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SUBMITTED VIA FEDERAL RULEMAKING PORTAL

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GIFFORDS submits this public comment in response to the Notice of Proposed Rulemaking regarding the Victims of Crime Act (“VOCA”) Victim Compensation Grant Program (“Victim Compensation Program”), Docket No. OJP (OVC) 1808 (the “Proposed Rule”). The Office for Victims of Crime (“OVC”) previously published the VOCA Victim Compensation Program Guidelines (“Guidelines”)¹ more than twenty years ago, and OVC promulgates the Proposed Rule to “clarify and streamline [the Guidelines]’ existing provisions.”²

As a result of numerous community engagements with survivors, direct service providers, State Administering Agencies (“SAAs”), national advocacy organizations, and federal and tribal leaders, the Proposed Rule represents OVC’s effort to make victim compensation funds more accessible and equitable.³ The Proposed Rule follows a flurry of state activity to modernize victim compensation statutes,⁴ and provides updated guidance on the VOCA Fix to Sustain the Crime Victims Fund Act of 2021 (“VOCA Fix”), which codified in part the federal government’s interest in a more trauma-informed Victim Compensation Program.⁵

In light of its significant changes to the administration of the federal Victim Compensation Program, GIFFORDS strongly supports the Proposed Rule, with the exception of subpart B, and urges OVC to codify these regulations as soon as feasible. (Regarding subpart B, GIFFORDS defers to the opinions of those with more relevant areas of expertise.)

¹ Victims of Crime Act Victim Compensation Grant Program Final Guidelines, 66 Fed. Reg. 27158 (May 16, 2001).

² Victims of Crime Act (VOCA) Victim Compensation Grant Program, 89 Fed. Reg. 7640 (proposed Feb. 5, 2024) (to be codified at 28 CFR pt. 94).

³ Office for Victims of Crime, *From the Director’s Desk, June 8, 2023*, U.S. DEP’T. OF JUST. OFF. OF JUST. PROGRAMS (Jun. 9, 2023), <https://ovc.ojp.gov/media/video/24601#0-0>.

⁴ ALLIANCE FOR SAFETY AND JUSTICE, HEALING FROM HARM: EXPANDING ACCESS TO VICTIM COMPENSATION 9–11 (2022).

⁵ See VOCA Fix, 34 U.S.C. § 20102(b)(2).

GIFFORDS IS COMMITTED TO HOLISTIC SOLUTIONS TO GUN VIOLENCE IN AMERICA

GIFFORDS—the national gun violence prevention organization founded by former Congresswoman and gun violence survivor Gabby Giffords—recognizes that “gun violence is a complex problem...requir[ing] a wide range of solutions.”⁶ GIFFORDS seeks to advance a holistic and nuanced understanding of gun violence in America. Indeed, GIFFORDS elevates issues like suicidality and community violence to broaden a public discussion that tends to focus primarily on mass shootings, and believes that the universe of solutions to gun violence must include services, resources, advocacy, and policymaking that focuses on the healing of survivors of gun violence, as a key mechanism for increasing public safety and preventing additional violence.

Having survived a mass shooting in 2011, Congresswoman Giffords has a first-hand understanding of the challenges that survivors of gun violence are forced to navigate. After surviving an attempted assassination at a constituent event, the congresswoman has embarked on a long journey including partial paralyzation and six months in a rehabilitation facility; years of occupational and physical therapy to relearn everyday activities like walking and talking; and the end of her career as a member of Congress.⁷ After thirteen years since the congresswoman’s shooting, she often remarks that her journey has been a “long, hard haul.”⁸ Congresswoman Giffords is a remarkable example of resilience, and every survivor of gun violence should have the same opportunity to engage in their own healing process. Victim compensation is a policy tool that can reconceptualize public safety infrastructure to bridge that gap between various systems to mitigate poor mental, physical, emotional, and practical outcomes that occur when victims do not have access to healing resources.

