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Submitted via www.regulations.gov

Regulations Division, Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500

Re: HUD Docket No. FR-6152-P-01, RIN 2506-AC53 Comments in Response to Proposed Rulemaking: Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs

Dear Office of General Counsel:

The National Women's Law Center (the "Center") takes this opportunity to comment in opposition to the U.S. Department of Housing and Urban Development (HUD) Proposed Rule published in the Federal Register on July 24, 2020 (RIN 2506-AC53; HUD Docket No. FR-6152-P-01) entitled "Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs."

The Center fights for gender justice – in the courts, in public policy, and in society – working across the issues that are central to the lives of women and girls. The Center uses the law in all its forms to change culture and drive solutions to the gender inequity that shapes society and to break down the barriers that harm everyone – especially those who face multiple forms of discrimination. For more than 45 years, the Center has been on the leading edge of every major legal and policy victory for women.

The Proposed Rule is just the latest of the current administration's ongoing efforts to limit rights and protections based on sex – including for the LGBTQ+ community, and this is true particularly for transgender people.¹ This Proposed Rule would strip protections for transgender and gender-nonconforming people seeking HUD-funded shelter and is rooted in harmful stereotypes about transgender persons, particularly transgender women. The Proposed Rule would allow HUD-funded women's shelters to deny access to transgender women and anyone who does not meet a shelter's stereotype about what a woman looks like (and vice versa for men's shelters), forcing more transgender and gender-nonconforming people onto the streets during an

¹ NAT'L CTR. FOR TRANSGENDER EQUALITY, The Discrimination Administration (May 15, 2020), <https://transequality.org/the-discrimination-administration>.

epidemic of violence against transgender people and a global health pandemic. Consequently, the Center strongly opposes the changes in the Proposed Rule. More specifically, the Center will stress in this comment the following:

- Access to safe shelter is vital to the well-being of all women, including transgender women and all survivors of gender-based violence.
- The Proposed Rule perpetuates sex discrimination by permitting women's shelters to create an admittance policy that treats transgender women differently than cisgender women and by permitting shelters to engage in sex stereotyping through their own assessment of someone's sex.
- The Proposed Rule is impractical. It proposes a regulatory structure that conflicts with other federal, state, and municipal nondiscrimination laws, would be impossible for shelters to navigate, and would be harmful to transgender women and all women who do not conform to sex-based stereotypes.
- The Proposed Rule is arbitrary and capricious.

I. Access to safe shelter is vital to the well-being of all women.

Access to safe shelter is vital to the well-being of all women, including transgender women and survivors of gender-based violence, who face heightened risk of experiencing homelessness in their lives.

A. Transgender people face higher rates of economic insecurity and are more likely to experience homelessness.

Transgender individuals are more likely to be economically insecure and are more likely to require housing assistance or experience homelessness.² The 2015 U.S. Transgender Survey found that 30 percent of transgender and gender non-binary people have experienced homelessness in their lifetime,³ as compared to six percent of the overall U.S. population.⁴ The homelessness rate was especially high for transgender respondents who had been kicked out of their home by immediate family members (74 percent) and transgender women of color, including Native transgender women (59 percent), Black transgender women (51 percent), multiracial transgender women (51 percent), and Middle Eastern transgender women (49 percent).⁵ Additionally, 29 percent of transgender respondents were living in poverty, compared to 12 percent of the overall U.S. population.⁶

² SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY, 2015 U.S. TRANSGENDER SURVEY (Dec. 2016), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>; Jillian Edmonds, NAT'L WOMEN'S LAW CTR., TRANSGENDER PEOPLE ARE FACING INCREDIBLY HIGH RATES OF POVERTY, (December 9, 2016), <https://nwlc.org/blog/income-security-is-elusive-for-many-transgender-people-according-to-u-s-transgender-survey/>.

³ JAMES ET AL., *supra* note 2, at 178.

⁴ VINCENT A. FUSARO ET AL., RACIAL AND ETHNIC DISPARITIES IN THE LIFETIME PREVALENCE OF HOMELESSNESS IN THE UNITED STATES, 55 DEMOGRAPHY 2119 (2018).

⁵ JAMES ET AL., *supra* note 2, at 178.

⁶ JAMES ET AL., *supra* note 2, at 5.

B. Survivors of gender-based violence face a heightened risk of experiencing homelessness.

One of the primary causes of homelessness for women and children in this country is domestic and sexual violence, with more than 48,000 beds in homeless services being set aside for survivors of domestic violence on a single night in 2019.⁷ Abusers commonly sabotage a survivor's economic stability, leading to 40 percent of all survivors experiencing homelessness and unstable housing situations.⁸

The American Medical Association recognizes that there is an "epidemic of violence against the transgender community," particularly for transgender people of color.⁹ Nearly half of transgender people (47 percent) have been sexually assaulted at some point in their lifetime.¹⁰ Thus far in 2020, at least 28 transgender or gender non-binary people, including 23 transgender women, have been murdered.¹¹ At least 27 transgender or gender non-binary people were murdered in 2019, and at least 26 were murdered in 2018.¹² This epidemic of violence disproportionately impacts Black and Latina transgender women. Transgender women survivors also face higher rates of homelessness.¹³

C. Shelters provide critical assistance for survivors, but many face barriers to access.

Leaving an abuser is the most dangerous time for a survivor of domestic violence, so it is critical that when survivors flee, they have a safe place to go.¹⁴ Housing services for survivors are critical. In just one day in 2018, the National Network to End Domestic Violence (NNEDV) annual Domestic Violence Counts Census reported that 74,823 survivors accessed shelter and services from domestic violence programs.¹⁵

⁷ NAT'L NETWORK TO END DOMESTIC VIOLENCE, DOMESTIC AND SEXUAL VIOLENCE IS A LEADING CAUSE OF HOMELESSNESS FOR WOMEN AND CHILDREN (May 30, 2017), https://nnedv.org/latest_update/domestic-sexual-violence-homelessness/.

⁸ Nat'l Network to End Domestic Violence, Comment Letter in Support of Full and Equal Access to Shelter for the Transgender Community and All Survivors of Domestic and Sexual Violence (Aug. 13, 2019) [hereinafter "NNEDV Comment Letter"].

⁹ AM. MEDICAL ASS'N, AMA ADOPTS NEW POLICIES ON FIRST DAY OF VOTING AT 2019 ANNUAL MEETING (June 10, 2019), <https://www.ama-assn.org/press-center/press-releases/ama-adopts-new-policies-first-day-voting-2019-annual-meeting>.

¹⁰ JAMES ET AL., *supra* note 2, at 5.

¹¹ NAT'L CTR. FOR TRANSGENDER EQUALITY, MURDERS OF TRANSGENDER PEOPLE IN 2020 SURPASSES TOTAL FOR LAST YEAR IN JUST SEVEN MONTHS (Aug. 7, 2020), <https://transequality.org/blog/murders-of-transgender-people-in-2020-surpasses-total-for-last-year-in-just-seven-months>.

¹² HUMAN RIGHTS CAMPAIGN, VIOLENCE AGAINST THE TRANSGENDER COMMUNITY IN 2019, <https://www.hrc.org/resources/violence-against-the-transgender-community-in-2019> (last visited Sept. 21, 2020).

¹³ NNEDV Comment Letter, *supra* note 8.

¹⁴ NAT'L COALITION AGAINST DOMESTIC VIOLENCE, WHY DO VICTIMS STAY?, <https://www.ncadv.org/why-do-victims-stay> (last visited Aug. 10, 2020).

¹⁵ NAT'L NETWORK TO END DOMESTIC VIOLENCE, 13TH ANNUAL DOMESTIC VIOLENCE COUNTS REPORT (Oct. 2019), available at https://nnedv.org/wp-content/uploads/2019/10/Census_2018_handout_report.pdf.

Unfortunately, LGBTQ+ survivors of gender-based violence too often face discrimination when seeking housing and shelter, despite experiencing unconscionably high rates of sexual assault and domestic violence. This often makes them hesitant to seek help from police, hospitals, shelters, or rape crisis centers, the very community-based resources that are supposedly available to provide help.

A 2015 survey conducted by the Center for American Progress (CAP) and the Equal Rights Center found that, even when the 2012 Equal Access Rule (described in more detail below) was in effect, only 30 percent of shelters were willing to properly accommodate transgender women.¹⁶ Further, among 2015 U.S. Transgender Survey respondents who experienced homelessness and stayed in a shelter in the previous year, 70 percent reported some form of mistreatment, including being harassed, assaulted, or kicked out because of being transgender.¹⁷ As a result, 26 percent of respondents who experienced homelessness in the previous year avoided staying in a shelter because they feared being mistreated as a transgender person.¹⁸

D. The Equal Access Rule helps transgender people gain access to shelter.

HUD's "Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity" final rule ("Equal Access Rule"), originally promulgated in 2012, required housing providers receiving HUD funding or HUD-backed loans to provide "equal access to HUD programs without regard to a person's actual or perceived sexual orientation, gender identity, or marital status."¹⁹

HUD updated this rule in 2016 to ensure access to Community Planning and Development (CPD)-assisted shelters and other housing providers in accordance with an individual's self-identified gender identity. The 2016 Equal Access Rule also requires CPD-assisted providers to establish policies and procedures to ensure that "an individual is not subjected to intrusive questioning or asked to provide anatomical information or documentary, physical, or medical evidence of the individual's gender identity."²⁰

Together, these Equal Access Rules provide clearer guidance on nondiscrimination protections for transgender people, which is critical given the risks unsheltered transgender individuals face.

¹⁶ CAITLIN ROONEY ET AL., CTR. FOR AMERICAN PROGRESS, DISCRIMINATION AGAINST TRANSGENDER WOMEN SEEKING ACCESS TO HOMELESS SHELTERS (Jan. 7, 2016), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2016/01/07/128323/discrimination-against-transgender-women-seeking-access-to-homeless-shelters/>.

¹⁷ JAMES ET AL., *supra* note 2, at 14.

¹⁸ JAMES ET AL., *supra* note 2, at 176.

¹⁹ Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662, 5662 (Feb. 3, 2012) (codified at 24 C.F.R. § 5.105(a)(2)).

²⁰ Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64763, 64782 (Sept. 21, 2016) (codified at 24 C.F.R. § 5.106(b)(3)).

