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Office of General Counsel
U.S. Department of Housing and Urban Development
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RE: Docket No. FR-6152-P-01, RIN 2506-AC53, July 24, 2020 *Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs*, **Comment to Proposed Rule**. Comment due date September 22, 2020.

To Whom It May Concern:

Transgender Law Center writes to reject in the strongest possible terms the Proposed Rule *Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs* (“Proposed Rule”). The Proposed Rule would set back fair housing and housing choice decades. Further, it perversely removes housing choice from the individual seeking housing and hands it to government agencies and housing providers to determine who transgender people are and where we can and should live.

With offices and staff around the country, Transgender Law Center is the largest national trans-led organization advocating self-determination for all people. Grounded in legal expertise and committed to racial justice, we employ a variety of community-driven strategies to keep transgender and gender nonconforming people alive, thriving, and fighting for liberation.

1. Introduction: The Proposed Rule Will Limit Housing Choice and is Targeted to Limit Housing Opportunity Based on Gender Identity.

As HUD acknowledges in its Proposed Rule, our communities¹ “experience poverty, housing instability, mental health issues, domestic violence, and homelessness at high rates,” and “shelter access for transgender persons is critical.” Yet, should HUD move forward with eliminating the 2016 Rule, it will surely increase the number of transgender people living on the streets, exacerbating the already high rates of poverty, housing instability, mental health crises, violence, victimization, homelessness, and premature death our communities—and particularly Black, indigenous, and other transgender women of color—endure.

HUD knows this, and yet it puts forward this Proposed Rule despite that knowledge and despite the recent Supreme Court precedent in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). While feigning concern for our communities, HUD advances this Proposed Rule as yet the latest in a long

¹ By “our communities,” Transgender Law Center refers to transgender and gender nonconforming people throughout the United States.

line of this administration's attacks on transgender people.² In targeting the most vulnerable in our communities, it is also the most egregious of those attacks. With this Proposed Rule, HUD is purposefully trying to create dangerous conditions for our community.

As you can see from the stories below, our community already knows all too well the impact that unsafe shelter has on our lives. Shelter access for transgender people *is* critical.

Octavia Lewis knows the need for safe shelter firsthand. In 2011, Octavia moved to New York City from Atlanta in order to access HIV treatment, which was unavailable to her in Atlanta. In New York, with no place to live, Octavia had to engage in survival sex to get a roof over her head, which put her at risk for arrest, violence, and death. Once Octavia was able to access a shelter that respected her gender identity, though, it made all the difference. The shelter gave Octavia a sense of safety she couldn't find on the streets, and it gave her the space and the clarity she needed to map out goals for her future. She wanted to go back to school; she wanted to have children someday. Stable and affirming shelter for Octavia was the first step and led her to earning a master's degree, becoming a proud mother, and finding work facilitating the same kind of healthcare access she once needed—all because she found respite and respect in a shelter that treated her as the woman she is.

Amongst the Proposed Rule's many artifices is the lie that when shelters discriminate against transgender people and refer them elsewhere, they will be able to obtain access to housing at other shelters. The Proposed Rule is gravely mistaken on this point and it is blatantly false to presume that a transgender woman would accept a referral to a men's shelter, or that she would be safe there. Octavia has known too many young transgender women who, denied access a women's shelter, found that the safest place to sleep was not in a men's shelter, but rather in a porta potty where, despite the stench, at least they could lock a door.

Kiara St. James knows this too well. Kiara survived homelessness and abuse in men's shelters. Kiara became homeless in the late nineties after her boyfriend passed away. Turned away from women's shelters, she spent three years in and out of men's shelters. There, she and other transgender women were ridiculed, written up, even denied meals and kicked out for wearing makeup or women's clothing. Such public displays of contempt from shelter staff only encouraged further disrespect and violence from male residents at the shelter. While at a shelter, another transgender woman suffered a permanent facial injury inflicted by a man whose sexual advances she turned down. Unfortunately, Kiara was later sexually assaulted at a shelter but no one would believe her because the staff would not believe that her abuser would sexually assault a transgender woman. When shelter staff did bed checks the following morning, they found Kiara hiding under her bed. Rather than believing her and working to keep her safe, the shelter had her committed to a psychiatric hospital. In spite of all this, Kiara learned to advocate first for herself, and then for her community. She has now been sharing her story and fighting for trans communities for over twenty years and helping ensure proper shelter placement for her community.

² See, e.g. National Center for Transgender Equality, The Discrimination Administration, <https://transequality.org/the-discrimination-administration>.

Jada Cardona of New Orleans had similar experiences. Jada was a successful legal secretary and public servant when she started her transition. One night about ten years ago, Jada joined some friends at a local gay bar. When New Orleans police raided the bar, as happens all too often in our communities, the police wrongly profiled Jada and several other transgender women as sex workers and arrested them. Jada spent three weeks in jail, and though charges against her were dropped, when she was released she had lost her job, her car had been stolen, and she'd been evicted. Jada became homeless, but found no help in the local shelters: they refused to let her in while she was wearing makeup or women's clothing. They wouldn't let her in even to change, so Jada would find a tree to hide behind to change and remove her makeup, sobbing all the while. Once in the shelter, she was placed with men and got no sleep due to constant harassment in the form of both unwanted sexual advances and anti-transgender slurs. Like so many others, Jada found that living on the streets was safer than a men's shelter. On the streets, Jada faced further threats of violence, from robbery to sexual assault. Feeling like there were "one-thousand swords around her neck" caused her to relapse on cocaine, yet when she sought treatment, the local rehabs treated her just as the shelters had. How could she engage with recovery while being forced to pretend she was a man? Jada felt the message from these social service providers was, "the only self-help is suicide." After nearly a year of living unsheltered, Jada encountered "an angel" in the form of an old friend who let her move in. Finally, and only with a safe place to sleep, where she could be herself, was Jada able to get back on her feet. Jada went on to become the first openly transgender person hired by the state of Louisiana. From her position in the state Department of Health, Jada was able to effect change in the very shelter and rehab systems that had rejected her.

As Kiara, Octavia, Jada and far too many other transgender women's stories show, accessing a shelter that acknowledges and respects them for the women they are can mean all the difference. HUD's decision, the decision to keep the 2016 Rule or eliminate it, also means all the difference—the difference between transgender women finding safety and support in the shelter system, or sleeping in porta potties just to survive.

While Kiara, Octavia, and Jada's stories have happy endings, too many others with similar experiences do not. As HUD is keenly aware based on its prior rulemakings, violence against transgender people, especially Black, indigenous, and other transgender women of color, is an epidemic in the United States. Those in our communities who are unsheltered or experiencing homelessness are all the more at risk. Just this summer, Marilyn Cazares, a 22-year-old transgender Latina who was homeless and taking shelter in an abandoned building in Southern California, was found stabbed to death and set on fire there.³ As of August, Marilyn was at least the twenty-fifth transgender woman murdered in hate violence this year.⁴ Earlier this year, Alexa Negrón Luciano, a homeless transgender woman in in Toa Baja, Puerto Rico was shot to death after she was policed, harassed, and mobbed for being a transgender woman in a women's bathroom.⁵ It is that very

³Trudy Ring, The Advocate, Trans Woman Marilyn Monroe Cazares Killed in California (July 17, 2020), <https://www.advocate.com/crime/2020/7/17/trans-woman-marilyn-monroe-cazares-killed-california>.

⁴ Sakshi Venkatraman, NBC News, 'Brave' and 'outspoken' Marilyn Cazares among six transgender Americans killed in July (Aug. 4, 2020), <https://www.nbcnews.com/feature/nbc-out/brave-outspoken-marilyn-cazares-among-six-transgender-americans-killed-july-n1235642>.

⁵ Harmeeet Kaur and Rafy Rivera, CNN, A transgender woman's brutal murder has shocked Puerto Rico and renewed a conversation about transphobia (Feb. 29, 2020), <https://www.cnn.com/2020/02/29/us/alexa-puerto-rico>.

prejudice which says transgender women don't belong that motivates HUD's Proposed Rule and that led to Alexa's murder. Ashanti Carmon was also shot to death in the Prince George's County area last year. Lacking other resources, Ashanti had learned to engage in survival sex work as a homeless teenager—work that ultimately contributed to her murder.⁶ In no uncertain terms, HUD's Proposed Rule will cause more and more transgender youth and adults to engage in criminalized work, risking their lives, and in some cases causing their deaths.

2. The Proposed Rule does not provide a “reasoned explanation,” as required by law, to allow recipients of Federal financial assistance to discriminate on the basis of sex, including gender identity.

In permitting housing shelter operators to intentionally discriminate against transgender people on the basis of gender identity, the Proposed Rule runs counter to decades of federal efforts that require recipients of federal financial assistance to use those funds in a non-discriminatory manner. Since the 1960s, federal legislation, executive orders, and regulatory action have tied receipt of federal funds to action that promotes anti-discriminatory conduct. The Proposed Rule reflects a complete reversal of these principles, allowing shelter operators who receive public funds to blatantly discriminate against our communities. Administrative law requires an agency to provide a “reasoned explanation” when changing existing regulations – especially when the change would massively reverse decades of federal antidiscrimination progress. Because HUD has failed to provide a reasoned explanation for such a radical about-face, it must reject the Proposed Rule

a. History makes it clear that the Proposed Rule Is a Dramatic Reversal in HUD Anti-Discrimination Policy.

Beginning in the 1960s, Congress enacted a series of laws intended to assure that federal programs supported with taxpayer dollars must be available to all in a nondiscriminatory manner. For example, Title VI of the Civil Rights Act of 1964 prohibited recipients of federal financial assistance from discriminating on the basis of race, religion or national origin. 42 U.S.C. §2000d. A few years later, Congress enacted the Rehabilitation Act of 1973, including Section 504, which similarly prohibits recipients of federal financial assistance from discriminating in their programs and activities against people on the basis of handicap (or disability). 29 U.S.C. § 701 et seq. Multiple executive orders have reflected a consistent commitment from the White House to assure that federal funds are not used to promote discriminatory ends. See Executive Order (Equal opportunity in housing) (Nov. 20, 1962); Executive Order 12259 (Leadership and Coordination of Fair Housing in Federal Program) (Dec. 31, 1980).

transgender-killing/index.html; CBS News, Video shows transgender woman being threatened before being murdered in Puerto Rico (March 2, 2020), <https://www.cbsnews.com/news/shocking-murder-of-transgender-woman-alexa-puerto-rico/>.

⁶ Samantha Schmidt, The Washington Post, As a homeless transgender woman, she had turned to sex work to survive. Then she was killed. (April 6, 2019), https://www.washingtonpost.com/local/social-issues/as-a-homeless-transgender-woman-she-turned-to-sex-work-to-survive-then-she-was-killed/2019/04/06/be157636-57e7-11e9-8ef3-fbd41a2ce4d5_story.html.

