includes persons who have perpetrated a crime

The OVC should add at the end of the definition of “crime victim or victim of crime” at 28 CFR 94.102: “In addition, for purposes of this program, crime victim or victim of a crime may include persons who are victims of a crime who have also perpetrated a crime.” By including perpetrators in the “crime victim” definition, the regulation acknowledges that exposure to violence perpetuates further violent behavior; in other words, persons who have been exposed to violence (e.g., as a victim, directly or indirectly) are likely to perpetuate violence in the future. As such, persons who perpetrate a crime should be eligible recipients of victims’ services.

A. Process: notice-and-comment rulemaking

To amend a regulation, first an agency must provide notice that it intends to promulgate a rule by publishing an NPRM in the Federal Register. The notice must provide the time, place, and

³⁴ US Department of Justice, Office of the Inspector General, “Review of the Office of Justice Programs’ Efforts to Address Challenges in Administering the Crime Victims Fund Programs,” July 2019, <https://www.oversight.gov/sites/default/files/oig-reports/a1934.pdf>.

³⁵ See Giffords Law Center to Prevent Gun Violence, “Intervention Strategies,” accessed July 15, 2020, <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/intervention-strategies/#gvi>.

nature of the rulemaking; the legal authority under which the rule is proposed; and either the terms or subject of the proposed rule.

Then, the agency must accept public comments on the proposed rule for a period of at least 30 days. Received comments must be reviewed, and the OVC must respond to significant comments, either by explaining why it is not adopting proposals or by modifying the proposed rule to reflect the input.

Once this process is complete, the final rule can be published in the Federal Register along with a concise explanation of the rule's basis and purpose. Generally, the final rule may not go into effect until at least 30 days after it is published.

IV. Legal justification

The changes proposed in the section above are within the OVC director's statutory authority. The OVC director may establish any rules, regulations, guidelines, or procedures necessary to carry out any function of the director related to the VOCA Victim Assistance Program.³⁶ As such, the OVC director may establish rules and regulations amending the percentage of funding allocated to the priority crime victim categories and previously underserved populations, and include additional direct services for which victim assistance funds may be used as established through guidelines prior to 2016 and the 2016 regulation.³⁷ Additionally, the OVC director may add and amend terms and definitions to clarify terms used in the regulation, removing ambiguity that may exist.³⁸

After an administrative regulation is finalized it can be judicially challenged for being beyond the agency's statutory authority, violating a constitutional right, not following rulemaking procedures, or arbitrary or capricious agency action. Amending the VOCA rule is clearly within the OVC's statutory authority, does not implicate any constitutional rights, and is unlikely to be challenged on such grounds. If the new rule is judicially challenged, it will likely be challenged for improperly following procedural rulemaking or arbitrary and capricious agency action.

Procedural challenges

The administration can ensure procedural compliance by following the NCRM process pursuant to Section 553 of the APA.

For example, the OVC should review all comments submitted during the public comment period. Courts have adopted a strong reading of the requirement that the agency "consider...the relevant matter presented" in the comments.³⁹ The agency must address the concerns raised in

³⁶ 34 U.S.C. § 20110(a).

³⁷ See 28 C.F.R. § 94.104 (2019).

³⁸ See 28 C.F.R. § 94.102 (2019).

³⁹ 5 U.S.C. § 553(c).

all non-frivolous and significant comments.⁴⁰ The final rule must be the “logical outgrowth” of the proposed rule and the feedback it elicited.⁴¹

Arbitrary-or-capricious challenge

If there is a judicial challenge brought regarding the proposed action, or new rule, being arbitrary or capricious, a court will invalidate the regulation if the agency action or conclusion is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁴²

The arbitrary-and-capricious test is used by courts to review the factual basis for agency rulemaking. When analyzing whether a rule passes the test, a court will look to whether the agency examined the relevant data and offered a satisfactory explanation for its action, establishing a nexus between the facts and the agency’s choice.⁴³