From 2016 to 2019, transgender homelessness has increased by 88 percent, with 63 percent of those individuals being unsheltered.²¹ Consequently, full implementation of the 2016 Equal Access Rule is more important than ever. Unsheltered transgender individuals face higher risks of violence, mental and physical health issues, and much more. For example:

- Of unsheltered transgender individuals, 60 percent are at a higher risk for tri-morbidity (co-occurring physical, mental, and substance abuse), compared to three percent for sheltered transgender individuals.²²
- Forty percent of unsheltered transgender individuals report being forced to do things they did not want to do.²³
- Thirty-eight percent of unsheltered transgender individuals have chronic health issues, compared to only three percent of sheltered transgender individuals.²⁴
- Fifty percent of unsheltered transgender individuals, compared to 16 percent of sheltered transgender individuals, have mental health issues.²⁵
- Drug and alcohol issues exist among 69 percent of unsheltered transgender individuals, but only among four percent of sheltered transgender individuals.²⁶
- Unsheltered transgender individuals are more likely to have a disability: 30 percent of unsheltered transgender individuals (compared to four percent of sheltered transgender individuals) have a physical disability,²⁷ and 39 percent of unsheltered transgender individuals (compared to 23 percent of sheltered transgender individuals) have a learning disability.²⁸
- Forty-three percent of unsheltered transgender individuals are likely to harm themselves and others, while only 11 percent of sheltered transgender individuals have been reported to do the same.²⁹
- Unsheltered transgender individuals are nearly eight times more likely to encounter police, who often engage in violence against transgender people instead of providing protection,³⁰ and are 10 times more likely to be forced into jail or prison, where transgender people face high levels of violence.³¹

²¹ JACKIE JANOSKO, NAT'L ALLIANCE TO END HOMELESSNESS, CHANGES TO HUD'S EQUAL ACCESS RULE COULD EXCLUDE MORE TRANSGENDER PEOPLE FROM SHELTER, (July 29, 2020), *available at* <https://endhomelessness.org/changes-to-huds-equal-access-rule-could-exclude-more-transgender-people-from-shelter/>.

²² DATA AND GRAPHICS PUBLICATION, NAT'L ALLIANCE TO END HOMELESSNESS, TRANSGENDER HOMELESS ADULTS & UNSHELTERED HOMELESSNESS: WHAT THE DATA TELLS US 2 (July 24, 2020), *available at* <https://endhomelessness.org/resource/transgender-homeless-adults-unsheltered-homelessness-what-the-data-tell-us/>.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

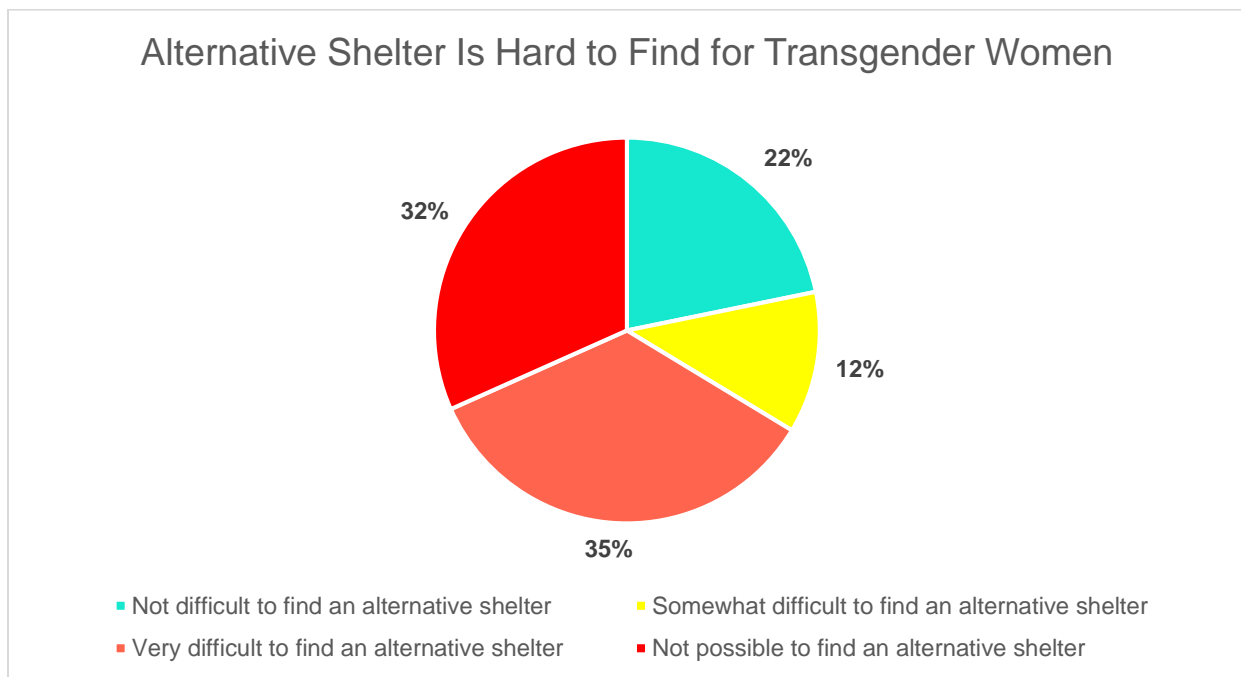
²⁹ *Id.*

³⁰ LAMBDA LEGAL, FIGHTING ANTI-TRANS VIOLENCE, <https://www.lambdalegal.org/know-your-rights/article/trans-violence> (last visited Sept. 21, 2020); JAMES ET AL., *supra* note 2, at 163 (finding that respondents who have experienced homelessness "were more likely to be sexually assaulted by an officer").

³¹ NAT'L CTR. FOR TRANSGENDER EQUALITY, POLICE, JAILS & PRISONS, <https://transequality.org/issues/police-jails-prisons> (last visited Sept. 21, 2020); VALERIE JENNESS, ET AL.,

There are clear benefits in ensuring fair access to shelters for transgender individuals. The 2016 Equal Access Rule remains critically important, especially as the ongoing epidemic of violence against transgender people intersects with a global health pandemic in which people experiencing homelessness are more likely to face hospitalization, need critical care, and die from COVID-19 than the general population.³²

Rolling back the 2016 Equal Access Rule would have harmful consequences. A June 2020 survey reveals that many transgender women denied access to women’s shelters would struggle to find somewhere else to go: 79 percent of transgender women said that it would be difficult or impossible to find an alternative shelter if they were turned away from the nearest shelter location (see graph below for an additional breakdown).³³



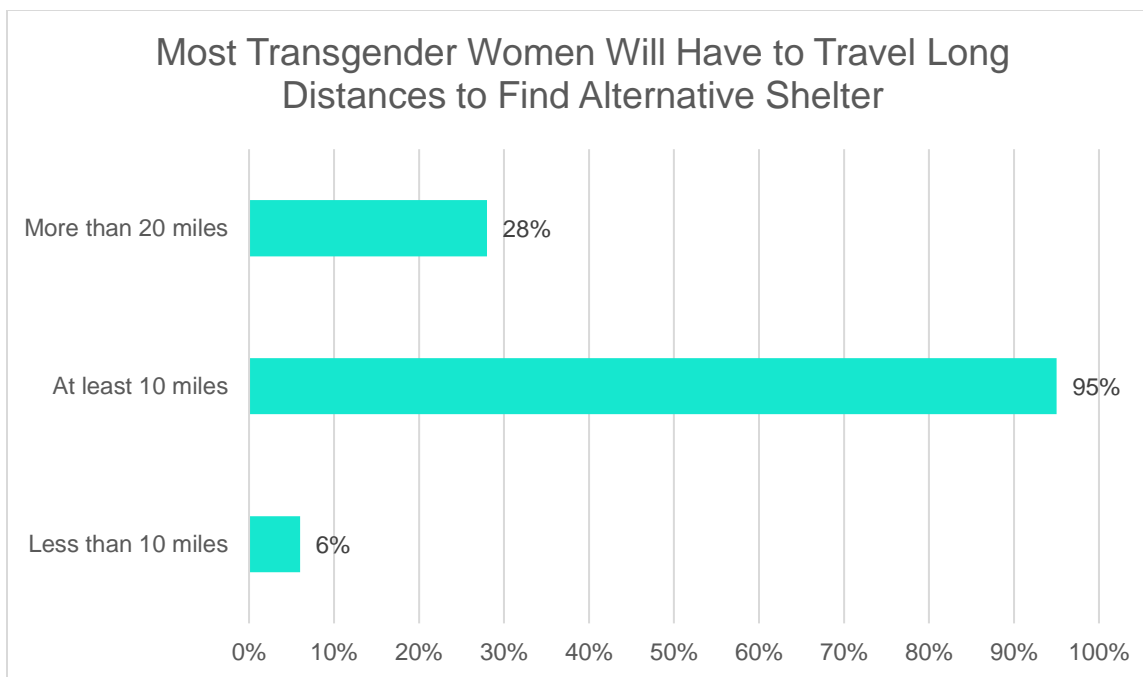
Additionally, 67 percent of transgender women survey respondents said that they would need to travel 10 to 20 miles to find an alternative shelter, and 28 percent of transgender women respondents said they would need to travel more than 20 miles (see graph below).³⁴

U. CAL., VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT 30 (May 16, 2007), *available at* https://ucicorrections.seweb.uci.edu/files/2013/06/PREA_Presentation_PREA_Report_UCI_Jenness_et_al.pdf (finding that 59 percent of transgender respondents in jail experienced sexual assault).

³² NAT'L WOMEN'S LAW CENTER, IMPROVING HOUSING ASSISTANCE IN RESPONSE TO COVID-19, at 1 (May 2020), *available at* <https://nwlc.org/resources/improving-housing-assistance-in-response-to-covid-19/>.

³³ THEO SANTOS ET AL., CTR. FOR AM. PROGRESS, THE TRUMP ADMINISTRATION'S LATEST ATTACK ON TRANSGENDER PEOPLE FACING HOMELESSNESS 2 (Sept. 2020), *available at* <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/09/03/490004/trump-administrations-latest-attack-transgender-people-facing-homelessness/>.

³⁴ *Id.* at 3.



II. The Proposed Rule perpetuates sex discrimination.

HUD should withdraw the Proposed Rule because it will create significant illegal barriers and harsh consequences for women experiencing homelessness, especially transgender women and gender-nonconforming women.

The Proposed Rule would allow HUD-funded single-sex shelters to establish a policy of admittance “on the basis of [an individual’s] biological sex, without regard to their gender identity.”³⁵ The Proposed Rule does not define “biological sex,” which has no legally significant meaning and does not appear in any nondiscrimination statute. Assuming that HUD defines “biological sex” to mean one’s sex assigned at birth for the purposes of this Proposed Rule, this proposal would allow HUD-funded shelters to admit cisgender women into their facilities but not transgender women. This would cause significant harm to transgender people. If HUD further interprets “biological sex” to refer to physical characteristics stereotypically associated with the male or female gender, then that could cause significant harm to both transgender and cisgender women.

Under the 2012 Equal Access Rule, which stated that shelters should house individuals without regard to gender identity but did not have more clearly articulated protections for transgender people, only 30 percent of shelters were willing to properly accommodate transgender women.³⁶ Under the Proposed Rule, which would explicitly allow shelters to discriminate against transgender women, it is likely that even fewer shelters will be

³⁵ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. 44811, 44812 (proposed July 24, 2020) (to be codified at 24 C.F.R. §§ 5, 576).

³⁶ ROONEY ET AL., *supra* note 16.

willing to provide proper accommodation. As stated previously, the overwhelming majority of transgender women respondents to a 2020 survey said that it would be difficult or impossible to find an alternative shelter if they were turned away from the nearest shelter location, and most of them would need to travel at least 10 miles to find alternative shelter.³⁷ Therefore, the Proposed Rule, if finalized and implemented, would result in many transgender women lacking reliable access to shelter.