In many respects, HUD was in the vanguard of these initiatives, adopting regulations to carry out the goals of Title VI (24 CFR Part 1) and Section 504 (24 CFR Part 8). More recently, HUD turned its attention to persistent housing discrimination against LGBTQ+ people. In 2011, HUD initiated its “Equal Access Rule” (“EAR”), proposing to prohibit owners and operators of HUD-assisted and –insured housing to inquire about the sexual orientation or gender identity of applicants as a condition to admission or occupancy. 76 Fed. Reg. 4194 (Jan. 24, 2011). The clear goal was to eliminate using a person’s gender identity and transgender status as grounds for discrimination by removing the source of gender identity as a legitimate topic for inquiry. In 2012, HUD adopted its final EAR (the “2012 Rule,” 77 Fed. Reg. 5662 (Feb. 3, 2012)), incorporating its provisions into various parts of HUD regulations.

In proposing what would become the 2012 Rule, HUD noted that many states and local governments had adopted protections for LGBTQ+ communities, but that LGBTQ+ people remained vulnerable to housing discrimination and homelessness. 76 Fed. Reg. 4194, 4194 (Jan. 24, 2011). While HUD declined at that point to extend additional protections to transgender people, it anticipated that, as a result of the 2012 Rule, “transgender individuals will have greater access to shelters and other housing” and promised to “monitor its programs so as to ascertain whether additional guidance may be necessary.” *Id.* at 5666.

In 2015, HUD initiated a second round of Equal Access rulemaking, addressing the issue of shelter housing for transgender people in its Community Planning and Development programs (“2015 CPD Proposed Rule”), proposing to require owners and operators of shelters and other services funded by CPD to provide equal access to their programs and facilities. 80 Fed. Reg. 72642 (Nov. 20, 2015). Following its commitment to monitor homelessness issues in our communities, HUD explained that it had determined additional protections were needed for transgender people, after participating in listening sessions, investigating cases concerning discrimination against transgender people, and considering other agencies’ action and regulatory guidance concerning the rights of and protections for transgender people. See 80 Fed. Reg. at 72644.

In 2016, HUD issued the current rule. 81 Fed. Reg. 64763 (Sept. 21, 2016) (the “2016 Rule”). Among other things, HUD noted recent actions by the Departments of Justice, Education, and Health and Human Services to expand equal access protections for transgender people to their programs. *Id.* at 64765. In addition, HUD reported the results of a then-recent survey undertaken by the Center for American Progress, confirming that, among other disturbing findings, only 30 percent of the shelters contacted were willing to house transgender women with other women, and that 21 percent refused service altogether. *Id.*

The 2016 Rule represented a culmination in a long-running effort by HUD to assure that housing providers who receive federal financial assistance—including Section 8 rental assistance, Community Development Block Grants (“CDBGs”), HOME funds, and other grants and financial assistance—extended protections to groups of people that were subject to persistent patterns of housing discrimination and, in the case of shelter operations, denied access to the minimum level of housing needed by human beings. Bit by bit, over decades of effort and many presidential administrations, both Democratic and Republican, HUD policies persistently expanded these protections to vulnerable groups, ultimately including transgender people. While its work was no

doubt incomplete, the 2016 Rule reflect HUD’s steadfast effort to expand housing opportunities for all, regardless of race, color, religion, national origin, disability, familial status and sex—including sexual orientation and gender identity.

b. An Agency Must Supply a Reasoned Explanation To Disregard Prior Policies and Regulations.

It is in this context of HUD’s decades-long effort to ensure housing to all vulnerable people that the Proposed Rule must be evaluated. It represents a complete 180-degree turn from decades of action by Congress, multiple presidents, and HUD itself to secure protections for these groups. However, an agency, having consistently pursued anti-discriminatory policies for years, cannot simply ignore that history, reverse course, and declare that those past policies were aberrations or inconsistent with governing statutes. An agency may not unilaterally and without explanation change its past interpretations, especially when those interpretations are based on long-standing policy goals. As the U.S. Supreme Court recently explained, when an agency changes existing policies and regulations, it must provide a “reasoned explanation” for the change:

[T]he agency must at least “display awareness that it is changing position” and “show that there are good reasons for the new policy.” In explaining its changed position, an agency must also be cognizant that longstanding policies may have “engendered serious reliance interests that must be taken into account.” “In such cases it is not that further justification is demanded by the mere fact of policy change; but that *a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.*” It follows that an “[u]nexplained inconsistency” in agency policy is “a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.

Encino Motorcars, LLC v. Navarro, 579 U.S. ___, 136 S. Ct. 2117, 2126 (2016) (internal citations omitted; emphases added). While there may be any number of grounds that would justify an agency to change existing regulations, an agency cannot undo existing regulations on the basis of flimsy pretexts that are at odds with decades of prior antidiscrimination policies.

c. The Proposed Rule Fails to Provide a Reasonable Explanation to Abandon the 2016 Rule.

It is clear that the grounds advanced by HUD for the Proposed Rule fail to satisfy the “reasoned explanation” standard. Indeed, most of the grounds advanced now in support of the Proposed Rule were previously considered by and rejected by HUD when it announced the 2016 Rule. Whether or not they were addressed by HUD when it adopted the 2016 Rule, they are insufficient to support the Proposed Rule now.

For example, the Proposed Rule claims that the 2016 Rule lacks express statutory authorization, contending that “HUD should not reach beyond the statutory authority granted to HUD by Congress.” 85 Fed. Reg. at 44813. That argument is based on the fundamental error that in order to protect our communities, HUD must rely on express statutory authority. In fact, when it announced the protections for transgender people in the 2016 Rule, HUD expressly tied its

authority to implement the 2016 Rule to organic and overarching authority under the Department of Housing and Development Act “to work to address ‘the needs and interests of the Nation’s communities and of the people who live and work in them.’” 81 Fed. Reg. at 64769, citing 42 U.S.C. 3531. Indeed, in 2016, HUD cited four additional statutes to establish that “Congress has repeatedly charged HUD with serving the existing housing needs of all Americans.” *Id.* and fn. 10 (Housing Act of 1949 (42 USC 1441); Housing and Urban Development Act of 1968 (12 USC 1701t); Cranston-Gonzalez National Affordable Housing Act (42 USC 12701-12702); and Housing and Community Development Act (42 USC 5301 note)). While statutes like the Fair Housing Act (“FHAct”) undoubtedly seek to eliminate discriminatory conduct in general, such express statutory authorization is not required for HUD to use its inherent rule-making authority to eliminate discriminatory practices by HUD grantees and to protect the housing needs of vulnerable populations. The argument that HUD lacks authority to protect transgender people because Congress did not expressly direct it to when it empowered HUD to protect all persons from discrimination on the basis of sex is merely a pretext to perpetuate discriminatory practices that violate the core of HUD’s mission.

Likewise, HUD contends that the 2016 Rule violates “local control.” 85 Fed. Reg. at 44813. Specifically, it claims that the current rule “elevates subjective assertions by persons seeking accommodations by gender identity in temporary shelters, despite significant variation in State and local laws.” *Id.* The notion that gender identity is “subjective” is both incorrect and deathly harmful. Rather, gender identity is at the very core of who someone is, and the rejection of transgender personhood inherent in HUD’s proposal is both counter to medical experts’ understanding and a prevailing reason why transgender people are so disproportionately in need of shelter access to begin with. See Section 10, below. *See also*, The World Professional Association for Transgender Health, Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, Version 7, p. 96 (2011) (defining gender identity as “A person’s *intrinsic* sense of being male (a boy or a man), female (a girl or woman), or an alternative gender) (emphasis added); Transcending Prejudice: Gender Identity and Expression-Based Discrimination in the Metro Boston Rental Housing Market, 29 Yale Journal of Law and Feminism 321 (2018), Suffolk University Law School Research Paper No. 17-9 (August 9, 2018). Holden, Alexandra, The Gay/Trans Panic Defense: What is it and How to End It, American Bar Association Civil Rights & Social Justice (legal defense using discrimination against a person’s sexual or gender identity status as provoking discrimination against them, similar to the debunked gay panic disorder defense); Cynthia Lee, The Trans Panic Defense Revisited, 57 American Criminal Law Review 1411 (2020) (trans panic inappropriately validates bias, discrimination and violence against transgender people).

Further, the examples of “local control” HUD provides are hardly more “objective” than the 2016 Standard. For example, the Proposed Rule cites the Anchorage Municipal Code, which requires, among other things, a showing that “the gender identity is a sincerely held, core to a person’s gender-related self-identity, and is not being asserted for an improper purpose.” 85 Fed. Reg. at 44813. Absent the ability to read another person’s mind, it is impossible to conclude that any of the factors in the Anchorage ordinance are more “objective” than the allegedly “subjective” standard HUD complains about. Likewise, the New York City municipal code, according to HUD, “defines gender to encompass perceived gender identity.” *Id.* Leaving aside the fact that the New York City Administrative Code is actually more expansive and protective than the 2016 Rule,

protecting people on the basis of “actual or perceived sex, gender identity, or gender expression,” there is no common sense understanding in which a “perception” of someone’s gender identity is more “objective” than the person’s own “actual” gender identity. Likewise, the third example cited by HUD is a Massachusetts law that ties gender identity to “a person’s gender-related identity, appearance or behavior,” which are at least as expansive as the 2016 Rule and are fundamentally “subjective” criteria. Try as it might, HUD is unable to demonstrate an example of “local control” that provides a more “objective” measure of gender identity than the 2016 Rule offers or to find that the 2016 Rule actually conflicts with local rules. And in all events, the concept of local control, and minor variations in the verbiage of local laws intended to *prevent* discrimination against our communities, do not provide support to over-ride federal prescriptions against discrimination on the basis of sex, including transgender status.

More broadly, in invoking local decision-making as superior to HUD’s national perspective, the Proposed Rule ignores the long history of HUD’s anti-discriminatory policies – including express provisions of the FHAct, adopted in its original enactment, that clearly authorizes invalidation of state and local laws that conflict with its provisions:

any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.

42 U.S.C. §3615. While the 2016 Rule did not rely directly on the FHAct, that act demonstrates Congress’ willingness—from the original enactment of the FHAct—to preempt state and local laws that perpetuated discriminatory housing policies. Indeed, from the early days of the FHAct, that authority has been regularly invoked by the courts to overturn local laws that promote discrimination, such as exclusionary zoning rules. *See United States v. City of Black Jack*, 508 F.2d 1179, 1188 (8th Cir. 1974). To object to the 2016 Rule on the grounds that it improperly infringes on local decision-making is to ignore the fact that Congress from the outset empowered HUD to attack State and local laws that promoted discriminatory housing practices. The Proposed Rule fails to provide a reasoned explanation why HUD should carve out an exception to protect discriminatory State and local laws concerning admission of transgender people to shelters, or why HUD cannot tie receipt of federal financial assistance to acceptance of anti-discriminatory policies.

The third argument advanced by HUD in support of its Proposed Rule is that the 2016 Rule improperly burdens shelters “with deeply held religious beliefs.” 85 Fed. Reg. at 44814. In a nation as diverse as the United States, with a long history of religious freedom and practice, it is no surprise that any number of issues of public policy may invoke someone’s “deeply held religious beliefs.” Whether the issue was slavery, temperance, women’s suffrage, civil rights, the rights of Native Americans, war and nuclear disarmament, reproductive rights, the environment and climate change, and many other topics, religious organizations and people of faith have taken opposing sides on many issues from the early days of our Republic to today on the basis of their “deeply held religious beliefs.” Indeed, if the standard was that the Federal government must eschew from legislating or rulemaking on matters that touched on someone’s “deeply held religious beliefs,” there would be scarcely any area of public policy left on which any governmental body could engage.