THE NATURE OF VIOLENT CRIME REQUIRES MORE EFFECTIVE VICTIM COMPENSATION

A recent survey of crime survivors revealed that 6 in 10 people have been a victim of crime over the past decade.⁹ In 2022 alone, there were more than 6.5 million violent victimizations of persons 12 years or older, an increase from 4.6 million in 2021.¹⁰ Yet nearly 60% of people who were violently victimized will not report the crime to law enforcement.¹¹ All too often, violent

⁶ *About Giffords*, GIFFORDS: COURAGE TO FIGHT GUN VIOLENCE, <https://giffords.org/about/> (last visited Mar. 19, 2024).

⁷ Sheryl Gay Stolberg, *For Giffords, Gun Safety Is Like Her Recovery: ‘Inch by Inch,’* THE NEW YORK TIMES COMPANY (June 20, 2023), <https://www.nytimes.com/2023/01/30/us/politics/gabby-giffords-mass-shootings.html>.

⁸ *Id.*

⁹ ALLIANCE FOR SAFETY AND JUSTICE, CRIME SURVIVORS SPEAK 2022: NATIONAL SURVEY OF VICTIMS’ VIEWS ON SAFETY AND JUSTICE 20 (2022).

¹⁰ See A. Thompson & S. Tapp, CRIMINAL VICTIMIZATION, 2022 2 (2023).

¹¹ See *id.* at 1. The reasons that victims do not report to law enforcement include general distrust or lack of confidence in police; fear of stigmatization or being blamed for their victimization; or fear of retaliation

crime is committed with a firearm. A Bureau of Justice Statistics inmate survey found that “29% of state and 36% of federal prisoners serving time for violent offense[s] possessed a gun during the offense.”¹² Offenders possessed, showed, or used a firearm more than 640,000 times in 2022, an increase of nearly 3% from 2021.¹³ 71% of homicides were committed with a firearm over a period from 1993 to 2018,¹⁴ and the proportion of homicides by firearm increased to 80% by 2021.¹⁵ Regarding nonfatal injury, the CDC previously suggested that 80% of nonfatal firearm injuries are from intentional assaults.¹⁶

The burden of violent crime is also borne disproportionately by already disadvantaged populations. People with lower incomes are at a much higher risk of violent victimization.¹⁷ Furthermore, violent firearm victimization tends to concentrate in urban environments, and a study of several cities indicated that “less than one percent of a city’s population is connected to at least 50% of violent incidents.”¹⁸ The risks are especially acute for Black Americans: “over the past four decades, the risk for [facing] serious violence has been 1.5 to 2 times greater for African Americans than [White people, and] 1.2 to 1.5 times greater for Hispanic [people] than [White people].”¹⁹ Though Black Americans constitute only fourteen percent of the United States’ population, they represented 62% of all firearm homicides in 2021.²⁰ Finally, past victimization or previous conviction are important predictors of victimization. For instance, 87 percent of people with past convictions have been victimized in the past decade, with 6 out of 10 having been violently victimized.²¹

Accordingly, more effective victim compensation programs may stabilize survivors as they deal with the resulting trauma of violent crime. “Nearly half of all crime survivors and seven out of ten victims of violent crime describe their experience as traumatic.”²² In other words, most survivors

or repeat victimization. See CRIME SURVIVORS SPEAK, *supra* note 9, at 16; see also Douglas N. Evans, COMPENSATING VICTIMS OF CRIME 10 (2014).

¹² See M. Alper & L. Glaze, SOURCE AND USE OF FIREARMS INVOLVED IN CRIMES: SURVEY OF PRISON INMATES, 2016 1 (2019).

¹³ See CRIMINAL VICTIMIZATION, *supra* note 10, at 10.

¹⁴ G. Kena & J. Truman, TRENDS AND PATTERNS IN FIREARM VIOLENCE, 1993–2018 1 (2022).

¹⁵ See Center for Disease Control and Prevention, CDC Wonder: Underlying Cause of Death, 2018–2021, <https://wonder.cdc.gov/controller/datarequest/D158> (last visited Apr. 1, 2024).

¹⁶ See Center for Disease Control and Prevention & Consumer Product Safety Commission, *National Electronic Injury Surveillance System All Injury Program, 2016*, UNIV. OF MICH. INST. FOR SOC. RES. (Aug. 19, 2020), <https://www.icpsr.umich.edu/web/NACJD/studies/37667>

¹⁷ See JOHN MAKI & HEATHER WARNKEN, REALIZING THE PROMISE OF VICTIM COMPENSATION: RECOMMENDATIONS TO HELP COMMUNITY VIOLENCE INTERVENTION MEET THE NEEDS OF UNDERSERVED VICTIMS 3 (2023).