When an agency fails to consider important facts, or when its explanation is either unsupported or contradicted by the facts, the court has grounds to find the rule “arbitrary or capricious.”⁴⁴

Reasoned explanation

Admittedly, the changes proposed in the section above would diverge from the OVC’s prior regulations. However, an agency is “free to change their existing policies as long as they provide a reasoned explanation for the change.”⁴⁵ When an agency changes its existing position, it “need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.”⁴⁶ However, an agency must at least “display awareness that it is changing position” and “show that there are good reasons for the new policy.”⁴⁷

In addition, “[i]n explaining its changed position, an agency must also be cognizant that long-standing policies may have engendered serious reliance interests that must be taken into account. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances

⁴⁰ *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977) (finding the agency’s “statement of general purpose” inadequate because it did not provide the scientific evidence on which it was based, and the agency’s consideration of relevant information inadequate because it did not respond to each comment specifically).

⁴¹ *Chesapeake Climate Action Network v. EPA*, No. 15-1015, 2020 WL 1222690 at *20 (D.C. Cir. Mar. 13, 2020) (noting that a final rule is the “logical outgrowth” of a proposed rule if “interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice and comment period.” A final rule “fails the logical outgrowth test” if “interested parties would have had to divine the agency’s unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.”) (internal quotation marks and citations omitted).

⁴² 5 U.S.C. § 706(2)(A).

⁴³ See *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁴⁴ *Id.* at 43.

⁴⁵ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citing *Nat’l Cable & Telecomms. Assn. v. Brand X Internet Servs.*, 545 U.S. 967, 981–982 & *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863-864 (1984)).

⁴⁶ *Encino*, 136 S. Ct. at 2125 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

⁴⁷ *Encino*, 136 S. Ct. at 2126.

that underlay or were engendered by the prior policy.”⁴⁸ “[A]n unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice” and that “an arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference.”⁴⁹

As described above, communities of color that experience very high rates of violence, created by pervasive cycles of violence, have been underserved for centuries. These communities have large victim populations, many of whom would benefit from programs funded by VOCA victim assistance grants. For example, so many members of these communities are unable to access the criminal justice system, which VOCA seeks to assist with, because of a failure by police to arrest and hold accountable those responsible in the majority of shootings and murders occurring in these communities.⁵⁰ This need in underserved communities of color is sufficient to justify increasing the percentage of funding allocated for previously underserved victims of violent crimes; the increase will address centuries of neglect and injustice.

Adding “community violence intervention programs” to the list of direct services for which VOCA victim assistance funds may be used explicitly affirms the funding eligibility of these programs and any activities in support of these programs.⁵¹ The explicitly stated eligibility of these programs for VOCA victim assistance funds may increase the number of applications from CVI programs for funding and the number of subgrants awarded to CVI programs.⁵²

While members of the public may object to using funds to assist perpetrators of crime, such use is consistent with the DOJ's current interpretation of the statute: “[a] state considering funding a batterer intervention program must determine if the program is using funding to provide services to victims of crime who are also batterers. If the state determines that the program is providing services to victims of crime (who are also batterers), then the program may be supported with

⁴⁸ *Encino*, 136 S. Ct. at 2126.

⁴⁹ *Id.* (internal quotations and citations omitted).

⁵⁰ Gun homicides in communities of color with high crime rates are often unsolved. Researchers for The Trace found that across 22 cities, 65% of fatal shootings involving a Black or Hispanic victim never led to an arrest. Police also failed to make an arrest in nearly 80% of nonfatal shooting incidents involving Black victims. These are citywide averages; in the poorest and most disadvantaged communities within those cities, accountability for shootings and murder is even rarer still. See Giffords Law Center to Prevent Gun Violence, “In Pursuit of Peace: Building the Police-Community Trust to Break the Cycle of Violence,” January 2020, <https://lawcenter.giffords.org/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/>; Sarah Ryley, Jeremy Singer-Vine, and Sean Campbell, “Shoot Someone In a Major U.S. City, and Odds Are You’ll Get Away With It,” The Trace, January 24, 2019, <https://www.thetrace.org/features/murder-solve-rate-gun-violence-baltimore-shootings/>.