The all-or-nothing dilemma posed by the Proposed Rule misreads both the Constitution’s protections for religious liberty and the powers of an agency like HUD to make sure its funds are used in a non-discriminatory manner. Indeed, as HUD itself acknowledges, “‘there is room for play in the joints’ between the Clauses, some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause.’” *Id.*, quoting *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (internal quotation and citation omitted). There is sufficient “play in the joints” to accommodate the Constitution’s protection for religious liberty and to promote anti-discriminatory policies. Here, the limited question is whether HUD can require Federal grantees to operate shelters in a way that does not discriminate against transgender people. No one is requiring local shelters, including those operated by groups with deeply held religious beliefs, to accept HUD funds, but when they do, they should be required to abide by the same antidiscrimination policies that all other shelters must adhere to.

The alternative—that HUD’s policy to prevent discrimination by those who receive federal financial assistance must yield to the recipient’s “deeply held religious beliefs”—would require HUD to provide funds to grantees who, on the basis of such beliefs, engage in discriminatory practices. If HUD must yield today to “deeply held religious beliefs” about gender identity, why would it not also have to yield next to people and groups who hold “deeply held religious beliefs” concerning race, religion, color, national origin or other protected classes? The Proposed Rule is not an attempt to “liberate” shelters from excessive federal control. It is a justification to tie the hands of Federal agencies like HUD from assuring that public funds are not used to promote discriminatory goals and methods. It must be rejected.

HUD based this portion of the justification for the Proposed Rule on the Supreme Court’s decision in *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm’n*, 138 S.Ct. 1719 (2018). Yet that reliance is misplaced. *Masterpiece* was a question as to whether the state law was hostile to the exercise of religious beliefs. Here, the question is whether a housing provider, particularly one receiving federal funds to provide housing, can selectively discriminate against applicants seeking that housing resource. *Masterpiece* never overruled the long-standing principle that religious objections cannot allow economic actors to deny equal access to goods and services under neutral and generally applicable antidiscrimination laws. *Id.* at 9. Indeed, that case rested in large part on the kind of cake, the messages, and the freedom of expression in how the service was being provided. The Colorado Commission had previously sided with bakers in past cases, but in that case, the Supreme Court said, there was a departure and an issue of religious hostility in the Commission’s ruling. Here, HUD’s Proposed Rule does not—because it cannot—make any suggestion that either the 2016 Rule or any of the hundreds of state and local nondiscrimination laws that cover gender identity were motivated by hostility to a religious belief. The facts here are much more analogous to *Robinson v. Florida*, 378 U.S. 153 (1964), where the Court struck down a law that prohibited serving two kinds of people together—Black and white people—without burdensome preconditions met, such as separate bathrooms. The Court found the State cannot employ its authority to force a service provider to discriminate. *Id.* at 155-56. In other words, the narrow holding in *Masterpiece*, which is not even connected to this issue, cannot justify a complete reversal in decades of HUD and other federal law and policy aimed at combatting discrimination in the United States.

The final grounds proposed for reversing the 2016 Proposed Rule is that it infringes on privacy rights of others, such as “unwelcome or accidental exposure to, or by” transgender people “where either party may be in a state of undress.” 85 Fed. Reg. at 44815. As the discussion at the beginning of these comments show, the privacy concerns expressed in the Proposed Rule are alarmist and overblown. HUD itself admits that it “is not aware of data suggesting that transgender individuals pose an inherent risk to [cisgender] women,” but claims “there is anecdotal evidence that some women may fear that non-transgender[]men may exploit the process of self-identification under the current rule to gain access to women’s shelters.” *Id.* The plural of anecdotes is not data, however, and HUD policies should not be based on speculations and fact-free scenarios.

Indeed, while HUD offers a variety of unsubstantiated concerns to support the Proposed Rule, the reality, as explained above, is that transgender people are in fact routinely the victims of housing discrimination, homelessness, and worse. It can hardly be an improvement to place transgender people at further risk of homelessness, mental and physical harm, and even death on the basis of such undocumented and transphobic allegations. The 2016 Rule in fact made provisions to address legitimate privacy needs of sheltered people—provisions which the Proposed Rule, without analysis or supporting facts, brushes off as insufficient on the one hand and too burdensome and costly on the other. *Id.* Rather than repealing the 2016 Rule, HUD would be far wiser to invest its energy and funds in promoting education about the housing threats our communities face and to assist shelters and other facilities to develop strategies to meet transgender people’s needs without compromising care for others.

d. The Proposed Rule Ignores the Serious Reliance Interest of Transgender People and Others.

Indeed, as the Supreme Court in *Encino* made clear, changes in regulations are held to higher scrutiny where they have “engendered serious reliance interests” among stakeholders – individual people, public agencies, and private firms alike. While the 2016 Rule has only been in effect for four years, thousands of transgender people have come to rely on its protections to meet their most basic shelter needs. More broadly, however, many other people—people of color, disabled people, LGBTQ+ people and others—have come to rely on HUD and other agencies to assure that their programs and funds are made available on a nondiscriminatory basis. Because the Proposed Rule does not squarely address its likely impact on transgender people and others who rely on HUD to assure that recipients of Federal financial assistance operate their programs in a nondiscriminatory manner, the Proposed Rule fails to consider the “serious reliance interests that must be taken into account” here. 136 S. Ct. at 2126.

e. The Alternatives Offered by HUD Are Impractical and Actually Likely to Lead to Worse Discrimination Against Transgender People.

In place of the 2016 Rule, HUD proposes several alternative that it contends will alleviate the rates of homelessness and contributing factors HUD has identified in our communities. These include requiring shelter operators who object to providing shelter to transgender people to refer them to other shelters. In many places, however, there may be only a single shelter with beds available, so this approach is simply impractical (and in any event would not eliminate the reality that a HUD

grantee is engaging in discrimination on the basis of sex and gender identity). See HUD’s 2019 Annual Homeless Assessment Report to Congress (January 2020) (on one night in 2019 approximately 568,000 people were homeless in the United States and 37% of those were unsheltered on the street). Further, as detailed above, in those areas where there are multiple shelters available, HUD provides no rational basis for the presumption that a transgender woman experiencing homelessness would (a) be safe in a shelter for men—Kiara wasn’t—, or (b) accept housing in a shelter for men rather than take her chances on the streets, like Jada had to do. *Also see*, J.M. Grant, L.A. Mottet, J. Tanis, J. Harrison, J.L. Herman, and M. Keisling, 2011, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, Washington, DC: National Center for Transgender Equality and National Gay and Lesbian Task Force (22 percent of transgender people experiencing homelessness reported being assaulted while staying in shelters); Sarah Kellman, et al., Center for American Progress, *The Dire Consequences of the Trump Administration’s Attack on Transgender People’s Access to Shelters* (July 31, 2019), <https://www.americanprogress.org/issues/lgbtq-rights/news/2019/07/31/472988/dire-consequences-trump-administrations-attack-transgender-peoples-access-shelters/> (“In the general population, the lifetime rate of homelessness is around 4 in every 100 people. According to the 2015 U.S. Transgender Survey, however, nearly 1 in 3 transgender respondents experienced homelessness at some point in their lives.”); *Id.* (“According to the 2015 U.S. Transgender Survey, 70 percent of respondents who were homeless in the year prior to the survey reported mistreatment in shelters due to their gender identity, and 52 percent experienced verbal, physical, and/or sexual harassment and/or assault during their stay. Ultimately, 44 percent left the shelter due to poor treatment or unsafe conditions, despite having nowhere else to go. Nearly 1 in 10 respondents who stayed in a shelter in the year prior to the survey were thrown out when staff found out they were transgender.”); Adam P. Romero, et al., *The Williams Institute, LGBT People and Housing Affordability, Discrimination, and Homelessness 18-19* (April 2020), *available at* <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf> (Assigning transgender people solely on the basis of sex assigned at birth “put transgender girls and women particularly at risk for violence and harassment. Transgender people seeking shelter also report having to choose between changing and sleeping in shared quarters where they lack privacy and encounter harassment or being isolated from other residents altogether.”).

Other suggestions, such as allowing operators to make their own decision about a person’s sex, are recipes for disaster—why would a shelter operator be in a better position to make a determination of a transgender person’s sex than the transgender person themselves? Giving such authority to a shelter operator would be an invitation to engage in illegal sex stereotyping, which courts have long held to violate sex discrimination laws. *See, e.g. Smith v. Avanti*, 249 F.Supp.3d 1194, 1200 (D. Colo. 2017). That HUD, in its Proposed Rule, would go so far as to offer “tips” for sex stereotyping to identify women as transgender is particularly appalling, and has led some in our communities to refer to the Proposed Rule as simply, “The Adam’s Apple Rule.” In addition to being incredibly demeaning to transgender women, the sex stereotyping tips presented in the Proposed Rule could also be used to exclude cisgender women and men who do not conform to sex stereotypes. And, because prevailing sex stereotypes are based on white notions of femininity and masculinity, that harm will disproportionately fall on Black, indigenous, and other cisgender women of color.

And the Proposed Rule’s suggestion that shelter providers could rely on sex designations in governmental identification cards and documents represents a profound ignorance of how such designations work. Agencies that issue government identification have widely varying standards and processes for issuing—or in some cases refusing to issue—ID that matches a transgender person’s gender identity. A 2015 survey of our communities found that 11% of respondents had been able to update all of their IDs to reflect their gender identity, while around 68% reported that they had not been able to update any of their IDs.⁷ So, if HUD is suggesting that shelters rely on ID to determine whether or not they can discriminate against a transgender person, that determination would be less reflective of whether a person is transgender, and more reflective of what kind of ID it is, what jurisdiction the ID is from, what legal standard that jurisdiction requires for changing the sex designation on that ID, and whether or not the ID’s bearer had the time and resources to acquire an updated ID. Given this wide variation in state policies and procedures relating to transgender people’s IDs, an ID requirement advanced by HUD would be nothing more than arbitrary and capricious.

Just as the reasons by the Proposed Rule are insufficient to provide a reasonable explanation to repeal the 2016 Rule, the alternatives proposed by HUD are insufficient to assure that transgender people receive the protections the 2016 Rule provided.

f. Because It Fails to Provide A Reasonable Explanation To Change the 2016 Rule, The Proposed Rule Must Be Rejected.

None of the four justifications offered by HUD—lack of statutory authority, worries about local control, fears of infringing on “deeply held religious beliefs,” or privacy worries—establishes a “reasonable explanation” to reverse the 2016 Rule. HUD also fails to consider the serious reliance interest that transgender people and other housing-vulnerable people face. As the jarring statistics cited in section e above make clear, our communities face a wide range of harms in the shelter system, and the 2016 Rule has empowered transgender people to seek safer situations when they need to use shelter services. HUD has also failed to advance alternatives that provide the same protections to our communities offered by the 2016 Rule. In fact, all the Proposed Rule offers is a series of pretexts engineered to advance a homophobic and transphobic agenda reflected in so many other administration actions. Because it fails to meet the standard imposed by courts on agencies that seek to rewrite their existing regulations and raises, rather than lowers, the threats to vulnerable transgender people, the Proposed Rule must be rejected.