¹⁸ *Intervention Strategies*, GIFFORDS: COURAGE TO FIGHT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/intervention-strategies/> (last visited Mar. 20, 2024) (Further, “almost half of all gun homicides occur in just 127 cities.”) *Id.*

¹⁹ See NATIONAL ALLIANCE OF TRAUMA RECOVERY CENTERS, TRAUMA RECOVERY CENTERS: ADDRESSING THE NEEDS OF UNDERSERVED CRIME SURVIVORS 5 (2020); see also TRENDS AND PATTERNS IN FIREARM VIOLENCE, *supra* note 14, at 7.

²⁰ See CRIME SURVIVORS SPEAK, *supra* note 9, at 10.

²¹ See *id.*

²² See CRIME SURVIVORS SPEAK, *supra* note 9, at 10.

of violent victimization will experience actual or threatened violence as “physically or emotionally harmful or life threatening,” and consequently the experience may have “lasting effects on the individual’s functioning and mental, physical, social, emotional, or spiritual wellbeing.”²³ Where post-victimization crisis reactions do not abate,²⁴ the effects of a traumatic criminal event may produce symptoms of long-term post-traumatic stress, such as intrusive re-experiencing of the crime.²⁵ As a result, violent victimization often leads to lifelong practical issues with financial stability, substance abuse, meaningful relationships, employment, and housing.²⁶ For many Black and Brown individuals, this trauma will compound with disinvested community conditions and the institutional biases that accord less weight to their experiences of trauma.²⁷

Ultimately, the Proposed Rule will better account for the complex nature of violent crime and provide survivors with more equitable access to compensation as they navigate trauma.

VICTIM COMPENSATION IS AN UNDERUTILIZED POLICY RESPONSE THAT CAN IMPROVE PUBLIC SAFETY

Unfortunately, victim compensation still remains an underutilized resource. A mere 9% of violent crime victims receive *any* kind of victim assistance in the aftermath of victimization.²⁸ Four out of five crime survivors are not even aware that victim compensation programs exist.²⁹ Only *one in twelve* violent crime survivors actually receive victim compensation.³⁰ Further, victim compensation applicants tend to be “white, female, and between the ages of 25 and 59.”³¹ People of color are generally less likely to receive victim services or support, notwithstanding their unequal share of victimization.³² Consequently, the limited use of victim compensation undermines its untapped potential as a violence intervention. GIFFORDS does not believe that

²³ See TRAUMA AND JUSTICE STRATEGIC INITIATIVE, SAMHSA’S CONCEPT OF TRAUMA AND GUIDANCE FOR A TRAUMA-INFORMED APPROACH 2 (2014). Even still, many people will lack the social capacity or knowledge to effectively engage with people who are experiencing the socioemotional and mental fallout from violent traumatization: “Several [people] experienced others attempting to rush their experience of grief or invalidating it due to the passing of time since the incident.” See Amanda DiLorenzo, *Experiences of Loss and Growth: A Phenomenological Inquiry of Mass Shooting Survivors and Their Family or Family-of-Choice Members*, UNIV. CENT. FLA. 1, 105 (2020).

²⁴ In the immediate aftermath of victimization, survivors will experience crisis reactions that may include “exhaustion, confusion, sadness, anxiety, agitation, numbness, dissociation, physical arousal, and blunted affect.” SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, TREATMENT IMPROVEMENT PROTOCOL: TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES ch. 3 (57th ed. 2014).

²⁵ See BESSEL VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA 159 (2015).

²⁶ See UNDERSERVED CRIME SURVIVORS, *supra* note 19, at 1.

²⁷ NATIONAL PUBLIC SAFETY PARTNERSHIP, BALTIMORE, MARYLAND VICTIM SERVICES CAPACITY ASSESSMENT REPORT: FOCUSED ON UNDERSERVED SURVIVORS, INCLUDING BOYS AND MEN OF COLOR AND THOSE IMPACTED BY GUN VIOLENCE 11 (2021).

²⁸ CRIMINAL VICTIMIZATION, *supra* note 10, at 10.