⁵¹ See 28 CFR §§ 94.119, 120.

⁵² Ideally, the amount of VOCA victim assistance funding going to community violence intervention programs would increase, however increasing the percentage of funding allocated to services assisting previously underserved victims will not guarantee that states will allocate any of that funding to programs serving victims of gun violence. States have discretion in “determining the populations of victims of violent crimes that may be underserved in their respective States.” In order to ensure projects serving victims of gun violence are allocated a percentage of funding, the VOCA victim assistance statute would need amending--for example, “gun violence” would need to be added as a priority category under 34 USC § 20103(a)(2)(A) or a category, generally, under 34 USC § 20103(a)(2)--something the Administration is unable to do on its own. 34 U.S.C. § 20103(a)(2)(B). See also 28 C.F.R. § 94.103(b) (2019).

VOCA Victim Assistance funding.”⁵³ As such, if a CVI program proposes to use VOCA victim assistance funding to provide services to victims of crimes (e.g. connecting victims with social service providers,⁵⁴ assisting victims to stabilize their lives after victimization, and restore a measure of security and safety for the victim⁵⁵) who have also perpetrated crime, then the CVI program may be supported with VOCA victim assistance funding.⁵⁶

Increasing the allocation for the underserved category

There are strong arguments for increasing the allocation for the underserved category. The OVC has claimed that the current allocation “balances the need for stability in state victim assistance funding with the need to ensure State victim assistance programs are responsive to emerging needs.”⁵⁷ However, there is no shortage of needs in underserved populations, whether those populations are underserved communities of color experiencing gun violence, where homicide rates often reach 10 times the national average;⁵⁸ Non-Hispanic Black and American Indian/Alaska Native women, who experience the highest rates of homicide, with over half being intimate partner-related;⁵⁹ or older adults in our communities, victimized by their community or caregivers.⁶⁰

Opponents may also argue that allocating more funding for underserved populations decreases the funding available for the other priority categories—victims of sexual assault, spousal abuse, and child abuse—as well as the other programs and projects that may not fit these four categories. However, the VOCA statute and the regulation require states to allocate funding toward the priority categories—victims of sexual assault, spousal abuse, and child abuse. The regulation specifies that at least 10% of the state’s grant go toward each of these individual categories. Increasing the funding allocated to underserved populations does not change the required allocation toward the three priority categories. Further, if funding allocated to underserved populations increases to 15% and the priority categories retain the required 10% allocation, 55% of a state’s VOCA victim assistance funding remains available to be used at the

⁵³ US Department of Justice, Office of Justice Programs, Office for Victims of Crime, “Victims of Crime Act (VOCA) Administrators: VOCAPedia,” accessed October 27, 2020, <https://ovc.ojp.gov/program/victims-crime-act-voca-administrators/vocapedia#DirectServices>.

⁵⁴ 28 C.F.R. § 94.119(b) (2019).

⁵⁵ 28 C.F.R. § 94.102 (2019).

⁵⁶ “A state considering funding a batterer intervention program must determine if the program is using funding to provide services to victims of crime who are also batterers. If the state determines that the program is providing services to victims of crime (who are also batterers), then the program may be supported with VOCA Victim Assistance funding.” US Department of Justice, Office of Justice Programs, Office for Victims of Crime, “Victims of Crime Act (VOCA) Administrators: VOCAPedia,” accessed October 27, 2020, <https://ovc.ojp.gov/program/victims-crime-act-voca-administrators/vocapedia#DirectServices>.

⁵⁷ Victims of Crime Act Victim Assistance Grant Program, 81 Fed. Reg. 44,515, 44,519 (July 8, 2016).

⁵⁸ Giffords, “Community Violence,” accessed July 29, 2020, <https://giffords.org/issues/community-violence/>.