In addition, the Proposed Rule directs shelters to determine an individual's sex based on a "good faith" assessment of physical characteristics, such as "height, the presence (but not the absence) of facial hair, the presence of an Adam's apple, and other physical characteristics which, when considered together, are indicative of a person's biological sex."³⁸ This assessment will not only lead to inevitable discrimination against transgender women, but also against any woman who does not meet a shelter provider's stereotype of what a woman "looks like," which will certainly include cisgender women and anyone who does not conform to shelter staff's stereotypical notions of gender.

This Proposed Rule is not only harmful and demeaning to transgender women and any woman who does not meet a shelter's stereotype of what a woman "looks like," it also constitutes illegal sex discrimination. By permitting shelters to implement admittance policies that grant cisgender women access to shelters while denying access to transgender women and by encouraging shelters to engage in sex stereotyping, the Proposed Rule violates the Fair Housing Act (FHA).

A. The Proposed Rule's admittance policy constitutes sex discrimination under the FHA and *Bostock v. Clayton County*.

The FHA prohibits sex discrimination, providing that it is unlawful "to refuse to sell or rent...or otherwise make available or deny...a dwelling to any person because of...sex."³⁹ The Proposed Rule wrongfully asserts that emergency shelters are permitted to discriminate against individuals seeking shelter based on sex because these shelters do not fall under the FHA's definition of "dwelling."⁴⁰ However, multiple courts, including three circuit courts, have held that shelters can constitute a "dwelling" under the FHA.⁴¹ When assessing whether a shelter should be considered a "dwelling,"

³⁷ SANTOS ET AL., *supra* note 33, at 2.

³⁸ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. at 44816.

³⁹ 42 U.S.C § 3604(a).

⁴⁰ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. at 44812.

⁴¹ See *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941, 942 (9th Cir.1996) (Ninth Circuit applying the FHA to a homeless shelter); *Community House v. City of Boise*, 490 F.3d at 1048 (9th Cir. 2007) (Ninth Circuit applying the FHA to a homeless shelter); *Lakeside Resort Enters., LP v. Bd. of Supervisors of Palmyra Twp.*, 455 F.3d 154, 159 (3d Cir. 2006) (Third Circuit held a shelter was a dwelling based on fact that facility was intended for occupants to remain for more than one night and was a place they would return); *Woods v. Foster*, 884 F.Supp. 1169, 1173–74 (N.D.Ill.1995) (District Court for the Northern District of Illinois holding a homeless shelter was a dwelling because the individuals who stayed at the shelter had no other place to return to.); *Defiore v. City Rescue Mission of New Castle*, 995 F. Supp. 2d 413, 418–19 (W.D. Pa. 2013) (finding the homeless shelter is a dwelling based on the expected extended length of stay of residents, the fact that residents receive mail and that residence get medications and

courts typically consider whether the person experiencing homelessness intends to remain in the shelter for more than one night and whether they view the shelter as a place to return to.⁴² For example, in one case, the court determined that a homeless shelter was a dwelling because the people experiencing homelessness staying at the shelter had no other place to go.⁴³

Applying this analysis, emergency shelters designated for women shows that courts are likely to view them as dwellings. Single-sex shelters for women experiencing homelessness are often entities that provide accommodations for more than one night, and they are often places where women experiencing homelessness are likely to return. Indeed, HUD itself acknowledged last January that domestic violence shelters, emergency shelters, and homeless shelters are covered under the Fair Housing Act.⁴⁴ Therefore, these shelters are subject to the FHA and its prohibition against sex discrimination.

The Supreme Court's recent *Bostock v. Clayton County* decision must guide the analysis of sex discrimination under federal civil rights laws that prohibit sex discrimination, including the FHA.⁴⁵ Specifically, in *Bostock*, the Supreme Court held that, under Title VII, discriminating against an individual for being transgender is unlawful sex discrimination.⁴⁶ Courts have consistently construed discrimination analysis under the FHA to follow discrimination analysis under other federal civil rights statutes, including Title VII.⁴⁷ For example, courts apply the disparate treatment framework created under Title VII to analyze FHA discrimination claims,⁴⁸ including sex

return to their sleeping areas at night); *Step By Step, Inc. v. City of Ogdensburg*, 176 F. Supp. 3d 112, 126 (N.D.N.Y. 2016) (finding homeless shelters are dwellings under the FHA based on the need to provide housing in order to divert people from hospitals or homelessness. Would not be transient and clients would view as a place to return.).

⁴² See *Lakeside Resort Enters., LP v. Bd. of Supervisors of Palmyra Twp.*, 455 F.3d 154, 159 (3d Cir.2006) (Third Circuit held a shelter was a dwelling based on fact that facility was intended for occupants to remain for more than one night and was a place they would return).

⁴³ *Woods v. Foster*, 884 F. Supp. 1169 (N.D. Ill. 1995) ("Although the Shelter is not designed to be a place of permanent residence, it cannot be said that the people who live there do not intend to return—they have nowhere else to go").

⁴⁴ See U.S. DEP'T OF HOUSING AND URBAN DEV., ASSESSING A PERSON'S REQUEST TO HAVE AS A REASONABLE ACCOMMODATION UNDER THE FAIR HOUSING ACT 3 (Jan. 28, 2020), *available at* <https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf> ("[f]or purposes of this guidance, the term 'housing' refers to all housing covered by the Fair Housing Act, including apartments, condominiums, cooperatives, single family homes, nursing homes, assisted living facilities, group homes, domestic violence shelters, emergency shelters, homeless shelters, dormitories, and other types of housing covered by the FHA").

⁴⁵ 140 S. Ct. 1731 (2020).

⁴⁶ *Id.* at 1737.

⁴⁷ See *Texas Dept. of Housing and Community Aff., v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2510, 2515, 2516-17, 2525 (2015) (referencing Title VII to interpret the Fair Housing Act); *Gamble v. City of Escondido*, 104 F.3d 300, 304 (9th Cir. 1997) (courts typically analogize to Title VII of the Civil Rights Act of 1964 when interpreting the Fair Housing Act) (citing *Larking v. Michigan Dep't of Social Servs.*, 89 F.3d 285, 289 (6th Cir. 1996)).

⁴⁸ *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2011) (analyzing disparate treatment claim under the FHA using the same framework as Title VII disparate treatment claims).

discrimination claims.⁴⁹ Therefore, the Supreme Court’s analysis in *Bostock* applies with equal force to the FHA.

Federal courts have also applied Title IX analysis to FHA claims.⁵⁰ Both before and after the *Bostock* decision, multiple federal courts have concluded that school districts discriminate on the basis of sex in violation of Title IX if they exclude transgender students from single-sex spaces, such as bathrooms and locker rooms, that align with their gender identity. For example, earlier this year, the Third Circuit assessed a school board’s restroom admittance policy by comparing the board’s treatment of the plaintiff “as a transgender boy, to its treatment of non-transgender boys.”⁵¹ The court found that, under *Bostock*, the board’s refusal to allow the plaintiff access to the boy’s restroom, while allowing cisgender boys access, constituted sex discrimination.⁵²

Similarly, at least two additional federal courts have interpreted *Bostock* to require schools to provide transgender students equal access to single-sex facilities based on their gender identity. The Fourth Circuit held that denying a transgender boy access to the boy’s restroom was unlawful sex discrimination, and the District Court for the District of Idaho enjoined Idaho’s ban prohibiting transgender student athletes from competing on teams aligning with their gender identity.⁵³ Under *Bostock* and these additional federal court decisions interpreting analogous federal civil rights protections, HUD’s Proposed Rule is unlawful because it promotes sex discrimination in violation of the FHA by permitting shelters to discriminate against transgender individuals.

HUD’s Proposed Rule would permit shelters to create an admittance policy allowing cisgender women access to women’s shelters while denying access to transgender women. This change from the 2016 Equal Access Rule encourages shelters to discriminate against transgender individuals, which is illegal sex discrimination under the FHA as interpreted in light of *Bostock*.⁵⁴ Consequently, the Center urges HUD to withdraw the Proposed Rule and instead focus on implementing the 2016 Equal Access Rule.

B. The proposed “good faith” assessment is also illegal sex discrimination tied to unlawful sex-stereotyping.

⁴⁹ *Honce v. Vigil*, 1 F.3d 1085, 1088 (10th Cir. 1993) (“This circuit has not yet addressed the issue of sexual discrimination in the context of fair housing under Title VIII. However, we will look to employment discrimination cases [under Title VII] for guidance.”); *Braunstein v. Dwelling Managers, Inc.*, 476 F. Supp. 1323, 1326–27 (S.D.N.Y.1979) (where a FHA claim raised “first impression in defining the limits of sex discrimination,” the court looked to cases “construing similar language in Title VII”).

⁵⁰ See, e.g., *Wetzel v. Glen St. Andrew Living Community, LLC*, 901 F.3d 856, 863-64 (7th Cir. 2018) (“the Supreme Court’s interpretation of analogous anti-discrimination statutes satisfies us that her claim...is covered by the [FHA].”).

⁵¹ *Adams v. School Board of St. Johns County*, 968 F.3d 1286, 1306 (3rd Cir. 2020).

⁵² *Id.*

⁵³ See *Grimm v. Gloucester County School Board*, 2020 WL 5034430 (4th Cir. Aug. 26, 2020); *Hecox v. Little*, 2020 WL 4760138 (D. Idaho Aug. 17, 2020).

⁵⁴ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. at 44815.

The Proposed Rule’s “good faith” assessment of physical characteristics directs shelters to unlawfully rely on sex stereotypes about appearance to decide who receives access to their facilities. As noted above, this assessment will lead to illegal sex discrimination against transgender women and any woman who does not meet a shelter provider’s stereotype of what a woman “looks like.”

In *Price Waterhouse v. Hopkins*, the Supreme Court held that discriminating against a person for not conforming to stereotypes about how members of their sex should “look” and “behave” constitutes sex discrimination under Title VII.⁵⁵ In line with *Price Waterhouse*, the Sixth Circuit held that an employee who had been fired because his appearance and mannerisms did not match a stereotypical male could sustain a sex-stereotyping claim, observing that “sex stereotyping based on a person’s gender-nonconforming behavior is impermissible discrimination, irrespective of the cause of that behavior.”⁵⁶ As discussed above, this Title VII precedent must guide courts’ interpretation of the FHA. Accordingly, the Proposed Rule’s “good faith” assessment provision is unlawful because it would permit shelters to engage in illegal sex stereotyping under the FHA. Consequently, the Center urges HUD to withdraw the Proposed Rule and instead continue implementing the 2016 Equal Access Rule.

C. The Proposed Rule violates HUD’s obligation under the FHA to affirmatively further fair housing.

HUD has its own statutory obligation to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further” fair housing.⁵⁷ As noted above, the Proposed Rule does not further the objectives of the FHA, a cornerstone civil rights law that seeks to both eliminate housing discrimination—including sex discrimination—and to rectify the impacts of historic housing discrimination. Instead, the Proposed Rule would roll back existing protections for transgender and gender-nonconforming individuals who are seeking access to CPD-funded shelters.