²⁹ See UNDERSERVED CRIME SURVIVORS, *supra* note 19, at 4.

³⁰ See CRIME SURVIVORS SPEAK, *supra* note 9, at 10.

³¹ GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, CROSSROADS: REIMAGINING FEDERAL FUNDING TO END COMMUNITY VIOLENCE 2 (2020).

³² UNDERSERVED CRIME SURVIVORS, *supra* note 19, at 5.

SAAs are purposefully inaccessible, recognizing that the antagonistic policy positions of service providers and SAAs undermine a mutual and “deep dedication to the support and healing of those impacted by violence.”³³ The reality is that SAAs are well-intentioned and critical partners in the collective effort to modernize public safety, but they—much like the educational, financial, and wider criminal justice systems—must contend with systemic biases.³⁴

If healing resources were more accessible, victim compensation programs could mitigate the practical fallout of trauma and promote public safety and confidence in governmental institutions. While community violence intervention embodies upstream efforts to interrupt cycles of violence, victim compensation resources are downstream interventions that can work similar benefits for public safety.³⁵ Responses to traumatic experiences can “manifest in behaviors or conditions that result in involvement with...the criminal and juvenile justice system.”³⁶ In other words, a crime survivor who chooses to carry a weapon is often manifesting a trauma response.³⁷ With resources to meet the healing needs of crime survivors, victim compensation can disrupt these maladaptive responses to trauma,³⁸ but regularly these experiences of victimization are discounted because of racial and ethnic biases.³⁹ Therefore, victim compensation can help deconstruct the highly racialized and false demarcation between “legitimate” and otherwise harmful responses to trauma.⁴⁰

So long as victim compensation remains a complicated process for traumatized survivors, however, there will be continued social distrust of government responses to violent crime. The notion that government institutions actually exacerbate or re-traumatize survivors is well known among service providers,⁴¹ and victim compensation programs are no exception.⁴² Codifying the Proposed Rule will work significantly toward instilling confidence in public safety infrastructure and improving victim compensation programs’ social legitimacy, thereby contributing to lower levels of crime.⁴³

³³ VICTIM SERVICES CAPACITY ASSESSMENT, *supra* note 27, at 32.

³⁴ See Mike Catalini & Claudia Lauer, *Every state offers victim compensation. For the Longs and other Black families, it often isn’t fair*, ASSOCIATED PRESS (May 17, 2023), <https://apnews.com/article/crime-victims-compensation-racial-bias-58908169e0ee05d4389c57f975eae49b>.

³⁵ See HEATHER M. WARNKEN, UNTOLD STORIES OF CALIFORNIA CRIME VICTIMS: RESEARCH AND RECOMMENDATIONS ON REPEAT VICTIMIZATION AND REBUILDING LIVES 4 (2014).

³⁶ SAMHSA’S CONCEPT OF TRAUMA, *supra* note 23, at 5.

³⁷ VICTIM SERVICES CAPACITY ASSESSMENT, *supra* note 27, at 15; see also SAMHSA’S CONCEPT OF TRAUMA, *supra* note 23, at 3.

³⁸ See SAMHSA’S CONCEPT OF TRAUMA, *supra* note 23, at 2.

³⁹ See REALIZING THE PROMISE OF VICTIM COMPENSATION, *supra* note 17, at 3.

⁴⁰ See *id.* at 2 (“The lives of gun and other forms of community violence and perpetrators of gun and other forms of community violence are often interwoven in complex ways...blam[ing] people’s victimization on their past behaviors, associations, or arrest or conviction records will exclude many of the most victimized people from getting the services they need to heal from violence.”) *Id.* at 6.

⁴¹ See SAMHSA’S CONCEPT OF TRAUMA, *supra* note 23, at 4–5.

⁴² See COMMON JUSTICE, ELIMINATING BARRIERS TO HEALING: AN EXAMINATION OF VICTIM COMPENSATION IN NEW YORK STATE 32 (2022).

⁴³ See REALIZING THE PROMISE OF VICTIM COMPENSATION, *supra* note 17, at 4.