3. The 2016 Rule Complied with Existing Law and Is Supported and Justified by Subsequent Decisions.

It is unquestionable that HUD cannot legally act contrary to the legislative mandate and purposes of the FHAct. Specifically, HUD must advance the policies of the United States to provide for and promote fair housing throughout the United States, including but not limited to making unlawful any inference with the exercise or enjoyment of the rights or protections of the FHAct.

⁷ S.E. James, et al., *The Report of the 2015 U.S. Transgender Survey 82 (2016)*, available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>

However, through this proposed rule, HUD is doing just that: promoting discrimination and limiting fair housing to our community. *See* 42 U.S.C. § 3601 (“It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”); 42 U.S.C. § 3615 (“[A]ny law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.”); 42 U.S.C. § 3517 (“It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.”). Here, HUD is acting in contrary to law and its own policies.

Thus, HUD lacks authority in the first instance to adopt the Proposed Rule, because the Proposed Rule, and the shelter policies it promotes, run counter not only to the purposes of the FHAct, but to legal interpretations of the FHAct and other existing fair housing laws.

a. Congress Intended That the FHA Should Be Broadly Construed, and the Courts Have Generously Construed It.

The broad mandate of the FHAct to entrust HUD with the responsibility of affirmatively promoting fair housing and nondiscrimination is not only plain on the face of the statute itself, it can literally be found on HUD’s own website as well:

Civil Rights Obligations of Public Entities and Recipients of Federal Financial Assistance

Federal laws prohibit discrimination in housing and community development programs and activities because of race, color, religion, sex, national origin, familial status, and disability. These obligations extend to recipients of HUD financial assistance, including subrecipients, as well as the operations of state and local governments and their agencies, and certain private organizations operating housing and community development services, programs, or activities.

For example, federal laws prohibit discrimination, including the denial of participation in and benefit of, the following examples of programs and activities: homelessness, transitional housing, permanent supportive housing, the operations of social service organizations, public housing, voucher programs, other affordable housing programs, community development funded facilities, etc. Recipients and other covered entities also must take certain affirmative steps within such programs and activities to provide equal housing opportunities.⁸

⁸ HUD Office of Fair Housing and Equal Opportunity, *Non-Discrimination in Housing and Community Development Programs*, available at:

Moreover, since the early years following its enactment, courts have consistently given a “generous construction” to provisions of the FHAct. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972). Thus, HUD clearly had the power and statutory authority under the FHAct to issue the 2016 Rule, despite its current assertions to the contrary.

b. Shelters Are Subject to the Nondiscrimination Policies of the FHAct.

Homeless shelters of the kind targeted by the Proposed Rule are subject to the nondiscriminatory policies of the FHAct. The FHAct makes it clear that discrimination on the basis of sex is prohibited, and shelters have been determined by a significant and growing body of case law to fall within the ambit of the FHAct. And, as made clear below, the FHAct’s prohibition of sex-based discrimination includes discrimination on the basis of gender identity.

The term “dwelling” is defined under the FHAct as: “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.” 42 U.S.C. § 3602(b). The term “residence” is not defined by the FHAct, but has been interpreted by the courts to mean, for purposes of the FHAct: “a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit.” *United States v. Hughes Memorial Home*, 396 F. Supp. 544 (W.D. Va. 1975).

Court after court has interpreted the FHAct to include homeless shelters and other forms of transitional housing within the meaning of the terms “dwelling” and “residence.” *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1044 n.2 (9th Cir. 2007); *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941, 942 (9th Cir. 1996); *Boykin v. Gray*, 895 F. Supp. 2d 199 (D.D.C. 2012); *Woods v. Foster*, 884 F. Supp. 1169, 1174 (N.D. Ill. 1995);

Thus, operators of homeless shelters are subject to the nondiscrimination provisions of the FHAct, including on the basis of sex, and people availing themselves of such homeless shelters are correspondingly protected from discrimination by the FHAct. That is, a shelter that turns away a transgender person solely because they are transgender runs afoul of the FHAct.

c. Courts Have Interpreted the FHAct’s Provisions Concerning Discrimination on the Basis of Sex Consistent with Similar Provisions of Title VII, Which Prohibits Discrimination on the Basis of Sex in Employment.

As described in detail above, the legal bases for both the Equal Access Rule and the 2016 Rule are well established, and HUD’s current attempt to undermine its own authority to issue those rules is without justification. It is further well-established that discrimination on the basis of gender non-conforming behavior violates Title VII. *See Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir.

https://www.hud.gov/program_offices/fair_housing_equal_opp/non_discrimination_housing_and_community_development_0 (last visited Sept. 13, 2020).

2004) (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim as suffered discrimination because of his or her gender nonconformity.”); *see also Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79-80 (1998) (same-sex harassment is sex discrimination under Title VII, which “prohibits ‘discriminat[ion] . . . because of . . . sex.’ [This] . . . must extend to [sex-based] discrimination of any kind that meets the statutory requirements.”); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (employment discrimination based on sex stereotypes (e.g., assumptions and/or expectations about how persons of a certain sex should dress, behave, etc.) is unlawful sex discrimination under Title VII); *Schwenck v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (Title VII protections extend to transgender plaintiffs; “the initial approach” taken in earlier federal appellate Title VII cases rejecting claims by transgender plaintiffs “has been overruled by the language and logic of *Price Waterhouse*.”); *Mencer v Princeton Square Apts*, 228 F.3d 631, 634 (6th Cir, 2004) (recognizing courts have adapted Title VII interpretations, such as the McDonnell Douglas test for establishing prima facie evidence of discrimination to housing cases).

It is also well-established that, because Title VII’s protections have been interpreted to apply with equal force to the FHAct, the FHAct prohibits discrimination on the basis of “sex stereotyping.” *See Smith v. Avanti*, 249 F. Supp. 3d 1194, 1200 (D. Colo. 2017) (but declining to find discrimination on the basis of gender-nonconforming behavior as not property pled). That is, the very sex-stereotyping HUD’s Proposed Rule engages in, by encouraging shelter providers to gawk at transgender people’s physical characteristics to determine whether they may find shelter, is prohibited by the FHAct. In fact, this principle is so well-established that it, too, appears prominently on HUD’s website:

Fair Housing Act

The Fair Housing Act prohibits housing discrimination on the basis of race, color, national origin, religion, sex, familial status, and disability. A person who identifies as LGBTQ who has experienced (or is about to experience) discrimination under any of these bases may file a complaint with HUD. HUD is committed to investigating violations of the Fair Housing Act against all individuals regardless of their sexual orientation or gender identity.

Examples:

- *A transgender woman is asked by the owner of her apartment building not to dress in women’s clothing in the common areas of the property. This may violate the Fair Housing Act’s prohibition against sex discrimination, which includes discrimination based on non-conformity with gender stereotypes.*⁹

⁹ HUD Office of Fair Housing and Equal Opportunity, *Housing Discrimination and Persons Identifying as LGBTQ*, available at: https://www.hud.gov/program_offices/fair_housing_equal_opp/housing_discrimination_and_persons_identifying_lgbtq (last visited Sept. 13, 2020) (emphasis added).

Even under the law as it existed prior to when the 2016 Rule went into effect, this Proposed Rule fails to reflect the full scope of protections available to people who are the victims of sex stereotyping, including the transgender people who will suffer needlessly if the Proposed Rule is enacted.

d. Existing Law Supported the 2016 Rule When It Was Enacted, and the Supreme Court’s Decision in *Bostock* Has Further Clarified the FHAct’s Broad Sex-Based Protections.

The Supreme Court has made it clear that Title VII’s protections based on sex include discrimination based on sexual orientation and gender identity, in other words, Title VII protects LGBT people from discrimination. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). Specifically, the Court held: “An employer violates Title VII when it intentionally fires an individual employee based in part on sex.” *Bostock*, 140 S.Ct. at 1741. “[H]omosexuality and transgender status are inextricably bound up with sex.” *Id.* at 1742. “We agree that homosexuality and transgender status are distinct concepts from sex. But, as we’ve seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.” *Id.* at 1746-47. The Court could not have been clearer that Title VII protections extend to and include protection against sexual orientation and gender identity discrimination, and specifically protect transgender people.

Thus, to the extent that Title VII provides guidance for interpreting the scope of protections provided by the FHAct—which, as demonstrated above, it plainly does—*Bostock* similarly expands the scope of protections based on sex under the FHAct. In short, HUD’s Proposed Rule is sex discrimination under *Bostock*. *Bostock* does not, for example, limit the definition of “sex” to “biological distinctions,” as HUD attempts to do here with the Proposed Rule. Moreover, *Bostock* removes all doubt—if any remained—that sex discrimination laws protect transgender and gender nonconforming people. Justice Alito acknowledged as much in his dissent. *See Bostock*, 140 S.Ct. at 1778 (Alito, J. dissenting) (“What the Court has done today—interpreting discrimination because of “sex” to encompass discrimination because of sexual orientation or gender identity—is virtually certain to have far-reaching consequences. Over 100 federal statutes prohibit discrimination because of sex...[including] 42 U.S.C. § 3631 (Fair Housing Act).”).

Moreover, HUD’s use of the word “biological” to describe transgender people’s sex assigned at birth is both incorrect and an apparently intentional, calculated, and cynical effort to belittle and dismiss transgender experience. *See, e.g.* Simón(e) D Sun, Scientific American Blog, Stop Using Phony Science to Justify Transphobia (June 13, 2019), <https://blogs.scientificamerican.com/voices/stop-using-phony-science-to-justify-transphobia/>.

In short, the purported “good faith” assessment of sex advanced by HUD in the Proposed Rule is textbook sex discrimination against transgender people and is blatantly illegal. This was true prior to *Bostock*; it is inescapable now. Amazingly, however, the Proposed Rule—issued more than a month after *Bostock* was announced—fails to discuss *Bostock* and the extent to which it clarifies the scope of sex discrimination protections under the FHAct.

e. The Proposed Rule Must Be Rejected on the Basis of HUD's Violation of Its Mandate and Its Failure to Consider the Impact of *Bostock*.