HUD is violating its statutory requirement to advance fair housing objectives in its housing programs and activities by proposing a rule that would allow CPD-funded shelter providers to engage in sex discrimination and erect more barriers for women to safely access shelter to survive. Consequently, the Center urges HUD to withdraw the Proposed Rule and implement the 2016 Equal Access Rule to further fair access to housing for all women, cisgender and transgender women.

III. The Proposed Rule would conflict with multiple other laws, be practically inoperable, and cause harm.

⁵⁵490 U.S. 228, 251 (1989) (“We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”).

⁵⁶ *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004).

⁵⁷ 42 U.S.C.A. § 3608(e)(5).

The Proposed Rule would conflict with several other federal, state, and municipal laws. It would also be impractical for states to implement and would lead to much harm against transgender and gender-nonconforming people.

A. The Proposed Rule would promote discrimination in violation of the U.S. Constitution.

1. The Fourteenth Amendment bars discrimination based on gender identity.

The Fourteenth Amendment of the U.S. Constitution bars discrimination based on gender identity under two separate theories. The first is that discrimination based on gender identity is inherently discrimination based on sex, as the Supreme Court recently made clear in *Bostock*. As such, discrimination based on gender identity is sex discrimination, which receives heightened scrutiny under equal protection jurisprudence.⁵⁸

Additionally, transgender people constitute a protected class that receives heightened scrutiny under the four-factor test for determining whether a classification is suspect or quasi-suspect, and thus deserving of heightened scrutiny.⁵⁹ Under this test, a court considers (1) whether the class has a history of discrimination, (2) whether there is an actual relationship between the class's ability to perform and the rule, (3) whether the class has an immutable characteristic that defines it as a discrete group, and (4) whether the class is politically powerless.⁶⁰ Transgender individuals in this country have a long and well-recognized history of being subject to discrimination throughout various sectors of society, including in housing, employment, education, and access to health care.⁶¹ This discrimination is unrelated to transgender individuals' ability to perform and contribute to society.⁶² Additionally, transgender individuals have an immutable characteristic that distinguishes them because experts agree that gender identity has a "biological component."⁶³ Lastly, transgender people lack political power to protect

⁵⁸ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973) (military law discriminated on the basis of sex, which is unconstitutional under the Fifth Amendment); *Craig v. Boren*, 429 U.S. 190 (1976); *U.S. v. Virginia*, 518 U.S. 515 (1996).

⁵⁹ *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *10-11 (W.D. Wash. Apr. 13, 2018), *vacated and remanded*, 926 F.3d 1180 (9th Cir. 2019); *Grimm v. Gloucester County School Board*, 2020 WL 5034430, at *18.

⁶⁰ See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-41 (1985); *Karnoski v. Trump*, 926 F.3d 1180, 1192 (9th Cir. 2019).

⁶¹ *Grimm v. Gloucester County School Board*, 2020 WL 5034430, at *17; *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *21-22 (W.D. Wash. Apr. 13, 2018).

⁶² *Grimm v. Gloucester County School Board*, 2020 WL 5034430, at *17; *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *22 (W.D. Wash. Apr. 13, 2018).

⁶³ *Grimm v. Gloucester County School Board*, 2020 WL 5034430, at *18; *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *22-23 (W.D. Wash. Apr. 13, 2018); BLAISE VANDERHORST, WHITHER LIES THE SELF: INTERSEX & TRANSGENDER INDIVIDUALS & A PROPOSAL FOR BRAIN-BASED LEGAL SEX, 9 HARVARD L. & POL'Y REV. 241, 259-60 (2015) (reviewing scientific research); MILTON DIAMOND, TRANSSEXUALITY AMONG TWINS: IDENTITY CONCORDANCE, TRANSITION, REARING, AND ORIENTATION, 14 INT'L J. OF TRANSGENDERISM 24 (2013).

themselves from wrongful discrimination.⁶⁴ As such, gender identity is a suspect classification that deserves heightened scrutiny.

2. HUD cannot ask grantees to engage in unlawful discrimination.

The government may not encourage private entities to engage in conduct that would be unlawful for the government to engage in itself, yet the Proposed Rule would do just that.

In *Reitman v. Mulkey*, the Supreme Court addressed whether the state of California could amend its constitution to eliminate previously enacted state nondiscrimination statutes.⁶⁵ In striking down that state constitutional amendment, the Court held that while the state could have remained neutral with respect to private discrimination—as the U.S. Constitution did not require the state to proactively forbid it—by amending its constitution to repeal an existing protection and allow such private discrimination, the state was in effect encouraging it. In *Reitman*, the California Supreme Court found—and the U.S. Supreme Court agreed—that the state “had taken affirmative action designed to make private discriminations legally possible.”⁶⁶ The Court concluded that the intent of the act was to allow for private discrimination that had previously been expressly outlawed by the state. The Court concluded that this would involve the state in private racial discrimination contrary to the Fourteenth Amendment and was therefore unconstitutional.⁶⁷

The Supreme Court has applied the Equal Protection Clause of the Fourteenth Amendment to apply to the federal government through the Fifth Amendment’s Due Process Clause.⁶⁸ Courts have also applied *Reitman* analysis to federal agency action challenged under Fifth Amendment.⁶⁹ Consequently, *Reitman* is instructive about how HUD’s Proposed Rule likely violates the U.S. Constitution.

The Court in *Reitman* examined the initiative’s “immediate objective,” its “ultimate effect,” and the “historical context and the conditions existing prior to its enactment.”⁷⁰ Applying this analysis to the Proposed Rule, it is clear that the government is likewise

⁶⁴ Grimm v. Gloucester County School Board, 2020 WL 5034430, at *18; Karnoski v. Trump, No. C17-1297-MJP, 2018 WL 1784464, at *23 (W.D. Wash. Apr. 13, 2018).

⁶⁵ 387 U.S. 369 (1967).

⁶⁶ *Id.* at 375.

⁶⁷ *Id.* at 376.

⁶⁸ Bolling v. Sharpe, 347 U.S. 497 (1955).

⁶⁹ While the cases discussed here all involved states and thus implicated the Fourteenth Amendment, the same principles apply to actions of the federal government. See, e.g., Citizens for Health v. Leavitt, 428 F.3d 167 (3d Cir. 2005) (applying analysis of *Reitman v. Mulkey* to federal agency action challenged under Fifth Amendment); All. for Cmty. Media v. F.C.C., 10 F.3d 812 (D.C. Cir. 1993), *reh’g in banc granted, opinion vacated*, 15 F.3d 186 (D.C. Cir. 1994), and *on reh’g*, 56 F.3d 105 (D.C. Cir. 1995), *aff’d in part, rev’d in part sub nom.* Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C., 518 U.S. 727 (1996) (same).

⁷⁰ *Reitman v. Mulkey*, 387 U.S. at 373. Erwin Chemerinsky explains that, “[t]o find state action based on entanglement, there must be some government action that can be identified as affirmatively authorizing, encouraging, or facilitating constitutional violations.” ERIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 586 (5th ed. 2015).

impermissibly involving itself in private discrimination that is contrary to the equal protection guarantee of the Fifth Amendment.

The “immediate objective” prong of the analysis is forthright, as HUD has made its intentions clear and unambiguous. “HUD ... proposes to allow shelters that may already consider sex in admission and accommodation decisions ... to establish a policy that places and accommodates individuals on the basis of their biological sex, without regard to their gender identity.”⁷¹ HUD has thus made plain that the immediate objective of the proposed rule is to expressly allow shelters to turn away transgender people. The ultimate effect of the proposed regulation, therefore, would be to foster discrimination against transgender people, which is impermissible under the Fifth Amendment.

By removing the requirement that CPD-funded shelters admit individuals consistent with their gender identity, and expressly allowing shelters to adopt their own policies that discriminate against transgender people, HUD is affirmatively signaling to CPD-funded shelters that they may engage in unlawful sex discrimination. HUD should not encourage such illegal conduct. Consequently, the Center urges HUD to withdraw the Proposed Rule in its entirety and instead focus on implementing the Equal Access Rule so government-funded shelters do not engage in unconstitutional sex discrimination.

B. The Proposed Rule conflicts with the Violence Against Women Act.

HUD must also consider how the Proposed Rule conflicts with the Violence Against Women Reauthorization Act of 2013 (VAWA) nondiscrimination grant conditions:

No person in the United States shall, on the basis of actual or perceived race, color, religion, national origin, sex, gender identity (as defined in paragraph 249(c)(4) of title 18), sexual orientation, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under the Violence Against Women Act of 1994 (title IV of Public Law 103–322; 108 Stat. 1902), the Violence Against Women Act of 2000 (division B of Public Law 106–386; 114 Stat. 1491), the Violence Against Women and Department of Justice Reauthorization Act of 2005 (title IX of Public Law 109–162; 119 Stat. 3080), the Violence Against Women Reauthorization Act of 2013, and any other program or activity funded in whole or in part with funds appropriated for grants, cooperative agreements, and other assistance administered by the Office on Violence Against Women.⁷²

VAWA covers half a billion dollars in federal programs through the Department of Justice (DOJ) Office of Violence Against Women (OVW). Many emergency shelters receive multiple sources of funding, including CPD funding from HUD and VAWA funding from OVW. Additionally, VAWA’s nondiscrimination grant condition prohibits

⁷¹ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. at 44812.

⁷² 34 U.S.C § 12291(b)(13)(A).

recipients of covered grants from discriminating in *any* program or activity.⁷³ Consequently, its prohibition on discrimination extends to programs funded partially by a covered grant and another source, which consequently are prohibited from discriminating in any of its operations.

DOJ's Frequently Asked Questions (FAQs) for VAWA grants explicitly state that a "recipient that operates a sex-segregated or sex-specific program should assign a beneficiary to the group or service which corresponds to the gender with which the beneficiary identifies."⁷⁴ Furthermore, the FAQs provide that a recipient is prohibited from "ask[ing] questions about a beneficiary's anatomy or medical history or make burdensome demands for identity documents."⁷⁵ By permitting women's shelters to turn away transgender women, the Proposed Rule encourages gender identity discrimination (a form of sex discrimination) and service refusals, which are prohibited for recipients of grants under the 2013 VAWA. Since the Proposed Rule directly contradicts VAWA's requirements, grant recipients that follow the Proposed Rule risk suspension or termination of their VAWA funding.

Rather than induce CPD-funded shelters to risk the loss of VAWA funding, the Center urges HUD to withdraw the Proposed Rule and implement the 2016 Equal Access Rule that aligns with nondiscrimination protections in VAWA.

C. The Proposed Rule likely conflicts with many state and municipal nondiscrimination laws.

Sex discrimination in housing is prohibited in almost every state.⁷⁶ More than 20 states plus the District of Columbia also explicitly prohibit gender identity discrimination in housing and public accommodations.⁷⁷ In addition, at least 300 municipalities have similar nondiscrimination ordinances.⁷⁸ Consequently, the Proposed Rule will likely conflict with many state and municipal laws.

D. The Proposed Rule is impractical and harmful.

In addition to conflicting with numerous federal, state, and municipal laws, as described above, the Proposed Rule would create barriers to ensuring access to shelter, and its purported workaround is impractical and harmful.