RECOMMENDATIONS FOR FURTHER DEVELOPMENT OF THE RULE

In consideration of the foregoing issues, the Proposed Rule would substantially improve victim compensation and unlock important follow-on benefits. GIFFORDS strongly endorses these proposals. We also encourage OVC to consider two recommendations for strengthening the Proposed Rule: (1) strengthen the contributory conduct provision; and (2) further define the provision on crowdfunding as a collateral source. GIFFORDS offers these recommendations in line with OVC’s stated purpose of “increasing access and equity to victim compensation.”⁴⁴

Contributory Conduct

Under existing standards, if an SAA determines that a compensation applicant “contributed” to their victimization, it may reduce or deny the claim. These eligibility standards are informed by cultural attitudes about the moral worthiness of victims, attitudes which have created a “long history in victim services of fixating . . . on whether people are bad or good.”⁴⁵ Importantly, the statutory language of VOCA does not provide any basis for contributory conduct standards. The only mention of a victim’s behavior relates to domestic violence survivors’ familial relationships with offenders, as VOCA prohibited states from denying applicants on the basis of such relationships.⁴⁶ In this provision, VOCA recognized that “relying solely on a framework of guilt and innocence is not an effective way to determine who should receive access to victim services.”⁴⁷ Despite the fact that some state legislatures have begun narrowing contributory conduct restrictions,⁴⁸ as many as 47 states had contributory conduct provisions in their compensation statutes as recently as 2014.⁴⁹

Contributory conduct standards are often vague,⁵⁰ and therefore claims investigators may apply subjective assessments about a victim’s behavior.⁵¹ For instance, some programs interpret contributory conduct standards to mean that a victim who used or possessed drugs at the time of victimization is ineligible for compensation.⁵² Other standards and determinations include consideration of the applicant’s social reputation and whether they are “known” to law enforcement, even where there are no other facts suggesting contributory conduct.⁵³ As a result

⁴⁴ *From the Director’s Desk*, *supra* note 3.

⁴⁵ Catalini, *supra* note 43.

⁴⁶ See REALIZING THE PROMISE OF VICTIM COMPENSATION, *supra* note 17, at 6.

⁴⁷ *Id.*

⁴⁸ See HEALING FROM HARM, *supra* note 4, at 6.

⁴⁹ See Evans, *supra* note 11, at 25.

⁵⁰ In New York State, for instance, the statutory language for contributory conduct is the following: “the [New York SAA] shall determine whether, because of his conduct, the victim of crime contributed to the infliction of his injury.” N.Y. LAW. EXEC. LAW § 631(5)(a).

⁵¹ See HEALING FROM HARM, *supra* note 4, at 6.

⁵² See ALLIANCE FOR SAFETY AND JUSTICE, CREATING A MODEL VICTIMS’ COMPENSATION POLICY: GUIDELINES FOR LAWMAKERS TO ADVANCE NEW SAFETY SOLUTIONS (2022).

⁵³ See *Cox v. Office of Victim Services*, 110 A.D.3d 797, 798–799 (2d Dept 2013). (“General knowledge that narcotics sellers are subject to a greater risk of [homicide] is not sufficient to supply a record-based relationship between the subject homicide and the victim’s alleged conduct.”)

of these standards, “thousands of people are denied compensation every year for reasons that have nothing to do with the crime itself.”⁵⁴

Finally, there are outstanding questions regarding the training SAA claims investigators receive about the legal sufficiency required to meet contributory conduct standards. As mentioned before, these standards are often vague or exist without meaningful construction to provide guidance about how the standards should be applied.⁵⁵ This ambiguity or the inadequacy of the training is deeply problematic because officials are being asked to engage in legal questions of foreseeability; determine the sufficiency of evidence; and analyze the comparative fault of a victim and perpetrator. Furthermore, survivors of violent crime rarely have the resources to prosecute their compensation claims through judicial review, so the case law governing contributory conduct standards is likely to be underdeveloped.

Contributory Conduct Recommendations

In light of the foregoing patterns and concerns, GIFFORDS recommends that the Proposed Rule suggest certain minimum standards or means to comply with the exceptions provision on contributory conduct. The Proposed Rule provides that SAAs cannot deny a claim because of contributory conduct except in “exceptional and specific cases.”⁵⁶ It further requires that SAAs have a “publicly available written policy in effect that (at a minimum) sets forth the standard of review, the review process, and an appeal process for any such denials or reductions.”⁵⁷ Though the Proposed Rule’s contributory conduct provision introduces a significant change for compensation programs, if SAAs were able to satisfy this “publicly available written policy” requirement by pointing to minimum statutory or regulatory language, this requirement would not do enough to address the problem of contributory conduct standards.