The FHAct protects individuals from shelter discrimination on the basis of sex, sex stereotyping, and (per *Bostock*) sexual orientation and gender identity. *See also, Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (transgender woman properly plead claims of sex in violation of the Equal Protection Clause); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (Title VII prohibits discrimination against transgender people based on gender stereotyping); *Rosa v. Parks W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir 2000) (claim of sex discrimination stated by transgender plaintiff under the Equal Credit Opportunity Act); *Lewis v. High Point Regional Health Sys.*, 79 F.Supp. 3d 588 (E.D.N.C. 2015) (alleged denial due to transgender status, court found grounds to allow transgender discrimination claim to proceed); *Doe v. Arizona*, 2016 WL 1089743 (D.Ariz. Mar 21, 2016) (Title VII prohibits discrimination based on gender identity); *Mitchell v. Axcan Scandipharm, Inc.*, 2006 WL 456173, at 2 (W.D. Pa. 2006) (complaint including facts about failure to conform to sex stereotypes sufficiently pleaded claims of gender discrimination)

Purely as a matter of administrative rulemaking, and even without reaching the merits of the Proposed Rule, a Proposed Rule that: (1) seeks to change the 2016 Rule in a discriminatory manner—in violation of existing law and HUD's mandate under the FHAct; and (2) utterly fails to address the consequences of the *Bostock* decision, cannot justify the proposed changes the 2016 Rule. Simply put, HUD cannot demonstrate, and has not demonstrated, any nondiscriminatory, non-pretextual basis to carve out a discriminatory exception to the FHAct that would exclude transgender people from equal access to homeless shelters in violation of exiting law and the very purpose of the FHAct. Rather, this administration has shown once again that it believes it is above the law of this land, and all HUD's Proposed Rule represents is a furtherance of this administration's overarching transphobic agenda. For these reasons alone, the Proposed Rule must be withdrawn.

4. The Proposed Rule Conflicts with *Bostock* and with HUD's Own Preamble.

- a. In Light of *Bostock*, Courts Would Interpret the EAR's "Nondiscrimination" Language to Be in Conflict with HUD's Current Explanation of It.

Even if the Proposed Rule somehow were to be deemed consistent with the FHAct, which it is not, the courts would interpret the EAR's nondiscrimination provisions to be in direct conflict with HUD's rational behind the Proposed Rule. In evaluating discrimination specifically based on transgender status, the Court in *Bostock* stated:

In Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in

members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

Bostock v. Clayton Cty. 140 S. Ct. 1731, 1737 (2020). In contrast, one of HUD’s justifications for the Proposed Rule is that the EAR 2016 Rule restricted single-sex facilities in a way not supported by Congressional enactment. It is clear that the courts would be bound by the decision in *Bostock* and would interpret sex discrimination under the Proposed Rule to include discrimination against transgender people.

b. The Proposed Rule is Inconsistent with the Nondiscrimination Language in HUD’s Preamble.

Indeed, the Proposed Rule is glaringly inconsistent with the nondiscrimination language in HUD’s own preamble. The preamble provides that the EAR requires all HUD-funded housing services to be provided *without discrimination based on sexual orientation or gender identity*. 77 FR 5662, February 3, 2012; 85 FR 143, July 24, 2020, at Section II (stating that “The proposed rule leaves in place requirements from the 2012 Rule that shelters and all other participants in HUD programs ensure that their programs are open to all eligible individuals and families without regard to sexual orientation or gender identity.”). Also, as discussed above, the Proposed Rule is in direct contradiction with *Bostock*, and excluding transgender people simply because they are transgender would necessarily mean sex discrimination. To put it in Justice Gorsuch’s terms, “A[shelter] who [turns away] an individual for being homosexual or transgender [turns] that person [away] for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision[.]” *Id.*

The preamble also requires each shelter’s policy to be consistent with state and local law, and to not discriminate based on sexual orientation or transgender status. As discussed below, the Proposed Rule will directly conflict with State and local anti-discrimination laws that explicitly, and in a way consistent with *Bostock*, prohibit gender identity discrimination.

c. HUD’s Definition of “Gender Identity” is in Direct Conflict with *Bostock*.

The Proposed Rule’s interpretation of “Gender Identity” directly conflicts with the Court’s findings in *Bostock* that discrimination against a person because that person is transgender constitutes sex discrimination. *Bostock, supra*, 140 S. Ct. 1737. In contrast, the Proposed Rule provides that “a shelter may place an individual based on his or her biological sex but may not discriminate against an individual because the person is or is perceived as transgender.” It is precisely this distinction under the Proposed Rule, which would allow discrimination against transgender people because that person’s gender identity does not align with their sex assigned at birth, that is in direct conflict with *Bostock*. Taking specific actions against a person because of that individual’s sex, in this case deciding where they can or not be sheltered according to their gender identity, constitutes sex discrimination and “discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.” *Bostock, supra*, 140 S. Ct. 1747-48.

d. Conflict Between the 2012 Rule and the 2016 Revision

Foretelling *Bostock*, the 2016 Revision removed the provisions of the 2012 Rule permitting a shelter to inquire about an occupant's sex assigned at birth. Whereas the 2012 Rule allowed shelters to ask questions about a person's sex assigned at birth in order to decide placement at a shelter, the 2016 revision, which foretold the Court's holding in *Bostock*, expressly removed the option to ask those types of questions. The 2016 Rule includes specific provisions that individuals cannot be subject to intrusive questioning or asked to provide anatomical information or documentary, physical, or medical evidence of their gender identity. Section 5.106(b)(3). The 2016 Revision is consistent with *Bostock* and should remain the controlling rule.

5. The Proposed Rule Conflicts with State and Municipal Laws.

The Proposed Rule further clashes with HUD's preamble in more ways than one. The Summary to the Proposed Rule, provides that shelter operators "may establish a policy, consistent with federal, state, and local law, to accommodate persons based on sex." Proposed Rule at "Summary." However, as explained above, discriminating against a transgender person by failing to treat them in accordance with their gender identity violates federal law. Additionally, at least twenty states have passed legislation banning housing and/or public accommodation discrimination based on gender identity or expression. The Proposed Rule would clash with the laws in these states.¹⁰ California's Unruh Civil Rights Act prohibits discrimination based on a person's sex and, in turn, defines sex as including "a person's gender identity and gender expression." Cal. Civ. Code § 51(e)(5), see also Cal. Gov't Code §12955. Similarly, Nevada law prohibits housing discrimination based on gender identity, NRS § 118.100, which it defines as "a gender-related identity, appearance, expression or behavior of a person, regardless of the person's assigned sex at birth." NRS § 118.075. Thus the Proposed Rule will expose shelter operators to liability for violating state anti-discrimination provisions.

In its justification for the Proposed Rule, HUD mischaracterizes Massachusetts gender identity nondiscrimination law. It cites to Mass. Gen. Laws ch. 22, § 32. However, that section concerns

¹⁰ States that have passed some kind of legislation that bans gender identity/expression discrimination in housing or accommodation include California (Cal. Gov't Code §12955 (housing), Cal. Civ. Code § 51 (public accommodations)); Connecticut (Conn. Gen. Stat. sec. 46a-81a); Colorado (Colo. Rev. Stat. Ann. §§ 24-34-502 (housing), 24-34-601 (public accommodations)); Delaware (Del. Code 25 § 5116 (housing), 47 § 4503 (public accommodation)); District of Columbia (D.C. Code §§ 2-1402.21 (housing), 2-1402.31 (public accommodations), 2-1402.73 (access to government facilities, services, programs or benefits)); Hawaii (Haw. Rev. Stat. §§ 489-2 (public accommodations), 515-3, 5, 6 (real property)); Illinois (775 Ill. Comp. Stat. 5/1-102); Iowa (Iowa Code Ann. §§ 216.8 (housing), 216.7 (public accommodations)); Maine (Me. Rev. Stat. Ann. Tit. 5, §§ 4552, 4602(4)); Maryland (Md. An. Code §§ 20-702 (housing), 20-304 (public accommodation)); Massachusetts; (M.G.L. c. 272 § 98 (public accommodation), M.G.L. c. 151B § 4 (housing)); Minnesota (Minn. Stat. Ann. §§ 363A.09 (real property), 363A.11 (public accommodation)); Nevada (NRS § 118.100); New Jersey (N.J. Stat. Ann. § 10:5-4; New Mexico (N.M. Stat. Ann. §§ 28-1-7(F) (public accommodations), 28-1-7(G) (housing)); New York (9 NYCRR § 466.13)); Oregon (Or. Rev. Stat. §§ 659A.403 (public accommodations), 659A.421, 93.270 (real property), § 179.750(2) (provision of care and services in state institutions)); Rhode Island (R.I. Gen. Laws §§ 11-24-2 (public accommodations), §§ 34-37-4 (housing)); Utah (Ut. Code § 57-21-5)); Vermont (Vt. Stat. Ann. Tit. 9, §§ 4502(a) (public accommodations), 4503 (housing)); and Washington (Wash. Rev. Code §§ 49.60.215 (public accommodation), 49.60.222 (housing)).

hate crimes. HUD disregards or fails to cite to M.G.L. c. 272 §§ 92A, 98, prohibiting public accommodation discrimination based on gender identity; M.G.L. c. 151B § 4, prohibiting housing discrimination based on gender identity. Thus, the Proposed Rule conflicts with Massachusetts' anti-discrimination laws.

a. *Bostock* Will Guide Decisions Concerning State-Level Public Accommodations by Sex.

As discussed above, more than twenty states have gender identity or sexual orientation anti-discrimination laws.¹¹ These state laws apply to state public accommodations, which include shelters. The *Bostock* decision will further boost any claims for gender identity discrimination in states that already have protections against gender identity discrimination. But more importantly, *Bostock* will provide exceedingly persuasive authority for gender identity discrimination claims in those states that have public accommodation laws prohibiting discrimination on the basis of sex.

b. HUD's Proposed Standard Conflicts with Municipal Nondiscrimination Laws.

Similar to the significant conflict between the Proposed Rule and the state laws in twenty-one states and the District of Columbia discussed above, the Proposed Rule also conflicts with dozens of nondiscrimination laws and ordinances in municipalities in all of the remaining twenty-nine states. For example, the following municipalities prohibit housing and/or public accommodation discrimination on the basis of gender identity: Birmingham, Alabama;¹² Phoenix, Arizona;¹³ Jacksonville, Florida;¹⁴ Atlanta, Georgia;¹⁵ Boise, Idaho;¹⁶ Indianapolis, Indiana;¹⁷ Kansas City,

¹¹ See Summary of State Public Accommodation Laws, National Conference of State Legislatures, at <https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx>

¹² At least three municipalities in Alabama prohibit discrimination on the basis of gender identity, covering an estimated 8% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/AL.

¹³ At least six municipalities in Arizona prohibit discrimination on the basis of gender identity, covering an estimated 35% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/AZ.

¹⁴ At least thirty-nine municipalities in Florida prohibit discrimination on the basis of gender identity, covering an estimated 60% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/FL.

¹⁵ At least ten municipalities in Georgia prohibit discrimination on the basis of gender identity, covering an estimated 9% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/GA.

¹⁶ At least fourteen municipalities in Idaho prohibit discrimination on the basis of gender identity, covering an estimated 37% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/ID.

¹⁷ At least forty-nine municipalities in Indiana prohibit discrimination on the basis of gender identity, covering an estimated 40% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/IN.

Kansas;¹⁸ Louisville, Kentucky;¹⁹ New Orleans, Louisiana;²⁰ Detroit, Michigan;²¹ Jackson, Mississippi;²² St. Louis, Missouri;²³ Helena, Montana;²⁴ Omaha, Nebraska;²⁵ Grand Forks, North Dakota;²⁶ Columbus, Ohio;²⁷ Oklahoma City, Oklahoma;²⁸ Pittsburgh, Pennsylvania;²⁹ Columbia, South Carolina;³⁰ Brookings, South Dakota;³¹ Dallas, Texas;³² Charleston, West Virginia;³³ Milwaukee, Wisconsin;³⁴ and Laramie, Wyoming.³⁵

¹⁸ At least seventeen municipalities in Kansas prohibit discrimination on the basis of gender identity, covering an estimated 30% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/KS.