⁷³ *Id.*

⁷⁴ Dep't of Justice, Frequently Asked Questions: Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013, at 8 (Apr. 9, 2014), *available at* <https://www.justice.gov/sites/default/files/ovw/legacy/2014/06/20/faqs-ngc-vawa.pdf>.

⁷⁵ *Id.* at 9.

⁷⁶ KNOW YOUR RIGHTS: HOUSING AND HOMELESS SHELTERS, NAT'L CTR. FOR TRANSGENDER EQUALITY, <https://transequality.org/know-your-rights/housing-and-homeless-shelters> (last visited Sept. 21, 2020).

⁷⁷ HUMAN RIGHTS CAMPAIGN, EQUALITY FED'N INST., 2019 STATE EQUALITY INDEX 15-16 (2019), *available at* <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/resources/2019-SEI-Final-Report.pdf>; MOVEMENT ADVANCEMENT PROJECT, NONDISCRIMINATION LAWS, LGBTMAP.ORG, https://www.lgbtmap.org/equality-maps/non_discrimination_laws/housing (last visited Sept. 22, 2020).

⁷⁸ MOVEMENT ADVANCEMENT PROJECT, LOCAL NONDISCRIMINATION ORDINANCES, LGBTQMAP.ORG, https://www.lgbtmap.org/equality-maps/non_discrimination_ordinances/ (last visited Sept. 22, 2020).

As mentioned above, under the Proposed Rule, shelters would determine a person's sex using a "good faith assessment" based on physical characteristics. Further, shelters can request evidence or documentation to prove one's sex. Requiring identification creates a barrier to accessing shelter for those who need it most. To the extent the Proposed Rule encourages shelters to require identification or other documentation, or to ask invasive personal questions, it thus could create barriers for many shelter-seekers, not just those who are transgender. Further, the Proposed Rule could even allow for the shelter's own opinion regarding a person's sex to take priority above someone's birth certificate (if changed to reflect their gender identity), other documentation, or self-identification.

In short, the Proposed Rule would allow women's shelters to turn away transgender women, including when they are seeking emergency shelter. In some cases, this means that transgender people will simply give up on even seeking emergency shelter and instead resort to sleeping on the street. As discussed above, unsheltered transgender people face a higher risk of physical and mental health issues and sexual violence. All these issues are not only harmful in and of themselves but will also likely increase the time it takes for affected individuals to be connected to stable housing.

While HUD would require a transfer recommendation to an alternative shelter under the Proposed Rule, this is no guarantee that a transgender woman would be able to access such shelter. There may not be another shelter in the area, which may especially be the case in rural areas with few shelters.⁷⁹ As noted previously, 67 percent of transgender women respondents to a recent survey said that they would need to travel 10 to 20 miles to find an alternative shelter, and 28 percent of transgender women said they would need to travel more than 20 miles.⁸⁰ In addition, many states do not have sufficient shelter beds to serve people experiencing homelessness in their area,⁸¹ so in practice, a women's shelter refusing to serve a transgender woman and providing a referral to another women's shelter may be of little assistance if that shelter is full.

Even worse, a women's shelter may provide a transgender woman with a referral to a men's shelter that would be unsafe for transgender women. In the 2015 U.S. Transgender Survey, 25 percent of transgender survey respondents said that they had "to dress or present as the wrong gender to feel safe in a shelter," and 14 percent were in a shelter requiring "them to dress or present as the wrong gender in order to stay at the shelter."⁸² Refusing to affirm someone's gender identity and instead forcing them to

⁷⁹ U.S. GOV'T ACCOUNTABILITY OFF., RURAL HOMELESSNESS: BETTER COLLABORATION BY HHS AND HUD COULD IMPROVE DELIVERY OF SERVICES IN RURAL AREAS (JULY 2010), <https://www.gao.gov/new.items/d10724.pdf>.

⁸⁰ SANTOS ET AL., *supra* note 33, at 2.

⁸¹ NAT'L ALLIANCE TO END HOMELESSNESS, STATE OF HOMELESSNESS: 2020 EDITION, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-2020/>; <https://nn4youth.org/wp-content/uploads/There-Are-Less-Beds-for-Youth-as-a-Result-of-COVID.pdf>. State Balance of State Continuum of Care reports consistently show a gap between the number of people who need shelter and the number of people who access shelter. U.S. DEP'T OF HOUSING AND URBAN DEV., COC DASHBOARD REPORTS, HUD EXCHANGE, <https://www.hudexchange.info/programs/coc/coc-dashboard-reports/> (last visited Sept. 21, 2020).

⁸² JAMES ET AL., *supra* note 2, at 181.

present as the wrong gender harms a transgender person's well-being.⁸³ While the 2016 Equal Access Rule addresses this harm by requiring shelters to admit individuals based on their self-identified gender identity, the Proposed Rule would instead likely lead to more dangerous and traumatizing placements of transgender women in men's shelters.

For all of these reasons, permitting women's shelters to deny access to transgender women is likely to force more transgender women to live on the street, with the higher risks of harm due to the high rates of violence and other forms of trauma that entails.

The Proposed Rule would lead to even more harm to transgender people in light of COVID-19. Transgender people, and especially transgender people experiencing homelessness, are among the communities most susceptible to contracting and becoming seriously ill or dying from COVID-19.⁸⁴ In a recent memo, Acting OMB Director Vought directed heads of federal departments and agencies to "prioritize all resources to slow the transmission of COVID-19."⁸⁵ This Proposed Rule does the

⁸³ See DWAYNE BIBB, ET AL., THE WELFARE WARRIORS RESEARCH COLLABORATIVE, A FABULOUS ATTITUDE: LOW-INCOME LGBTGNC PEOPLE SURVIVING & THRIVING ON LOVE, SHELTER & KNOWLEDGE 23 (2010), <https://www.issueab.org/resources/14891/14891.pdf> (describing higher violence against transgender shelter residents placed in a shelter that does not align with their gender identity); ALEX ABRAMOVICH, 1 in 3 transgender youth will be rejected by a shelter on account of their gender identity/expression, HOMELESS HUB (June 13, 2014), <https://www.rondpointdelitinerance.ca/blog/1-3-transgender-youth-will-be-rejected-shelter-account-their-gender-identityexpression>; LISA RAPAPORT, TRANS TEENS FACE HIGHER SEXUAL ASSAULT RISK WHEN SCHOOLS RESTRICT BATHROOMS, REUTERS (May 6, 2019), <https://www.reuters.com/article/us-health-youth-transgender/trans-teens-face-higher-sexual-assault-risk-when-schools-restrict-bathrooms-idUSKCN1SC1LR> (finding that transgender and non-binary teens are more likely to experience sexual assault when forced to use restrooms or locker rooms that do not match their gender identity). Research also shows how discrimination against transgender people in general has negative psychological and physical health impacts. CAITLYN ROONEY & LAURA E. DURSO, CTR. FOR AM. PROGRESS, THE HARMS OF REFUSING SERVICE TO LGBTQ PEOPLE AND OTHER MARGINALIZED COMMUNITIES (November 29, 2017), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2017/11/29/443392/harms-refusing-service-lgbtq-people-marginalized-communities/>. Conversely, studies find that reducing transphobia reduces the risk of suicidal ideation and attempts. See, e.g., GRETA R. BAUER, ET AL., INTERVENABLE FACTORS ASSOCIATED WITH SUICIDE RISK IN TRANSGENDER PERSONS: A RESPONDENT DRIVEN SAMPLING STUDY IN ONTARIO, CANADA, 15 BMC PUBLIC HEALTH 525 (2015), available at <https://bmcpublikealth.biomedcentral.com/articles/10.1186/s12889-015-1867-2> (concluding that "interventions to increase social inclusion and access to medical transition, and to reduce transphobia, have the potential to contribute to substantial reductions in the extremely high prevalences of suicide ideation and attempts within trans populations").

⁸⁴ See HUMAN RIGHTS CAMPAIGN, THE LIVES AND LIVELIHOODS OF MANY IN THE LGBTQ COMMUNITY ARE AT RISK AMIDST COVID-19 CRISIS (2020), available at <https://www.hrc.org/resources/the-lives-and-livelihoods-of-many-in-the-lgbtq-community-are-at-risk-amidst>; JODY L. HERMAN & KATHRYN O'NEILL, WILLIAMS INSTITUTE, VULNERABILITIES TO COVID-19 AMONG TRANSGENDER ADULTS IN THE U.S. (Apr. 2020), <https://williamsinstitute.law.ucla.edu/publications/transgender-covid-19-risk>; UN'S OFFICE OF THE HIGH COMMISSIONER, COVID-19 AND THE HUMAN RIGHTS OF LGBTI PEOPLE (Apr. 17, 2020), available at <https://www.ohchr.org/Documents/Issues/LGBT/LGBTIpeople.pdf>; OUTRIGHT ACTION INTERNATIONAL, VULNERABILITY AMPLIFIED: THE IMPACT OF THE COVID-19 PANDEMIC ON LGBTIQ PEOPLE (May 2020), <https://outrightinternational.org/content/vulnerability-amplified-impact-covid-19-pandemic-lgbtqi-people>.

⁸⁵ Memorandum for the Heads of Departments and Agencies from Russell T. Vought, Acting Director, Office of Management and Budget, Federal Agency Operational Alignment to Slow the Spread of Coronavirus COVID-19 (Mar. 17, 2020), available at <https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-16.pdf>.

opposite as it would create an environment more likely to increase the transmission of COVID-19.

For all of these reasons, and more, the Proposed Rule is inoperable, and the Center urges HUD to withdraw it and instead continue to implement 2016 Equal Access Rule.

IV. The Proposed Rule is arbitrary and capricious and should be withdrawn.

Under the Administrative Procedures Act (APA) and binding Supreme Court precedent on agency rulemaking, one of the minimum requirements of rulemaking is that an agency provide a “reasoned explanation” justifying its proposed rule and assessing its impacts.⁸⁶ The agency “must examine the relevant data and articulate a satisfactory explanation for its action,”⁸⁷ including by “paying attention to the advantages *and* the disadvantages of agency decisions.”⁸⁸ As the Supreme Court has explained, “where an agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law.”⁸⁹

Moreover, when an agency seeks to *reverse* its previous policy in a regulation, it generally must provide a “reasoned analysis for the change,” including by contending with the evidence and rationale on which its previous policy was based.⁹⁰ The agency must at least provide “a reasoned explanation...for disregarding facts and circumstances that underlay or were engendered by the prior policy.”⁹¹ Given that a change in policy disrupts a “settled course of behavior,”⁹² agencies must articulate an explanation for the change in policy to overcome the presumption “*against* changes in current policy that are not justified by the rulemaking record.”⁹³

In *New York v. United States Department of Health and Human Services*, the federal court held that a rule allowing health care entities to refuse patient care violated the APA.⁹⁴ The court held that the U.S. Department of Health and Human Services (HHS) lacked adequate justification for the rule when it relied on, at most, 21 complaints alleging violations of the federal laws the rule purported to implement.⁹⁵ And because the rule expanded the refusal laws in ways that were not contemplated in any of the complaints, Judge Engelmayer noted that there was a “yawning evidentiary gap” in

⁸⁶ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

⁸⁷ *Id.* (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).