Thus, GIFFORDS recommends that the Proposed Rule go further by providing suggested guidelines, much like the Proposed Rule’s provision on the promotion of law enforcement cooperation.⁵⁸ These suggested guidelines should recommend that contributory conduct denials be issued only pursuant to criminal or substantially wrongful conduct on the part of the applicant. Criminal conduct should be used to construe the “exceptional and specific”⁵⁹ language in Section 94.223(b) because, currently, SAAs can deny or reduce awards “regardless of whether [the survivor was] charged or convicted for criminal conduct that caused their injuries.”⁶⁰ This policy change can reduce racial disparities in compensation awards. It has already been implemented in Maryland, where claims investigators determine whether the applicant was engaging in (1) criminal acts during their victimization, or (2) conduct that is

⁵⁴ Catalini, *supra* note 43.

⁵⁵ See N.Y. LAW. EXEC. LAW § 631(5)(a); see also 9 N.Y. Comp. Codes R. & Regs., § 525.5(b).

⁵⁶ Victims of Crime Act (VOCA) Victim Compensation Grant Program, 89 Fed. Reg. 7651 (proposed Feb. 5, 2024) (to be codified at 28 CFR pt. 94).

⁵⁷ *Id.*

⁵⁸ *Id.* at 7650.

⁵⁹ *Id.* at 7651.

⁶⁰ REALIZING THE PROMISE OF VICTIM COMPENSATION, *supra* note 17, at 6.

“substantially wrong[ful],” not merely “morally wrong or offensive.”⁶¹ OVC may construe substantially wrongful conduct as conduct that is civilly actionable. Maryland also provides that substantially wrongful conduct may include a victim who allegedly “provoked or failed to avoid confrontation at the time of the incident.”⁶² This approach has allowed Maryland to achieve the lowest disparity when comparing compensation applications against claim denials for Black applicants.⁶³ Out of 23 states reviewed, Maryland is one of only four states without disproportionately high denial rates along racial lines.⁶⁴

Furthermore, the Proposed Rule should suggest that SAA contributory conduct standards follow existing principles under civil or criminal law. A victim who engaged in *only* a verbal dispute prior to victimization should not be denied for contributory conduct when, under tort law, words alone are not considered assault.⁶⁵ Similarly, survivors should not be denied compensation where they would have had the right to self defense under criminal law. These principles underscore why it is important for claims investigators to be adequately trained on the legal issues that arise in situations where there may be contributory conduct.

Because OVC will require a publicly available policy stating the review process for contributory conduct,⁶⁶ the Proposed Rule should also suggest ways for the process to be more objective. First, an objective process may include mandatory review by a state attorney before an SAA issues a contributory conduct denial, as such a review may present a cheaper alternative to training all claims investigators as to the legal principles discussed above. Next, the Proposed Rule should recommend that SAAs hold a mandatory administrative hearing prior to contributory conduct denials. Maryland, again, is a helpful example: its SAA has begun to require “hearings pertaining to any potential substantive denial claim to clearly ascertain all pertinent facts prior to rendering any denial decision...[and] as a result all claims involving contributory or illegal conduct will fall into this category.”⁶⁷ Lastly, the Proposed Rule should require more evidence than police reports to issue contributory conduct denials. The flaws of relying on the singular perspectives of police reports and questionnaires include the potential biases of law enforcement when dealing with victims of community violence.⁶⁸

⁶¹ See GOVERNOR’S OFFICE OF CRIME PREVENTION, YOUTH, AND VICTIM SERVICES, CRIMINAL INJURIES COMPENSATION BOARD FY 2023 ANNUAL REPORT 6–7 (2023).

⁶² *Id.*

⁶³ See Catalini, *supra* note 43.

⁶⁴ *Id.*

⁶⁵ See RESTATEMENT (THIRD) OF TORTS § 105(g) (AM. LAW INST., Tentative Draft No. 1, 2015) (“Words cannot subject an actor to liability for assault unless, together with other acts or circumstances, they cause the other to reasonably anticipate that [an assault] is imminent.”).