¹⁹ At least twenty-one municipalities in Kentucky prohibit discrimination on the basis of gender identity, covering an estimated 31% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/KY.

²⁰ At least two municipalities in Louisiana prohibit discrimination on the basis of gender identity, covering an estimated 12% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/LA.

²¹ At least forty-nine municipalities in Michigan prohibit discrimination on the basis of gender identity, covering an estimated 23% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/MI.

²² At least four municipalities in Mississippi prohibit discrimination on the basis of gender identity, covering an estimated 6% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/MS.

²³ At least nineteen municipalities in Missouri prohibit discrimination on the basis of gender identity, covering an estimated 26% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/MO.

²⁴ At least five municipalities in Montana prohibit discrimination on the basis of gender identity, covering an estimated 19% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/MT.

²⁵ At least two municipalities in Nebraska prohibit discrimination on the basis of gender identity, covering an estimated 25% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/NE.

²⁶ At least one municipality in North Dakota prohibits discrimination on the basis of gender identity, covering an estimated 7% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/ND.

²⁷ At least forty-seven municipalities in Ohio prohibit discrimination on the basis of gender identity, covering an estimated 31% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/OH.

²⁸ At least four municipalities in Oklahoma prohibit discrimination on the basis of gender identity, covering an estimated 30% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/OK.

²⁹ At least fifty-two municipalities in Pennsylvania prohibit discrimination on the basis of gender identity, covering an estimated 34% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/PA.

³⁰ At least five municipalities in South Carolina prohibit discrimination on the basis of gender identity, covering an estimated 14% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/SC.

³¹ At least one municipality in South Dakota prohibits discrimination on the basis of gender identity, covering an estimated 3% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/SD.

³² At least seven municipalities in Texas prohibits discrimination on the basis of gender identity, covering an estimated 30% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/TX.

³³ At least thirteen municipalities in West Virginia prohibit discrimination on the basis of gender identity, covering an estimated 11% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/WV.

³⁴ At least thirteen municipalities in Wisconsin prohibit discrimination on the basis of gender identity, covering an estimated 32% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/WI.

³⁵ At least two municipalities in Wyoming prohibit discrimination on the basis of gender identity, covering an estimated 7% of the state's population. See https://www.lgbtmap.org/equality_maps/profile_state/WY.

6. The Proposed Rule Conflicts with Other Federal Programs and Regulations.

The Proposed Rule would conflict with other laws and regulations created to make housing and related services more available to people regardless of gender or gender identity. For example, the Violence Against Women Reauthorization Act of 2013 (“VAWA”), 127 Stat. 54, 61 (2013), includes protections for and bars discrimination based on actual or perceived gender identity or sexual orientation - as well as race, color, religion, national origin, sex or disability. The purpose of this law is to ensure housing and supportive services to lesbian, gay, bisexual and transgender (LGBT) victims of domestic violence, sexual assault, dating violence and stalking. And, further, that these people are protected under law and are not denied, on the basis of sexual orientation or gender identity. 42 USC 13701 note; 24 C.F.R. 5.2001.

Housing is not just an urban issue but a rural issue, and Rural Development must provide its housing and resources in a manner that does not discriminate on the basis of gender identity. 7 C.F.R. § 15d.3. Section 15d.3 prohibits, in relevant part, any discrimination by any agency of USDA on the grounds of sex, sexual orientation, disability, or gender identity. It also prohibits denying benefits based on such status.

7. The Proposed Rule Would Inflict Emotional Distress.

The Proposed Rule reflects the specific animus held by this Administration against transgender people and amounts to intentional infliction of emotional distress or, at a minimum, negligent infliction of emotional distress. As explained throughout our Comments to the Proposed Rule, as well as in the preamble of the Proposed Rule, our communities are vulnerable to housing and other forms of discrimination, and homeless transgender people are especially at risk. *See, e.g., F.V. v. Barron*, 286 F.Supp.3d 1131, 1136-1137 (D. Id. 2018) (“[t]ransgender individuals often suffer emotional distress in the process of recognizing and responding to the complex social and personal scenarios that result because their gender identity does not align with birth-assigned sex. A clinical medical condition, known as gender dysphoria, can result from such distress. Symptoms include anxiety and depression, suicidality, and other serious mental health issues”); *Flack v. Wis. Dep’t of Health Servs.*, 328 F. Supp. 3d 931, 951-953 (W.D. Wis. 2018) (“one would be hard-pressed to identify a class of people more discriminated against historically...than transgender people”).

Courts across the country have recognized the sobering statistics with respect to the challenges faced by our communities. “The transgender community...suffers from high rates of employment discrimination, economic instability, and homelessness...[P]eople who are transgender are twice as likely as the general population to have experienced unemployment...and two and a half more times more likely to have experienced homelessness.” *Grimm v. Gloucester Cty Sch. Bd.*, 2020 WL 5034430 (4th Cir. Aug. 26, 2020); *see also Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Ed.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (citing “alarming” statistics which document the “discrimination, harassment, and violence” faced by transgender people because of their gender identity); *M.A.B. v. Bd. of Ed. of Talbot Cty*, 286 F.Supp.3d 704, 720 (D. Md. 2018); *Evancho v. Pine-Richland Sch. Dist.*, 237 F.Supp.3d 267, 288 (W.D. Pa. 2017); *Bd. of Ed. of Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F.Supp.3d 850, 874 (S.D. Ohio 2016); *Adkins v. City of N.Y.*,

143 F.Supp.3d 134, 139 (S.D.N.Y. 2015). Additionally, transgender people frequently report experiencing harassment in schools (78%), medical settings (28%), and retail stores (37%). *Grimm, infra*. Our communities also experience higher rates of physical assault in schools and places of public accommodation. *Id.* “Indeed, transgender people are more likely to be the victim of violent crimes. So, in 2009, Congress expanded federal protections against hate crimes to include crimes based on gender identity.” *Id.* (internal citations omitted); *see also Matter of M.E.B.*, 126 N.E.3d 932, 936-937 (Ind. Ct. App. 2019) (“transgender individuals are disproportionately impacted by violence and homicide... Transgender people are more likely than the general population to experience discrimination, harassment, and violence in every facet of life”). “Notably, the reported lifetime suicide attempt rate for transgender people is nearly nine times the rate of the United States population on average.” *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1138 (D. Id. 2018) (citing James et al., *The Report of the 2015 U.S. Transgender Survey*, Washington, D.C., National Center for Transgender Equality at 8, 13 (2016)). According to the FBI, 2.2% of all hate crimes reported by law enforcement agencies in the United States in 2018 were motivated by gender-identity bias.³⁶ This is so despite transgender people comprising less than 1% of the United States’ population.³⁷

This administration is well aware of the risks that transgender people, especially Black, indigenous, and other transgender people of color, face, and the harmful – often fatal – result of discrimination against them. As described throughout this comment, to be homeless and transgender is a dangerous, even terrifying proposition. Housing-insecure transgender people around the United States have come to rely on the 2016 Rule, believing that should they lose their home, at least the law would be on their side when they went to seek shelter services. In moving to rip that small comfort away from them, and knowing full well that the Proposed Rule will inflict harm, including significant emotional harm, on a large population, the administration’s decision to move forward with the Proposed Rule can only be viewed as a conscious and concerted attack against transgender people. Indeed, the language itself in the justification for the Proposed Rule is telling of the Administration’s intentionality.³⁸

It is especially damning that HUD, which is charged by Congress to enforce the Fair Housing Act to oppose housing discrimination and affirmatively further fair housing, chooses to betray its charge and instead lead the attack against housing rights for transgender people -- rights that are recognized by many states and by the Supreme Court of the United States of America as noted above. Even with the knowledge of these laws and Supreme Court decision, and in spite of its own laws and policies, HUD has made a conscious decision to target our community purely for the purposes of harming us. This Administration’s conduct in eliminating protections adopted by

³⁶ 2018 Hate Crime Statistics, FBI, Criminal Justice Information Services Division, <https://ucr.fbi.gov/hate-crime/2018/topic-pages/victims.pdf>.

³⁷ Esther L. Meerwijk, Jae M. Sevelius, *Transgender Population Size in the United States: a Meta-Regression of Population-Based Probability Samples*, at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5227946/>

³⁸ See 85 FR 143, July 24, 2020, at Section III, stating that “While HUD *is not aware of data suggesting that transgender individuals pose an inherent risk to biological women*, there is *anecdotal evidence* that some women may fear that nontransgender, biological men may exploit the process of self-identification . . .” (emphasis added). HUD further acknowledges “that transgender individuals experience poverty, housing instability, mental health issues, domestic violence, and homelessness at high rates.” *Id.*

prior administrations and pushing through the Proposed Rule with full knowledge, at worst, or negligent disregard, at best, of the harm it will inflict on the most vulnerable transgender people is extreme, outrageous and is done with intent or disregard to causing significant emotional distress.³⁹

8. The Proposed Rule Limits Housing Choice and Is Inconsistent with HUD’s Obligation to Affirmatively Further Fair Housing.

As HUD determined in the 2016 Rule, gender identity is covered by the Fair Housing Act as it is a characteristic regarding sex and the Fair Housing Act prohibits discrimination in providing housing on basis of sex. 81 Fed. Reg. 64763, 64770. HUD is statutorily required to affirmatively further fair housing for protected people, including transgender people.

HUD has a specific set of responsibilities and burdens under the Fair Housing Act, in relevant part to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies” of the Act. 42 USC 3608(e)(5). HUD must use its authorities to promote housing choice for individuals who have been the victim of discrimination. There has been much public debate in the last few years, and currently, in what “affirmatively furthering fair housing” means—what role HUD plays, what requirements HUD has to impose, etc. Here, we suggest HUD has a very low bar to meet—simply not denying housing choice. While it is debatable how much HUD must require of housing providers and much it may have to spend in enforcing housing rights, it is not debatable that affirmatively furthering fair housing means, at the very least, not allowing discrimination against transgender people on the basis of gender or gender identity.

In the instant matter, that means preserving the choice of transgender people who are in need of shelter housing. The Proposed Rule would shift the decision, in the first instance, as to where a transgender person lives to the shelter operator. That position is completely contradictory to the notion of affirmatively furthering fair housing. The Proposed Rule removes from the housing applicant any choice, any agency, where that person may reside simply based on the baseless conclusions of the housing provider. Transgender people deserve the same protection as any other member of a protected class, and of any other person, to make their own housing determinations.