⁸⁸ *Michigan*, 135 S. Ct. 2699, 2707 (2015) (emphasis in original).

⁸⁹ *Encino Motorcars*, 136 S. Ct. at 2125.

⁹⁰ *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 30 (1983). See also *Washington v. Azar*, 376 F.Supp.3d 1119, 1131 (E.D. Wash. 2019) (a health care rule was “arbitrary and capricious because it reverses long-standing positions of the Department without proper consideration of sound medical opinions and the economic and non-economic consequences.”).

⁹¹ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

⁹² *Motor Vehicle Mfrs. Assn. of United States*, 463 U.S. at 41 (quoting *Atchison, T. & S. F. R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973)).

⁹³ *Id.* at 42 (emphasis in original).

⁹⁴ *New York v. United States Dep’t of Health and Human Services*, 414 F.Supp.3d 475 (S.D.N.Y. 2019).

⁹⁵ *Id.* at 542.

HHS's case.⁹⁶ Here, HUD is using an even weaker record of complaints and data to propose a harmful and discriminatory rollback of the 2016 Equal Access Rule.

HUD has failed to meet these minimum standards for rulemaking. In the Proposed Rule's preamble, HUD fails to justify its significant reversal of the protections for transgender people in the Equal Access Rule and neglects to consider the full costs of the Proposed Rule.

A. HUD's purported justifications for the Proposed Rule are inaccurate and fail to provide valid justification for undermining the Equal Access Rule.

In the preamble to the Proposed Rule, HUD's proffered reasons for the rule change that mischaracterize the law and fail to provide meaningful data for changing the requirements in the Equal Access Rule.

1. HUD had the authority to promulgate the 2016 Equal Access Rule.

In the Proposed Rule, HUD claims that, in relying on the Secretary's plenary authority under 42 U.S.C. § 3535(d) to promulgate the 2016 Equal Access Rule, rather than "a more specific affirmative grant of authority from Congress," HUD "violated the basic principle of administrative law that an agency should not go beyond the scope of the power granted them by duly enacted legislation and imposed a regulatory burden."⁹⁷ This mischaracterizes the scope of authority of the HUD Secretary.

The Housing and Urban Development Act of 1965 grants HUD the authority to "make such rules and regulations as may be necessary to carry out [the Secretary's] functions, powers, and duties."⁹⁸ The developing and enforcing of uniform requirements across HUD funding recipients falls within the HUD Secretary's duties, which Congress broadly defined.⁹⁹ Further, the first authority for rulemaking HUD lists on its own website is this plenary authority.¹⁰⁰

Additional acts of Congress provide ample authority for HUD to promulgate the 2016 Equal Access Rule. The FHA requires the HUD Secretary to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter,"¹⁰¹ and, as discussed above, the FHA imposes a statutory duty to affirmatively further fair housing based on sex, one of the protected classes under the FHA. Courts have interpreted this obligation to affirmatively further fair housing to apply to HUD programs authorized by acts other than the FHA.¹⁰²

⁹⁶ *Id.* at 545.

⁹⁷ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. at 44813.

⁹⁸ 42 U.S.C. § 3535(d).

⁹⁹ 42 U.S.C. § 3532(b).

¹⁰⁰ HUD RULEMAKING, U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, https://www.hud.gov/program_offices/general_counsel/HUD-Rulemaking (last visited Sept. 21, 2020).

¹⁰¹ 42 U.S.C. § 3608(e)(5).

¹⁰² See *MT Mortgage Corp. v. White*, 736 F. Supp. 2d (E.D.N.Y. 2006) (holding that the duty to affirmatively further the policies of the FHA applied to a HUD mortgage program authorized by the National Housing Act).

Promulgating an inclusive definition of “gender identity” to ensure that CPD-funded shelters do not discriminate against transgender people, a form of sex discrimination as explained above, clearly affirmatively furthers fair housing based on sex in accordance with HUD’s duty under the FHA.

Further, HUD’s 2016 Equal Access Rule applies to any CPD program, including certain explicitly named programs.¹⁰³ Congress explicitly granted the HUD Secretary authority to engage in rulemaking as necessary to implement each such program.¹⁰⁴

HUD’s assertion is thus contrary to the clear and well-founded authority of the HUD Secretary to engage in rulemaking on this topic. Because HUD did indeed have the authority to promulgate the 2016 Rule, HUD’s argument now fails to justify the rule change. Consequently, HUD should withdraw the Proposed Rule and continue implementing the 2016 Rule.

2. HUD purports to encourage local control, but in doing so, fosters violations of federal, state, and municipal laws.

HUD next argues that the Proposed Rule’s proposed changes from the 2016 Equal Access Rule are justified because “the 2016 Rule minimized local control.”¹⁰⁵ However, the Proposed Rule would in fact conflict with the nondiscrimination laws in many states and municipalities, as mentioned above. Following *Bostock*, more state and local laws prohibiting sex discrimination will also be interpreted by courts to prohibit discrimination against transgender individuals.¹⁰⁶

Ultimately, it is essential for HUD to ensure application of federal regulations and standards across HUD-funded programs in a manner that avoids sex discrimination in violation of federal and other laws. Thus, HUD’s argument fails to justify the rule change. The Center urges HUD to withdraw the Proposed Rule and implement the 2016 Equal Access Rule.

3. HUD's religious burden argument does not pass muster.

HUD’s third purported rationale for the Proposed Rule is that the change is justified because “the 2016 Rule burdened those shelters with deeply held religious convictions.”¹⁰⁷ This also fails to pass muster.

¹⁰³ See 24 C.F.R. § 5.106(a) (“applicability”).

¹⁰⁴ See, e.g., 42 U.S.C. § 11386a (granting the Secretary authority to establish criteria to award Continuum of Care program grants); 42 U.S.C. § 12725 (granting the Secretary authority to issue regulations to implement the HOME Investment Partnerships Program); 12 U.S.C. § 4568(g) (granting the Secretary authority to issue regulations to implement the Housing Trust Fund program).

¹⁰⁵ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. at 44813.

¹⁰⁶ See, e.g., *Nafziger v. Gospel Crusade, Inc.*, No. 8:2019-cv-02511-TGW (M.D. Fla. July 13, 2020).

¹⁰⁷ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. at 44814.

It is well established that the government may enforce nondiscrimination laws, even when an entity has religious objections to following these laws.¹⁰⁸ The government has a compelling government interest in eliminating all forms of sex discrimination.¹⁰⁹ Further, authorizing people to harm others in service of their religious beliefs violates the Establishment Clause.¹¹⁰

Notably, in response to a Freedom of Information Act (FOIA) request by CAP seeking information about waivers or religious accommodations under both the 2012 and 2016 Equal Access rules, HUD could not locate any such waiver or religious accommodation requests.¹¹¹ Neither does HUD mention any waiver requests in the preamble to the Proposed Rule. HUD claims that shelter providers that do not now seek federal funding would do so if the Proposed Rule were promulgated, but this is conjecture and not based on actual data.

There is no data supporting HUD's claim that the 2016 Rule burdened "shelters with deeply held religious beliefs," and, as discussed above, HUD misunderstands court precedent on the First Amendment in the first place. Consequently, the Center urges HUD to withdraw the Proposed Rule in its entirety and continue implementing the 2016 Equal Access Rule.

4. Anecdotes about privacy interests do not meet the rational basis test, particularly when they contain bias.

HUD's fourth purported justification for proposing a rule change is that "the 2016 Rule has manifested privacy issues."¹¹² Administrative rulemaking requires an agency to evaluate relevant data and provide adequate reasons for its choices in a rule. While a new administration can disagree with a previous administration's policy interpretation, courts will not sanction reversals of previous policies without a "rational connection between the facts found and the choice made."¹¹³ An agency rule failing to meet this rational basis test is arbitrary and capricious and thus unlawful. HUD's privacy justification fails to meet this rational basis test.

Other federal agencies have adopted nondiscrimination policies to treat people consistent with their gender identity, including granting equal access to gender-specific

¹⁰⁸ See *Bob Jones Univ. v. United States*, 461 U.S. 574, 579 (1983); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

¹⁰⁹ *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (finding compelling interest in eliminating discrimination against women); *Romer v. Evans*, 517 U.S. 620, 631 (1996) ("[T]hese are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984).

¹¹⁰ *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985).

¹¹¹ SANTOS ET AL., *supra* note 33, at 6.

¹¹² *Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs*, 85 Fed. Reg. at 44814.

¹¹³ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983).

facilities such as restrooms in workplaces¹¹⁴ and schools,¹¹⁵ dormitories,¹¹⁶ and domestic violence shelters.¹¹⁷ Yet HUD proposes to violate this principle of equal opportunity by allowing CPD-funded shelters to treat transgender women differently than cisgender women.

HUD argues that beneficiaries' biases must be accommodated, and in support, makes the hypothetical assertion that "*some women* may fear that non-transgender, biological men may exploit the process of self-identification under the current rule in order to gain access to women's shelters".¹¹⁸ This is a prejudicial and unfounded myth that HUD should not perpetuate in the rulemaking process, nor any other government action. The reality is that there is no evidence that cisgender men resort to such gimmicks, or frankly, need such gimmicks to abuse women. A 2018 study compared two localities in Massachusetts with and without ordinances allowing transgender individuals access to single-sex facilities matching their gender identities. The study found that not only do equal access laws have no bearing on the frequency or number of crimes committed in single-sex spaces, but that such crimes are overall exceedingly rare.¹¹⁹ Similarly, in 2016, PolitiFact could not identify a single case in the United States in which a nondiscrimination law allowed a person access to a single-sex facility and that person went on to commit a crime in that space.¹²⁰ In addition to this research, hundreds of organizations seeking to reduce domestic violence and sexual violence signed a Consensus Statement in 2018, agreeing that shelters serving transgender women alongside other women is appropriate and not a safety issue.¹²¹

¹¹⁴ See, e.g., *Lusardi v. McHugh*, E.E.O.C. App. No. 0120133395, 15 (Apr. 1, 2015); Discrimination on the Basis of Sex, Notice of Proposed Rulemaking, 80 Fed. Reg. 5246 (proposed Jan. 30, 2015) (to be codified at 41 C.F.R. § 60); Report of Prohibited Personnel Practice, Office of Special Counsel File No. MA-11-3846 (Jane Doe) (Aug. 28, 2014); Dep't of Labor, Training and Employment Guidance Letter No. 37-14, The Workforce Development System: Training and Employment Guidance Letter on Gender Identity, Gender Expression and Sex Stereotyping (May 29, 2015).

¹¹⁵ See, e.g., Brief of the United States as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal, *G.G. ex rel. Grimm v. Gloucester City Sch. Bd.*, No. 15-2056, (4th Cir. Oct. 28, 2015); Statement of Interest of the United States at 5, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15cv54 (E.D. Va. June 29, 2015); *Tooley v. Van Buren Pub. Sch.*, No. 2:14-cv-13466 (E.D. Mich. Feb. 24, 2015); Resolution Agreement between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division (OCR No. 09-12-1020) (DOJ No. 169-12C-70) (July 24, 2013); Resolution Agreement between the Downey Unified School District and the U.S. Department of Education, Office for Civil Rights (OCR Case No. 09-12-1095 Oct. 8, 2014).