⁶⁶ Victims of Crime Act (VOCA) Victim Compensation Grant Program, 89 Fed. Reg. 7651 (proposed Feb. 5, 2024) (to be codified at 28 CFR pt. 94).

⁶⁷ COMPENSATION BOARD FY 2023 ANNUAL REPORT, *supra* note 61, at 17.

⁶⁸ See HEALING FROM HARM, *supra* note 4, at 6; see also Cox, 110 A.D.3d at 797 (2d Dept. 2013).

The Proposed Rule’s Private Donations and Crowdfunding Provision

The Proposed Rule includes provisions to address the rise of crowdfunding platforms, which leverage the internet to channel private donations to survivors in the aftermath of violent victimizations. Crowdfunding is pervasive, especially after incidents of mass violence and mass shootings.

Building on prior guidance,⁶⁹ OVC published a memorandum addressing crowdfunding and the VOCA payor-of-last-resort obligation in 2021, stating that SAAs are not required to account for crowdfunding since crowdfunding is not federally financed.⁷⁰ The memorandum highlights questions of fairness arising from SAAs that require victims to exhaust private donations, including the fact that crowdfunding “efforts [may] not be controlled by the victim, and general availability of money does not mean that it will or must be allocated to the victim at all, much less to the same expense items covered by victim compensation.”⁷¹ In keeping with these points, the Proposed Rule instructs SAAs that they should not consider crowdfunding as collateral sources except “under extenuating circumstances (e.g., large incidents, mass violence, high profile incidents), as determined by the state.”⁷² GIFFORDS applauds the general rule, but worries that the “extenuating circumstances” exception will weaken its effectiveness, particularly in the context of mass violence or mass shootings.

In general, crowdfunding sources should be treated as gifts from members of the public. They should be treated as such because, after incidents of mass violence, survivor populations may organize themselves into social hierarchies based on physical proximity to the violence and degree of injury (with physical injury taking precedence over psychological injury).⁷³ Regardless of degree of injury or proximity, “this ranking system does distinguish and disenfranchise the grief and trauma response of [variously injured] survivors.”⁷⁴ Victim hierarchies have been readily observed in multiple incidents of mass violence, including the Marjory Stoneman Douglas High School shooting and the Boston Marathon Bombing.⁷⁵ When centrally-organized crowdfunding campaigns are established after mass violence, the campaigns will develop distribution protocols that may give effect to these social hierarchies. The Las Vegas Victims’ Fund—established after the Las Vegas Mass Shooting—prioritized distribution of the

⁶⁹ OFFICE FOR VICTIMS OF CRIME, HELPING VICTIMS OF MASS VIOLENCE & TERRORISM: PLANNING, RESPONSE, RECOVERY, AND RESOURCES: RECOVERY CHECKLIST 7–8 (2015) (“Not everyone in [a] community will agree on the final donation management strategy, and [officials] must keep the entire [victimized] community’s needs in mind.”).

⁷⁰ DEPT. OF JUST., OFFICE FOR VICTIMS OF CRIME, CROWDFUNDING AND VOCA COMPENSATION 2 (2021).

⁷¹ *Id.*

⁷² Victims of Crime Act (VOCA) Victim Compensation Grant Program, 89 Fed. Reg. 7651 (proposed Feb. 5, 2024) (to be codified at 28 CFR pt. 94).

⁷³ DiLorenzo, *supra* note 23, at 79.

⁷⁴ *Id.* (“I know that I’ve survived something traumatic, but I don’t always feel like a survivor...[because] there are people who have been through so much worse than me.”) *Id.* at 81.