9. The Proposed Rule Would Violate the Americans With Disabilities Act.

The Proposed Rule is materially harmful to disabled people suffering from symptoms of gender dysphoria. Making housing more difficult for and denying it on the basis of gender dysphoria is a violation of the Americans with Disability Act (“ADA”). Gender dysphoria is “clinical significant distress” resulting from a difference between someone’s gender identity and sex assigned at birth (*See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 452, 454 (5th ed. 2013)). Without treatment, people with gender dysphoria may experience serious

³⁹*CM, et al. v. United States*, No. CV-19-05217-PHX-SRB (March 30, 2020), available at:

https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/separated_family_members_seek_monetary_damages_from_united_states_order_denying_governments_motion_to_dismiss.pdf

psychological debilitation (e.g., anxiety, depression, suicidality and other mental health issues). *Id.* At 454-455.

The ADA includes protection for people with a disability in the form of gender dysphoria. The ADA excludes “gender identity disorders not resulting from physical impairments” and “transsexualism.” 42 U.S.C. § 12211. Yet, in introducing the diagnosis of gender dysphoria more than 20 years after the passage of the ADA, the medical community was clear that gender dysphoria is distinct from “gender identity disorders” and “transsexualism,” and therefore gender dysphoria is not excluded from coverage by the ADA. Even if gender dysphoria were excluded on the text of the ADA, it would be clear that such exclusion is based in bare animus and moral opprobrium of the sort courts have routinely struck down when directed at LGBTQ communities, and certainly such an exclusion could not survive the Fourteenth Amendment intermediate scrutiny standard due to gender identity discrimination post-*Bostock*. See *Blatt v. Cabela’s Retail, Inc.*, No. 5:14-CV-04822, 2017 WL 2178123, at *4 (E.D. Pa. May 18, 2017 (amicus brief at <https://www.glad.org/wp-content/uploads/2015/02/blatt-v-cabelas-glad-amicus-brief.pdf>)).

On May 18, 2017, a district court in Pennsylvania held, while denying a motion to dismiss an ADA claim, that medical conditions like gender dysphoria that transgender people may have are not excluded from ADA coverage. (*Blatt v. Cabela’s Retail, Inc.*, No. 5:14-CV-04822, 2017 WL 2178123, at *4 (E.D. Pa. May 18, 2017)). In 2017, the U.S. Department of Justice under Attorney General Jeff Sessions filed two separate statements of interest, similarly supporting coverage of gender dysphoria under the ADA. (Statement of Interest of the United States of America, *Doe v. Arrisi*, No. 3:16-cv-08640, at 2-3 (D.N.J. July 17, 2017); Statement of Interest of the United States of America, *Doe v. Dzurenda*, No. 3:16-CV1934, at 3 (D. Conn. Oct. 27, 2017)). (*Blatt v. Cabella*). The Proposed Rule would therefore encourage shelters to violate the ADA by turning away and failing to reasonably accommodate transgender people on the basis of a disability, gender dysphoria or the symptoms thereof—thus failing in their obligations both as housing providers and as places of public accommodations. Further, transgender people are more likely than the general population to have other disabilities, too often making them targets for other forms of discrimination, neglect, and violence. See, e.g., DREDF, *Health Disparities at the Intersection of Disability and Gender Identity: A Framework and Literature Review* (July 2018), <https://dredf.org/health-disparities-at-the-intersection-of-disability-and-gender-identity/>.

With regards to inquiries about disabilities, federal regulations implementing the ADA make it unlawful for a person to inquire as to the nature or severity of a handicap. (24 C.F.R. § 100.202(c).) Accordingly, it is unlawful for a shelter to inquire to a person regarding the nature or severity of one’s gender dysphoria. There only exception where certain inquiries may be permissible is if the person bases them upon a “nexus between the fact of the individual’s tenancy and [an] asserted direct threat to the health or safety of other individuals.” (See U.S. *Dep’t of Hous. & Urban Dev. v. Williams*, 1991 WL 442796 (HUDALJ Mar. 22, 1991) (citing H. Rep. No. 711, 100th Cong. 2d Sess. 13, (1988) (“House Report”) at 29.)) However, here, the standard proposed by HUD to require documentation is not threat of harm but simply a “good faith” “doubt” as to the individual’s sex, which is impermissible. Any requirement for an individual to produce documentation when seeking emergency shelter based on a “doubt” by the shelter as to that person’s sex is contrary to

the very concept of “emergency” shelter and further, if that person seeking shelter has a disability in the form of gender dysphoria, is also a violation of the ADA.

10. Specific Responses to HUD’s Request for Comments.

While the Transgender Law Center is firm in its position that HUD should entirely abandon the Proposed Rule and leave the 2016 Equal Access Rule in place as currently written, we provide responses to each of HUD’s requests for comments below.

a. Should HUD maintain the anti-discrimination protections reflected in the original 2012 Equal Access Rule?

HUD should maintain the anti-discrimination protections reflected in the original 2012 Rule as modified in 2016. As a justification for the Proposed Rule, the proposal claims that the 2012 Rule “lacks an explicit statutory authorization”. 85 FR at 44817. On the contrary, both the 2012 Rule and the 2016 Rule explicitly rejected claims that such rules exceeded HUD’s legal authority. The 2012 Rule begins its validation for the rule with stating that “HUD is charged with promoting the federal goal of providing decent housing and a suitable living environment for all.” 77 FR at 5662. HUD’s LGBTQ resources page also states that part of HUD’s mission is to give all people equal access to safe, secure, and affordable housing regardless of their “sexual orientation, gender identity or marital status”, and that as the “Nation’s housing agency, it is our responsibility to ensure that every person participating in HUD’s programs has equal access to them without being arbitrarily excluded.”⁴⁰

HUD’s broader mission to provide equal access to housing to all, including transgender people is well-rooted within HUD’s statutory authority. HUD acknowledges that Congress has appointed HUD with the responsibility of carrying out this goal as summarized in Section 2 of the Housing Act of 1949, 42 U.S.C. 1441 (“Congress hereby declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy... inadequate housing through... the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family...The Department of Housing and Urban Development... shall exercise [its] powers, functions or duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established...”). 77 FR at 5662.

HUD further acknowledges that “Congress has given HUD broad authority to fulfill this mission and implement its responsibilities through rulemaking. *Id.* Section 7(d) of the Department of Housing and Urban Development Act specifically states that the Secretary ‘may make such rules and regulations as may be necessary to carry out his functions, powers, and duties.’” *Id.* at 7663. Both the 2012 Rule and the 2016 Rule acknowledge HUD’s broad authority to establish rules and regulations to ensure access to housing to all people. *Id.* at 5672-5673; 81 FR at 64769-64770. Additionally, subsequent case law has reaffirmed HUD’s broad authority to implement rules in

⁴⁰ HUD LGBTQ Resources, available at https://www.hud.gov/LGBT_resources.

furtherance of its mission to provide adequate housing for all. See *Ferrell v. U.S. Dept. of Housing and Urban Development*, No. 73 C 334., 1998 WL 160916, 4 (N.D. Ill. March 31, 1998) (reaffirming HUD’s rulemaking authority to further its goal of providing a “decent home and a suitable living environmental for every American”); *Bjstrom v. Trust One Mortg.*, 178 F.Supp.2d 1183, 1188 (W.D. Wash. 2001) (reaffirming HUD’s congressional mandate under 42 U.S.C. § 1441); *Com. of Pa. v. Lynn*, 501 F.2d 848, 855 (D.C. Circuit 1974) (reaffirming the notion that HUD has broad discretion to choose how to implement national housing objections); *U.S. v. Winthrop Towers*, 628 F.2d 1028,1036 (7th Cir. 1980) (confirming the notion that HUD has broad discretion to choose how to implement national housing objections); *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 926 (9th Cir. 2008) (concluding that HUD has a legal obligation to fulfill its mandate under the National Housing Act); *Valentine Properties Associates, LP v. U.S. Dept. of Hous. and Urban Dev.*, 501 Fed. Appx. 16, 18 (2nd Circ. 2012) (reaffirming that Congress has issued HUD explicit rulemaking authority with respect to implementing its housing goals).

Not only is the 2012 Rule well within HUD’s statutory authority, but HUD itself conceded that it “is not aware of any relevant party that has raised any material concerns about that 2012 rule.” (85 FR at 44817). According to the Center for American Progress:

There is no significant evidence that emergency shelters have petitioned the federal government for the kind of changes that HUD is considering. For example, HUD’s response to a May 31, 2017, Freedom of Information Act (FOIA) request from the Center for American Progress for information regarding waivers or religious accommodations made under the 2012 and 2016 Equal Access rules from their date of publication to May 31, 2017, failed to locate any waiver requests from service providers. It also turned up no records of complaints from service providers pertaining to the rules under both the Obama and Trump administrations. This indicates that no religious exemptions had been requested under either administration.

Sarah Kellman, Laura E. Durso, Sharita Gruberg, and Caitlin Rooney, *The Dire Consequences of the Trump Administration’s Attack on Transgender People’s Access to Shelters* (July 31, 2019).⁴¹

In *Thomas v. Osegueda*, HUD’s authority to issue the 2012 Rule came into question and the court supported HUD’s explicit authority to issue a rule with an expansive definition of “sex” under the Fair Housing Act. See *Thomas v. Osegueda*, No. 2:15-CV-0042-WMA, 2015 WL 3751994, 4 (N.D. Ala. June 16, 2015) (“Considering the deference due by the court to agency interpretations, HUD’s narrow tailoring of jurisdiction for discrimination based on sexual orientation to protections for gender stereotyping in its interpretation of the FHA is a permissible reading of ‘sex.’”). The lack of opposition to the 2012 Rule should demonstrate that the validations for the 2016 Proposed Rule are overblown, unsupported, and alarmist. As described above, HUD had the authority to issue the 2012 and 2016 Rules as part of its statutory mission to address the housing needs of all; yet, in failing to offer any reasoned justification for clawing back protections for our communities,

⁴¹ Sarah Kellman, Laura E. Durso, Sharita Gruberg, and Caitlin Rooney, *The Dire Consequences of the Trump Administration’s Attack on Transgender People’s Access to Shelters* (July 31, 2019), available at <https://www.americanprogress.org/issues/lgbtq-rights/news/2019/07/31/472988/dire-consequences-trump-administrations-attack-transgender-peoples-access-shelters/>.

HUD lacks the authority to move forward with this Proposed Rule. Therefore, HUD must maintain the anti-discrimination protections reflected in the 2012 Rule and reject any attempts to overturn them.

b. Should HUD define what constitutes a good faith belief for determining so-called biological sex and what type of evidence would be helpful for determining an individual’s so-called biological sex? How, if at all, should government IDs be considered.

HUD should not define what constitutes a good faith belief for determining so-called biological⁴² sex because HUD must reject such concept entirely and uphold the 2016 Rule’s definition of gender identity to mean “the gender with which a person identifies, regardless of the sex assigned to that person at birth and regardless of the person’s perceived gender identity. Perceived gender identity means the gender with which a person is perceived to identify based on that person’s appearance, behavior, expression, other gender related characteristics, or sex assigned to the individual at birth or identified in documents.” 81 FR at 64782.

Outright discrimination against homeless transgender people seeking shelter is pervasive in the United States. One study on inequality and discrimination in our communities (the “2015 Transgender Survey”) found that more than 26% of respondents facing homelessness did not even attempt to seek shelter because they feared being mistreated.⁴³ The same study found that 29% of respondents who did attempt to access a homeless shelter reported being denied access entirely to such shelters because they were transgender or gender non-conforming. *Id.* at 116.