¹¹⁶ Dep't of Labor, Job Corps Program Instruction Notice No. 14-31, Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program (May 1, 2015).

¹¹⁷ Dep't of Justice, *supra* at note 74, at 9.

¹¹⁸ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. at 44815 (emphasis added).

¹¹⁹ AMIRA HASENBUSH, ANDREW R. FLORES & JODY L. HERMAN, GENDER IDENTITY NONDISCRIMINATION LAWS IN PUBLIC ACCOMMODATIONS: A REVIEW OF EVIDENCE REGARDING SAFETY AND PRIVACY IN PUBLIC RESTROOMS, LOCKER ROOMS, AND CHANGING ROOMS, 16 SEX RES SOC POL'Y 70–83 (2019), <https://doi.org/10.1007/s13178-018-0335-z>.

¹²⁰ WILL DORAN, EQUALITY NC DIRECTOR: NO PUBLIC SAFETY RISKS IN CITIES WITH TRANSGENDER ANTI-DISCRIMINATION RULES, POLITIFACT (Apr. 1, 2016), <https://www.politifact.com/factchecks/2016/apr/01/chris-sgro/equality-nc-director-no-public-safety-risks-cities/>.

¹²¹ ALLIANCE FOR STRONG FAMILIES AND COMMUNITIES ET AL., NATIONAL CONSENSUS STATEMENT OF ANTI-SEXUAL ASSAULT AND DOMESTIC VIOLENCE ORGANIZATIONS IN SUPPORT OF FULL AND EQUAL ACCESS FOR THE TRANSGENDER COMMUNITY, THE NAT'L TASK FORCE TO END SEXUAL AND DOMESTIC VIOLENCE (Apr. 13,

Multiple circuit courts have rejected the argument that a transgender person's presence in a single-sex facility violates the privacy interests of other parties. For example, in the recent case *Doe v. Boyertown Area School District*, the Third Circuit examined whether cisgender students' privacy rights were violated by a policy allowing transgender students to use the restroom corresponding with their gender identity.¹²² The Third Circuit held that "the presence of transgender students in these spaces does not offend the constitutional right of privacy any more than the presence of cisgender students in those spaces."¹²³ The Eighth and Ninth Circuits have similarly held that allowing transgender individuals access to restrooms in line with their gender identity has no bearing on the rights of other parties.¹²⁴

In the absence of other court precedents or factual evidence, HUD finds only two anecdotes to support its claim that allowing transgender women in women's shelters "could harm individuals in need of shelter by chilling their participation in HUD programs."¹²⁵

First, the Proposed Rule preamble cites one case that actually underscores the harm to transgender people at issue. According to press reports, the faith-based shelter in the case twice refused to admit a transgender woman with medical issues.¹²⁶ Knowing she would not be safe as the only woman in a men's shelter, she had to sleep in the woods.¹²⁷ The shelter, repeatedly misgendering the plaintiff woman in a press report, claimed cisgender women raised their discomfort at sharing a shelter with transgender women.¹²⁸ While the court in question did not strike down the shelter's action, the case was brought under a local Anchorage public accommodation ordinance, which the court held did not apply to the shelter in the first place.¹²⁹ Thus, the court in that case did not actually analyze the 2016 Equal Access Rule. And as previously established, the mere presence of transgender women in single-sex spaces does not violate the rights of cisgender women.

2018), <http://www.4vawa.org/ntf-action-alerts-and-news/2018/4/12/national-consensus-statement-of-anti-sexual-assault-and-domestic-violence-organizations-in-support-of-full-and-equal-access-for-the-transgender-community>.

¹²² *Doe v. Boyertown Area School District*, 897 F.3d 518 (3rd Cir. 2018).

¹²³ *Id.* at 533.

¹²⁴ *Parents for Privacy v. Barr*, 949 F.3d 1210 (2020) (rejecting arguments that a school allowing transgender students to use the restroom corresponding to their gender identity violated other students' privacy rights); *Cruzan v. Special Sch. Dist. No. 1.*, 294 F.3d 981, 983 (8th Cir. 2002) (rejecting arguments that a school policy allowing transgender employees to use the restrooms corresponding to their gender identity violated another employee's rights under Title VII).

¹²⁵ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. at 44815.

¹²⁶ JILL BURKE, TRANSGENDER WOMAN AT CENTER OF DOWNTOWN SOUP KITCHEN LAWSUIT SPEAKS OUT, ALASKA'S NEWS SOURCE (Jan. 18, 2019), <https://www.alaskasnewssource.com/content/news/Transgender-woman-at-center-of-Downtown-Soup-Kitchen-lawsuit-speaks-out-504529741.html>

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Downtown Soup Kitchen v. Municipality of Anchorage*, No. 3:18-cv-00190 2019 WL 3769623 (Aug. 9, 2019).

Second, HUD also points to a pending civil complaint in California alleging harassment, as justification for the Proposed Rule. If the harassment allegations are true, such conduct would be inappropriate for any shelter resident, be the person transgender or cisgender. The Equal Access Rule does not prevent shelters from having an anti-harassment policy or from having staff address and stop inappropriate conduct by any resident. As the Third Circuit observed in *Boyertown*, raising individual incidents of already-prohibited misconduct is “wholly unhelpful” to deciding the issue of whether transgender individuals should have equal access to facilities.¹³⁰ Just as the *Boyertown* court stated that “the presence of transgender students in these spaces does not offend the constitutional right of privacy any more than the presence of cisgender students in those spaces,”¹³¹ there is no privacy (or harassment) violation by the mere presence of a transgender woman in a women’s shelter. HUD’s reference to one allegation of an individual’s misconduct fails to provide evidence that, on the whole, transgender women in a women’s shelter pose safety or privacy issues for cisgender women. HUD perpetuating this unsubstantiated myth, especially a myth rooted in prejudice against transgender people, in a rulemaking fails to meet the rational basis test.

Additionally, HUD has already provided emergency shelters with explicit guidance to ensure all beneficiaries with both privacy and safety. For example, HUD and technical assistance partners held a 2016 webinar providing suggestions to increase privacy through locks and doors for toilet stalls, installing curtains, staggering shower times, and creating gender-neutral single-use restroom facilities.¹³² These are low-cost suggestions to improve the experience for all shelter beneficiaries that HUD previously developed in coordination with providers.

In putting forward the Proposed Rule, HUD fails to give adequate weight to the privacy and safety issues that are actually at stake. Denying transgender women access to shelter that aligns with their gender identity does create safety issues—for transgender women. HUD’s Proposed Rule, if implemented by shelters, will put transgender people’s lives in danger by subjecting them to abuse and violence. This is true if transgender women are forced to live, sleep, and shower with men,¹³³ or if they are turned away from shelters for women and onto the streets where they face an increased risk of illness, self-harm, harm from others, and mental health concerns. Based on the applicable legal standards and the data regarding the communities that are actually at risk of harm, the life-saving protections of the 2016 Equal Access Rule must remain in place for transgender women experiencing homelessness. Consequently, the Center urges HUD to withdraw this Proposed Rule in its entirety.

5. The 2016 Equal Access Rule did not impose an unreasonable regulatory burden.

¹³⁰ *Boyertown v. Doe*, 897 F.3d 518, 532 (2018).

¹³¹ *Id.* at 533.

¹³² See U.S. DEP’T OF HOUSING AND URBAN DEV. ET AL., EQUAL ACCESS AND GENDER IDENTITY RULES TRAINING (Nov. 16, 2016) (transcript available at <https://sexdiscriminationinhousing.org/assets/docs/Equal-Access-and-Gender-Identity-Rule-Training-Webinar-Transcript.pdf>).

¹³³ AASTHA UPRETY, EQUAL RIGHTS CTR., HUD PROPOSAL PUTS HOMELESS TRANSGENDER PEOPLE’S LIVES AT RISK (July 4, 2019), available at <https://equalrightscenter.org/hud-transgender-homeless-shelters/>.

HUD's final purported justification for the Proposed Rule is that "the 2016 Rule imposed regulatory burdens."¹³⁴ First, HUD argues that a "document retention requirement applicable to determinations of 'sex'" is "burdensome and not supported either by statute or practice."¹³⁵ This fails to recognize that HUD evaluated paperwork burdens when it was in the process of promulgating the final 2016 Equal Access Rule and ultimately reduced the burden in the final rule so that it would be minimal. In that final rule, HUD noted the following:

This final rule eliminates most of the provisions of the [2015] proposed rule that required recordkeeping requirements, and as a result HUD has removed most of the recordkeeping requirements in this final rule. The only recordkeeping requirement that remains is the requirement to maintain records of policies and procedures to ensure that equal access is provided, and individuals are accommodated, in accordance with their gender identity. This requirement will aid HUD in monitoring compliance with this rule and taking enforcement action where needed.¹³⁶

HUD consequently followed procedural requirements in promulgating the 2016 Equal Access Rule, reducing the regulatory burden imposed upon CPD programs in light of the commenters arguing that the 2015 Proposed Equal Access Rule's paperwork proposals would have been too burdensome. In addition, requiring beneficiaries to maintain records of policies and procedures is a typical practice to monitor compliance with nondiscrimination laws and regulations. For all of these reasons, HUD's argument falls flat.

Second, HUD argues that addressing privacy concerns presents a regulatory burden on shelters. However, HUD inappropriately dismisses low-cost suggestions, such as curtains, to address privacy concerns. As a result, HUD's argument should be rejected.

Further, this Proposed Rule fails to recognize that, if finalized, it would itself increase regulatory burdens on providers, discussed in more detail below. Consequently, the Center urges HUD to withdraw this Proposed Rule and fully implement the 2016 Equal Access Rule.

B. HUD has failed to analyze the applicable law as it evolved and all possible costs of this Proposed Rule in comparison with the benefits of maintaining the 2016 Equal Access Rule.

1. HUD failed to properly account for *Bostock* and failure to do so and withdraw this Proposed Rule will result in litigation costs.

The Supreme Court decided *Bostock* prior to HUD publishing this Proposed Rule but during its Congressional review period. Representatives Wexton and Waters noted

¹³⁴ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. at 44816.

¹³⁵ *Id.*

¹³⁶ Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. at 64774.

apparent contradictions in the Proposed Rule they received for review and the Supreme Court's reasoning in *Bostock* and asked HUD to conduct additional legal analysis of the Proposed Rule in light of *Bostock*.¹³⁷ In response, Secretary Carson argued, with only cursory analysis, that *Bostock* does not impact the Proposed Rule.¹³⁸

HUD has erred in multiple ways by failing to properly account for *Bostock*. First, HUD failed to include Secretary Carson's analysis in the Notice of Proposed Rulemaking, limiting the public's ability to fully respond. Because Representative Wexton's office published Secretary Carson's response letter, the Center can provide some initial responses.