⁷⁵ *Id.*; see also *Resilience*, NAT’L MASS VIOLENCE CENT., <https://nmvvc.org/media/3q1cmb1e/mvp-5-amy.mp3my> (last visited Apr. 1, 2024) (“I spent a lot of time in the shadows of the [survivor community]. There’s a lot of hierarchy in the survivor community depending on the degrees of injury and all kinds of stuff.”).

crowdfunds according to severity of injury, locking thousands of psychologically traumatized people out of the population of eligible recipients.⁷⁶ GIFFORDS highlights this hierarchy not to flatten the measurably different needs of victims who are physically injured, but to demonstrate why OVC previously stated that certain victims will not be eligible for certain crowdfunding campaigns.⁷⁷ Even where the psychologically injured are included in distribution protocols, their receipt of funds is given lower priority.⁷⁸ In the distribution of funds after the San Bernardino shooting, for instance, “the families of 14 people killed in the workplace shooting...were each eligible for about \$140,629,” while others who were physically present but not physically injured could receive \$2,993.⁷⁹

Under the Proposed Rule’s current language, in incidents of mass violence, an SAA could require exhaustion of crowdfunding sources before receiving access to victim compensation. This would place all mass violence survivors on the same footing despite the clear hierarchy of priority in distribution protocols. If crowdfunding sources were treated as gifts, survivors would have greater discretion over these funds, especially for expenses not otherwise covered by SAAs.⁸⁰ Of course, the most salient expenses after mass violence victimization are likely those compensable by SAAs (i.e., relocation, lost wages, etc.). However, lower earning campaign recipients would be required to exhaust their crowdfunds in the same manner as higher earning recipients. Once the lower earning recipients exhaust their funds, they will no longer have discretion to pay for things that SAAs would not. To use the San Bernardino distribution protocol as an example, if a physically present and psychologically injured survivor collected \$2,993, they may use that money to cover costs of living (i.e., their lost wages) for as long as that sum may allow. However, once those funds were exhausted, the psychologically injured survivor may not be eligible to receive lost wages from their SAA—and therefore would have less time to focus on healing—because VOCA only requires lost wages for injuries “attributable to a physical injury.”⁸¹ This would be a perverse and unconscionable outcome for a survivor of a mass shooting, whose victimization should not be discounted because of a lack of physical injury.

Accordingly, the Proposed Rule should omit the “extenuating circumstances” exception, or, at a minimum, should require SAAs to write a publicly available policy on when crowdfunds will be

⁷⁶ See Nicole Raz, *Victims of Las Vegas shooting can apply for aid from fund*, LAS VEGAS REVIEW-JOURNAL, INC. (Jan. 2, 2018), <https://www.reviewjournal.com/crime/shootings/victims-of-las-vegas-shooting-can-apply-for-aid-from-fund/>; see also Lucas Thomas, *Las Vegas Victims Fund Committee Finalizes Protocol*, PATCH MEDIA (Dec. 5, 2017), <https://patch.com/nevada/lasvegas/las-vegas-victims-fund-announces-final-protocol> (A psychologically injured survivor responded to the protocol, saying “although [our] injuries may not be physical and something that you can see, it’s definitely there...please try to keep these people in mind.”).

⁷⁷ See CROWDFUNDING AND VOCA COMPENSATION, *supra* note 70, at 2.

⁷⁸ See MAINE COMMUNITY FOUNDATION, LEWISTON-AUBURN AREA RESPONSE FUND: FINAL PROTOCOL OVERVIEW 1 (2023).

⁷⁹ David Montero, *Victims of Las Vegas mass shooting start receiving payments of up to \$275,000 each*, LOS ANGELES TIMES (Mar. 5, 2018), <https://www.latimes.com/nation/la-na-victims-fund-vegas-20180305-story.html>.

⁸⁰ See CROWDFUNDING AND VOCA COMPENSATION, *supra* note 70, at 2.

⁸¹ 34 U.S.C. § 20102(b)(1)(B).

considered collateral sources. In implementing either of these recommendations, mass shooting survivors could engage in crowdfunding efforts without jeopardizing their access to victim compensation. In turn, more accessible victim compensation would make it less necessary for mass shooting survivors to rely on crowdfunding.

CONCLUSION

GIFFORDS commends OVC for its diligent engagement with various stakeholders to formulate a significant overhaul of the federal Victim Compensation Program. The healing resources that can be provided via more equitable and accessible victim compensation will be critical tools in the effort to decrease gun violence in America. This Proposed Rule will effectuate the purpose of greater accessibility, and GIFFORDS offers its recommendations in further support of that goal. We thank OVC for its consideration of these recommendations, and—most importantly—we strongly urge OVC to finalize the Proposed Rule.