⁵⁹ Emiko Petrosky et al., “Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence — United States, 2003–2014,” *MMWR and Morbidity and Mortality Weekly Report*, July 21, 2017, <https://www.cdc.gov/mmwr/volumes/66/wr/mm6628a1.htm>.

⁶⁰ US Department of Justice, Office of Justice Programs, Office for Victims of Crime, “Elder Justice,” accessed July 29, 2020, <https://ovc.ojp.gov/topics/elder-justice>.

state's discretion. This could mean further funding to programs supporting victims of sexual assault, spousal and child abuse, and other programs eligible for victim assistance funding.

Deposits into the Crime Victims Fund (from which VOCA victim assistance grants are funded) are decreasing; thus, the obligation cap set by Congress (which sets the amount of CVF funds available for distribution) continues to decrease. However, deposits into the CVF fluctuate each year as a result of how the CVF receives funds.⁶¹ The amounts deposited into the CVF in FY 2018 and 2019 were the lowest since 2003—\$444.8 million and \$524 million, respectively. Between 2004 and 2017, the deposited amounts ranged from \$641.8 million (in 2006) to \$6.584 billion (in 2017, as the result of two very large settlements that accounted for about 86% of the amount collected to CVF⁶²).⁶³ The fluctuation is an issue Congress would need to review. However, even with fewer funds available, requiring a greater allocation to underserved populations diversifies the populations⁶⁴—including populations of individuals who are less advantaged based on their race, sex, age, ethnicity, ability, sexual orientation, religion, and nationality—and victimization types served by VOCA victim assistance funds.

Community violence intervention programs as direct services

Opponents of the proposed rule change may argue that the individuals served by community violence intervention programs are predominantly perpetrators of crime, not victims. However, exposure to violence perpetuates further violent behavior, creating a chain of killing and violence that will continue absent an intervention.⁶⁵ While not every perpetrator is a crime victim, we know that being shot, being shot at, or witnessing a shooting doubles the probability that a young person will commit a violent act within two years.⁶⁶ The likelihood that a CVI program is not serving a victim of a crime is quite low. However, to appease this concern states awarding sub-grants could require, as a part of the application, that programs provide victimization data on the individuals currently served by the program or target data.

⁶¹ The funds available in the Crime Victims Fund come from criminal fines, forfeited bonds, penalties, and special assessments. Additionally, gifts, bequests, and donations from private entities may also be deposited. Congress does not appropriate funding for the Crime Victims Fund. Congressional Research Service, "The Crime Victims Fund: Federal Support for Victims of Crime," April 2, 2020, <https://crsreports.congress.gov/product/pdf/R/R42672>.

⁶² Doug Sword, "Shrinking victims fund signals tough times for appropriators," Roll Call, March 21, 2019, <https://www.rollcall.com/2019/03/21/shrinking-victims-fund-signals-tough-times-for-appropriators/>.

⁶³ Congressional Research Service, "The Crime Victims Fund: Federal Support for Victims of Crime," April 2, 2020, <https://crsreports.congress.gov/product/pdf/R/R42672>.

⁶⁴ In 2018, of those reporting, 70.5% of victims served were female, 52% were white, 5% were a part of the LGBTQ community and 42% of victims served were receiving services following domestic and/or family violence victimization. US Department of Justice, Office of Justice Programs, Office for Victims of Crime, "Victims of Crime Act Victim Assistance Formula Grant Program, Fiscal Year 2018 Data Analysis Report," 2018, <https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/2018-voca-annual-assistance-performance-report.pdf>.

⁶⁵ Research and case studies have shown that through a combination of low-cost, violence intervention programs and much-needed firearms policy reforms, gun violence rates in communities of color can be cut in half in as little as two years.

⁶⁶ Jeffery B. Bingenheimer, Robert T. Brennan, and Felton J. Earls, "Firearm Violence, Exposure and Serious Violent Behavior," *Science* 308 (2005): 1323–1326.