Secretary Carson first argued that the shelter facilities subject to this Proposed Rule are not covered under the FHA. This argument falls flat. As explained above, these shelters are in fact "dwellings" under the FHA and consequently, the FHA's prohibition on sex discrimination applies.

Second, Secretary Carson argued that the Supreme Court in *Bostock* "assumed that 'sex' referred 'only to biological distinctions between male and female.'"¹³⁹ However, the Supreme Court in *Bostock* did not need to determine whether "sex" only refers to "biological sex" to find that a "straightforward application" of statutory text means that discrimination against transgender people is sex discrimination. Secretary Carson improperly relied on the Court making an assumption for the sake of argument, because the holding is not dispositive on one answer or the other. The Supreme Court did not *find* that "sex" only refers to "biological sex." HUD must follow the holding of *Bostock*, not an assumption therein for the sake of argument, and must reevaluate this Proposed Rule in light of that holding. Failure to do so will likely result in costly litigation. Taxpayer funds, which include revenues raised from transgender and gender-nonconforming taxpayers, are much better spent affirmatively furthering fair housing based on sex through the 2016 Equal Access Rule versus defending an illegal rule.

As a recent analogy, to date, two federal district courts have held that the U.S. Department of Health and Human Services acted arbitrarily and capriciously by issuing a final rule redefining the scope of sex discrimination in health care to remove a protection from discrimination based on gender identity "without addressing the impact of the Supreme Court's decision in *Bostock*."¹⁴⁰ If HUD fails to reconsider this Proposed Rule in light of *Bostock*, a court is likely to similarly hold that HUD has acted arbitrarily and capriciously.

¹³⁷ Letter to Benjamin Carson, Sec'y of U.S. Dep't of Housing & Urban Dev. from Rep. Maxine Waters, Chairwoman, H. Fin. Servs. Comm. & Rep. Jennifer Wexton, Member, H. Fin. Servs. Comm. (Jun. 29, 2020), *available at* https://financialservices.house.gov/uploadedfiles/6.29.20_ltr_to_hud_ea_scd_wexton_waters.pdf.

¹³⁸ Letter to Rep. Maxine Waters, Chairwoman, H. Fin. Servs. Comm. & Rep. Jennifer Wexton, Member, H. Fin. Servs. Comm. from Benjamin Carson, Sec'y of U.S. Dep't of Housing & Urban Dev. (July 13, 2020), *available at* https://wexton.house.gov/uploadedfiles/hud_response_to_waters-wexton_6.29.20_letter.pdf.

¹³⁹ *Id.*

¹⁴⁰ Walker v. Azar, No. 20-CV-2834 (FB) (SMG), at 25 (E.D.N.Y. August 17, 2020). See also Whitman-Walker Clinic, Inc. v. HHS, 1:20-cv-01630-JEB, at 57 (D.D.C. Sept. 2, 2020).

2. Rescinding the 2016 Equal Access Rule protections would create multiple additional costs.

HUD has also failed to consider other possible costs of the Proposed Rule. Rescinding key portions of the HUD Equal Access Rule could generate significant costs for people seeking shelter, covered programs, local communities, and society as a whole. Here are just some of them:

- **Costs for covered programs:** Because this Proposed Rule departs from the 2016 Equal Access Rule, may be confusing, and may conflict with other federal, state, and municipal laws, covered programs will face significant costs that exceed the cost of paying an employee to spend the time to read it. Covered programs may need to seek legal advice and, if they engage in illegal sex discrimination in reliance on the new rule, may incur costs related to state enforcement actions, litigation, or losing federal, state, or local funding. Providing a uniform standard that does not promote sex discrimination would benefit covered programs operating in more than one locality or state and reduces the amount of time they need to understand differing laws and other requirements.
- **Costs for unsheltered transgender people:** As noted above, the Proposed Rule would likely lead to more transgender people being turned away from safe shelter and instead having to attempt to survive on the street. This will likely increase the time it takes for them to be connected to stable housing, increase the risk they will face violence, increase their risk of exposure to COVID-19, and increase physical and mental health effects from the stress of experiencing discrimination.
- **Societal costs:** On average, a night on the street for a transgender person incurs a high risk to their own health and safety. Increasing the risk an unsheltered transgender person becomes infected with COVID-19 increases the risk of further spread, a high cost to society.
- **Costs associated with increasing barriers to access to shelter:** Barriers such as requiring identification are contrary to evidence-based practices for ensuring access to shelter for those who need it most. To the extent the Proposed Rule encourages shelters to require identification or other documentation or to ask invasive personal questions, it increases barriers to shelter for many shelter-seekers, not just those who are transgender.
- **Intangible costs in decreased fairness, equity, personal freedom, personal privacy, and respect for fundamental rights:** Under applicable Executive Orders and OMB guidance, agencies must also consider these kinds of intangible costs. Courts have repeatedly recognized that transgender people's right to define and express their identity, to make personal and medical decisions regarding social transition, to privacy regarding their transgender status and details of their transition, and to equal dignity and treatment are protected by the Constitution. This proposal would erode respect for those fundamental rights and freedoms.

HUD is required, just like other agencies engaging in rulemaking, to consider costs of regulatory changes even if they are difficult to quantify. HUD could seek to estimate the potential costs referenced above through these existing sources of data:

- Data on the frequency with which transgender people experienced discrimination in shelter settings prior to full enforcement of the 2016 clarification of the Equal Access Rule;¹⁴¹
- Data on related phenomena such as disparities in poor health and violent victimization among transgender people who had experienced homelessness in the previous year compared to those who had not (including but not limited to the U.S. Transgender Survey);¹⁴²
- Data about the benefits of low-barrier shelter practices and the costs of high barriers, and estimate a cost from the Proposed Rule by assuming a percentage of shelters who may adopt new barriers as a result;
- Demographic data on the transgender population;¹⁴³
- Data on the costs of persons spending nights without shelter;
- Data on the costs of persons not having stable housing over a period of time;
- Data on the health impacts of experiencing discrimination;¹⁴⁴ and
- Data on the health impacts of changes to high-profile civil rights policies applying to LGBTQ+ populations.¹⁴⁵

¹⁴¹ See, e.g., JAMES ET AL., *supra* note 2.

¹⁴² *Id.*

¹⁴³ See, e.g., JODY L. HERMAN ET AL., THE WILLIAMS INST., AGE OF INDIVIDUALS WHO IDENTIFY AS TRANSGENDER IN THE UNITED STATES (Jan. 2017), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Age-Trans-Individuals-Jan-2017.pdf>.

¹⁴⁴ See, e.g., JACLYN M. WHITE HUGHTO, SARI L. REISNER & JOHN E. PACHANKIS, TRANSGENDER STIGMA AND HEALTH: A CRITICAL REVIEW OF STIGMA DETERMINANTS, MECHANISMS, AND INTERVENTIONS, 147 SOC. SCI. & MED. 147, 222–231 (2015); MARK L. HATZENBUEHLER, ET AL., STIGMA AS A FUNDAMENTAL CAUSE OF POPULATION HEALTH INEQUALITIES, 103 AM. J. PUB. HEALTH 813, 816 (2013); TOHRU NEMOTO, BIRTE BÖDEKER, & MARIKO IWAMOTO, SOCIAL SUPPORT, EXPOSURE TO VIOLENCE AND TRANSPHOBIA, AND CORRELATES OF DEPRESSION AMONG MALE-TO-FEMALE TRANSGENDER WOMEN WITH A HISTORY OF SEX WORK, 101 AM. J. PUBLIC HEALTH. 1980 (2011); KRISTEN CLEMENTS-NOLLE, RANI MARX, & MITCHELL KATZ, ATTEMPTED SUICIDE AMONG TRANSGENDER PERSONS: THE INFLUENCE OF GENDER-BASED DISCRIMINATION AND VICTIMIZATION. 51 J. HOMOSEXUALITY 53 (2009); ILAN H. MEYER, PREJUDICE, SOCIAL STRESS, AND MENTAL HEALTH IN LESBIAN, GAY, AND BISEXUAL POPULATIONS: CONCEPTUAL ISSUES AND RESEARCH EVIDENCE, 129 PSYCHOL. BULLETIN 674, 679-85 (2003); VICKIE M. MAYS & SUSAN D. COCHRAN, MENTAL HEALTH CORRELATES OF PERCEIVED DISCRIMINATION AMONG LESBIAN, GAY, AND BISEXUAL ADULTS IN THE UNITED STATES, 91 AM. J. PUB. HEALTH 1869, 1874 (2001).

¹⁴⁵ See, e.g., JULIA RAIFMAN ET AL., DIFFERENCE-IN-DIFFERENCES ANALYSIS OF THE ASSOCIATION BETWEEN STATE SAME-SEX MARRIAGE POLICIES AND ADOLESCENT SUICIDE ATTEMPTS, 171 JAMA PEDIATR. 350 (2017); JOHN R. BLOSNIH ET AL., MENTAL HEALTH OF TRANSGENDER VETERANS IN US STATES WITH AND WITHOUT DISCRIMINATION AND HATE CRIME LEGAL PROTECTION, 106 AM. J. PUB. HEALTH. 534 (2016); MARK L. HATZENBUEHLER ET AL., EFFECT OF SAME-SEX MARRIAGE LAWS ON HEALTH CARE USE AND EXPENDITURES IN SEXUAL MINORITY MEN: A QUASI-NATURAL EXPERIMENT, 102 AM. J. PUB. HEALTH 285 (2012); MARK L. HATZENBUEHLER ET AL., THE IMPACT OF INSTITUTIONAL DISCRIMINATION ON PSYCHIATRIC DISORDERS IN LESBIAN, GAY, AND BISEXUAL POPULATIONS: A PROSPECTIVE STUDY, 100 AM J. PUBLIC HEALTH, 452 (2010).

To estimate potential costs of the rule change, HUD could consider a range of assumptions regarding the percentage (whether 5, 10, 25, or 50 percent) by which the Equal Access Rule would likely affect these phenomena over a ten-year period.

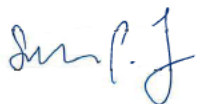
V. The Center strongly opposes the Proposed Rule and urges HUD to withdraw it and focus on implementing the 2016 Equal Access Rule.

HUD's Proposed Rule would perpetuate illegal sex discrimination in ways that would harm both transgender women and any woman who does not conform to a shelter's stereotype of what a woman should look like. This Proposed Rule would violate federal laws, the FHA and the U.S. Constitution, and conflict with other federal, state, and municipal nondiscrimination laws.

The discriminatory scheme in the Proposed Rule would also endanger the lives of transgender women and make it harder for women who do not conform to sex-based stereotypes to access safe shelter. All women, including transgender women, should have fair access to shelter, especially during a global health pandemic. Amidst an epidemic of violence against transgender people, transgender women have an acute need to have fair access to shelter. The Center urges HUD to immediately withdraw the Proposed Rule and instead affirmatively further fair housing based on sex through continued implementation of the 2016 Equal Access Rule with CPD programs.

Thank you for the opportunity to submit comments on the Proposed Rule. You are welcome to contact Sarah Hassmer at shassmer@nwlc.org for any further information regarding the Center's opposition to this illegal and harmful Proposed Rule.

Sincerely,



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