Admittedly, community violence intervention programs may not serve victims immediately following their victimization. Some “victims” may not be served by a CVI program until years after their victimization. However, the 2016 regulation defines “direct services or services to victims of crimes” to include “efforts that . . . [a]ssist victims to stabilize their lives after victimization . . . or [r]estore a measure of security and safety for the victim.”⁶⁷ “The phrase “after victimization” is given no timeframe. Of the 12 direct services listed for which funds may be used, only one requires that the service respond to the immediate needs of the victim— “immediate emotional, psychological, and physical health and safety.”⁶⁸ Further, the regulation currently includes direct services that may not serve victims immediately following their victimization, including mental health counseling and care, peer-support, and public awareness.⁶⁹

Perpetrators of crime may receive assistance

The proposed change to the definition of “crime victim or victim of crime” may stir up claims that aim to draw a thick line between perpetrators and victims of crimes. However, the proposed change would explicitly limit the definition to include “persons who are victims of a crime who have also perpetrated a crime,” not anyone who has perpetrated a crime. The wording of this definition aligns with the DOJ’s interpretation of the statute: a state may fund, for example, a batterer intervention program “if the state determines that the program is providing services to victims of crime (who are also batterers).”⁷⁰ Gun violence in communities of color with high crime rates creates a vicious cycle, where the exposure to violence, especially at a young age, increases the chance that the victim will commit a violent act. This is yet another example of a community of victims who may also perpetrate the violence they have fallen victim to. These victims of gun violence are in no less need of services than someone who has not taken that additional step to perpetrate violence.

Opponents may also argue that victim assistance funding should not be used for programs serving perpetrators of crime (even if they are victims), since there are other funding sources for those programs. However, the pre-2016 Guidelines explicitly prohibited VOCA victim assistance funds to be used “to offer rehabilitative services to offenders” and “support services to incarcerated individuals, even when the service pertains to the victimization of that individual.”⁷¹ However, the 2016 regulation removed the prohibition, recognizing that the prohibition “unnecessarily prevent[ed] States and communities from fully leveraging all available resources to provide services to these victims, who have been shown to have a great need for such services.”⁷²

⁶⁷ 28 C.F.R. § 94.102.

⁶⁸ 28 C.F.R. § 94.119(a).

⁶⁹ See e.g., 28 C.F.R. § 94.119(c), (d), (j).

⁷⁰ US Department of Justice, Office of Justice Programs, Office for Victims of Crime, “Victims of Crime Act (VOCA) Administrators: VOCApedia,” accessed October 27, 2020, <https://ovc.ojp.gov/program/victims-crime-act-voca-administrators/vocapedia#DirectServices>.

⁷¹ Victims of Crime Act Victim Assistance Grant Program, 62 Fed. Reg. 19,607, 19,619 (April 22, 1997).

⁷² Victims of Crime Act Victim Assistance Grant Program, 81 Fed. Reg. 44,515, 44,524 (July 8, 2016).

V. For consideration

While outside of the role of the administration in promulgating a regulation, it is worth noting the eligibility requirements that CVI programs will need to meet to obtain funding. For example, CVI programs that are eligible crime victim assistance programs, and not solely projects that another eligible crime victim assistance program is using VOCA funds toward, will need to (1) demonstrate the breadth and depth of financial support from sources other than the CVF,⁷³ in some instances demonstrating that at least 25% of the program's funding comes from sources other than the CVF,⁷⁴ and (2) assist potential recipients with seeking crime victim compensation benefits.⁷⁵ In promulgating this rule, the OVC should make clear that these programs will have to meet these eligibility requirements.

⁷³ 28 C.F.R. § 94.112(b) (2019).

⁷⁴ 28 C.F.R. § 94.112(b)(2) (2019).

⁷⁵ 34 U.S.C. § 20103(b)(1)(E). See 28 C.F.R. 94.113(d) (2019). Assistance includes “referring such potential recipients to an organization that can so assist, identifying crime victims and advising them of the availability of such benefits, assisting such potential recipients with application forms and procedures, obtaining necessary documentation, monitoring claim status, and intervening on behalf of such potential recipients with the crime victims' compensation program.”