The good faith belief concept should be rejected entirely because without a definition of gender identity that offers full protection against invalid and harmful determinations of sex, shelters will continue to discriminate against transgender people. For example, in the 2016 Rule, HUD cited as evidence of pervasive discrimination against transgender people in accessing shelters, a study conducted by the Center for American Progress a study (the “CAP Study”) where callers reached out to 100 homeless shelters across four states (Virginia, Washington, Connecticut and Tennessee) to measure the degree to which transgender women could access a shelter in accordance with their gender identity as oppose to the gender that they were assigned at birth.⁴⁴ The CAP Study found that 21% of shelters refused access to the transgender women altogether and 13% of shelters were willing to grant access to a shelter, but either in isolation or with men. *Id.*; see 81 FR at 64765-

⁴² As mentioned above, HUD’s use of the word “biological” to describe transgender people’s sex assigned at birth is both incorrect and an apparently intentional, calculated, and cynical effort to belittle and dismiss transgender experience. See, e.g. Simón(e) D Sun, Scientific American Blog, Stop Using Phony Science to Justify Transphobia (June 13, 2019), <https://blogs.scientificamerican.com/voices/stop-using-phony-science-to-justify-transphobia/>.

⁴³ S. E. James, et. Al., The Report of the 2015 U.S. Transgender Survey, 81 (2016), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

⁴⁴ Caitlin Rooney, Laura E. Durso, and Sharita Gruberg, Discrimination Against Transgender Women Seeking Access to Homeless Shelters, 1 (January 7, 2016), available at https://cdn.americanprogress.org/wp-content/uploads/2016/01/06113001/HomelessTransgender.pdf?_ga=2.24854266.1555203148.1599519171-668547057.1599519171.

64766 (HUD cited the CAP Study as applicable research showing discrimination experienced by transgender people seeking shelter access).

In addition to denying access to shelter entirely, the CAP Study also found that transgender women seeking shelter were mistreated by shelter employees. See *Id.* at 3. Examples of mistreatment included, but were not limited, to shelter employees providing different information to the caller depending on whether the caller seeking shelter had disclosed that they were transgender, shelter employees misgendering a transgender woman or making other statements to discredit a transgender woman's identity, shelter employees referring to surgery as a requirement for shelter, and shelter employees commenting that other residents might be uncomfortable with a transgender women's presence at the shelter. See *Id.* at 3.

As discussed above HUD must provide a reasonable explanation for overturning its existing policies and prior interpretations. HUD presents no such reasonable explanation by failing to present any evidence in the Proposed Rule that suggests that the type of discrimination and mistreatment described in the CAP Study and stories above is no longer a persistent issue. The data in the CAP Study was collected in 2015, after the 2012 Rule was passed, but prior to the 2016 Rule's clarification on the definition of gender identity. This evidence of discrimination shows that protections for transgender people seeking shelter are needed to prevent blatant and open discrimination. The Proposed Rule would allow shelters to use the pretext of their "good faith belief" to continue to deny transgender people access to shelter. The CAP study further supports the need for clear protections against such discrimination by also finding that shelters in states with explicit anti-discrimination laws and policies for gender identity were twice as likely to accommodate a transgender woman with a shelter that conformed with their gender identity. See *Id.* at 2. HUD itself conceded to the fact that our communities continue to experience harassment and discrimination in attempting to access shelters when it adopted the 2016 Rule. 81 FR at 64764. Therefore, HUD should not peel back any protections by allowing shelters to use a so-called good faith belief to discriminate and deny transgender people shelter access.

The only appropriate measure for who belongs in what shelter is that described in the 2016 Rule: an individual's self-identification of gender identity. *Id.* HUD should not retract its initial conclusion that the most appropriate way for a shelter to determine an individual's gender identity for purposes of a placement decision is to rely on an individual's self-identification of gender identity and that it would be inappropriate to subject individuals to unnecessary, intrusive questioning about their gender identity or to ask them to provide documentary, physical, or medical evidence of their gender identity. *Id.* Without this standard, and particularly with the good faith belief standard if adopted, shelters will continue to discriminate against transgender people.

Not only should shelter providers not be permitted to use a good faith belief concept, but shelter providers should also not use government ID's to determine where to shelter a transgender person. As mentioned above, HUD's suggestion that government ID's are effective in determining either one's gender identity or one's sex assigned at birth, is deeply mistaken. While many transgender people are able to update the gender marker on their ID, many more face a variety of barriers to doing so. Herman at 81. The 2015 Transgender Survey found that only 11% of respondents reported that all of their IDs and records listed both the name and gender they preferred, and more

than 68% reported that none of their IDs or records had both the name and gender they preferred. See *Id.* at 85. The low percentage of respondents with accurate identity documentation is due to a variety of factors, such as the complicated processes for legally changing one’s name and gender, the eligibility and procedural requirements for name and gender changes in particular jurisdictions, the costs associated with changing identity documentation (including costs to undergo surgery or other procedures in order to be eligible for a gender change in some jurisdictions), and the negative experiences some experienced when attempting to change their name and/or gender on particular documentation. See *Id.* at 85. Respondents in higher educational attainment categories and those with higher household income brackets were more likely to be successful in obtaining changes to their identity documents, suggesting that transgender people experiencing homelessness would be less likely to have acquired identification that matches their gender identity. See *Id.* at 140-151.

Our organization has repeatedly represented clients who faced discrimination and harassment while trying to update their identification. One of our clients broke down in tears after a DMV employee angrily yelled at her for the “sin” of being transgender and called her a “devil.” A manager later apologized, yet told our client that the same employee had “done this before.”⁴⁵ Another client of ours, Amber Yust, was horrified to discover that a DMV employee had saved her address so he could threaten her via the mail, sending her a letter calling for “homosexuals” to be put to death.⁴⁶

Given the high percentage of those in our communities who do not have forms of identification with their preferred name and/or gender due to discrimination and procedural or financial barriers, shelter providers should not consider ID’s to determine an individual’s so-called biological sex. Additionally, when transgender people are forced to show ID’s with a name or gender that does not match their gender identity, they are too often subjected to harassment, denial of services, and even physical attack. Herman at 89.

For all of the foregoing reasons, HUD should uphold the gender identity definition from the 2016 Rule and abandon the concept of a so-called good faith belief determination, and should only allow shelters to rely on an individual’s self-identification of gender identity for placement decisions.

c. To what extent is a requirement to provide a transfer recommendation unduly burdensome or likely to cause operational challenges?

HUD should withdraw the Proposed Rule entirely and there is no need for the Proposed Rule to require that a shelter provider provide a transfer recommendation if a transgender individual is denied access based on a determination of sex. Even if HUD passes the Proposed Rule, a transfer recommendation would not be a viable option for providing transgender people with access to safe housing accommodations. The Proposed Rule would allow shelter providers to deny access to a transgender individual on the basis that such individual is transgender, but then provide a referral

⁴⁵ Transgender Law Center, DMV again settles with a transgender woman assaulted in Bay Area (June 4, 2015), <https://transgenderlawcenter.org/archives/11663>.

⁴⁶ Transgender Law Center, San Francisco DMV Settles Civil Rights Lawsuit with Transgender Woman (Aug. 18, 2011), <https://transgenderlawcenter.org/archives/379>.

to another shelter that does not conform with such transgender individual's gender identity, which by no means provides equal access to housing for transgender people.

As discussed above, HUD is deathly wrong to suggest that denying shelter to a transgender person is remedied by referring them to another shelter that does not respect their gender identity. Rather, such denials will lead to more transgender people sleeping on the streets, or would be sheltered in a single-sex facility that does not conform to the gender identity and subject to abuse and harassment. Due to the high level of discrimination noted above, the good faith belief standard would continue to allow much more discrimination against transgender people and their choices of shelters, leaving no safe housing options for those seeking shelter.

A 2017 study by the Center for American Progress revealed that among LGBTQ-identified respondents, 61.5% said it would be somewhat difficult to find an alternative homeless shelter if turned away, and among transgender respondents specifically:

- 6.10% said it would be somewhat difficult to find an alternative shelter;
- 17.40% said that it would be very difficult to find an alternative shelter; and
- 20.70% said that it would not be possible to find an alternative shelter if such individual was refused service. Kellman.

Forcing transgender people in any circumstance, to deny their gender identities can have severe emotional, psychological, mental, and physical effects, including substance use and self-harm. Alex Abramovich, PhD, 1 in 3 transgender youth will be rejected by a shelter on account of their gender identity/expression (June 13, 2014).⁴⁷

The later consequence of choosing no shelter at all is just not an option that we can accept. The National Alliance to End Homelessness found that since 2016 alone, the number of transgender adults experiencing homelessness increased 88% and the number of transgender adults experiencing unsheltered homeless increased 113%.⁴⁸ Overall, according to the National Center for Transgender Equality, one in five transgender people have experienced homeless at some point in their lives.⁴⁹ The statistics for transgender youth and people of color are even more startling. The Center for American Progress reported that as many as 40% of the millions of homeless youth are LGBTQ.⁵⁰ And a deeper look into the data collected from the National Transgender

⁴⁷ Alex Abramovich, PhD, 1 in 3 transgender youth will be rejected by a shelter on account of their gender identity/expression (June 13, 2014), available at <https://www.rondpointdelitinerance.ca/blog/1-3-transgender-youth-will-be-rejected-shelter-account-their-gender-identityexpression>.

⁴⁸ National Alliance to End Homelessness, *Transgender Homeless Adults & Unsheltered Homelessness: What the Data Tell US*, available at <https://endhomelessness.org/wp-content/uploads/2020/07/Trans-Homelessness-Brief-July-2020.pdf>.

⁴⁹ Issues | Housing & Homelessness, available at <https://transequality.org/issues/housing-homelessness>.

⁵⁰ Nico Sifra Quintana, Josh Rosenthal, and Jeff Krehely, *On the Streets: The Federal Response to Gay and Transgender Homeless Youth*, 6 (June 2010), available at https://cdn.americanprogress.org/wp-content/uploads/issues/2010/06/pdf/lgbtyouthhomelessness.pdf?_ga=2.112141575.2064732642.1599931207-668547057.1599519171.

Discrimination Survey found that a whole 41% of Black respondents reported experiencing homelessness at some point in their lives.⁵¹

The number of transgender people in the United States who have faced homelessness or are currently facing homelessness is alarming, particularly those facing unsheltered homelessness. The National Transgender Discrimination Survey reported that of the 19% of respondents who have experienced homelessness, 25% reported trying to access a homeless shelter but were denied, 25% reported being evicted from shelter after their transgender identity was revealed, and 47% reported leaving a shelter due to poor treatment. Herman at 116. The same survey reported that of those respondents who have experienced homelessness, but were able to access shelter, 42% of such respondents were forced to live as the wrong gender to be allowed to stay, with Black respondents experiencing the highest level of such discrimination. *Id.* at 118. These statistics show that transgender people who are denied access to a particular shelter will not likely be able to find another accommodation to a shelter that conforms to their gender identity—and why HUD must keep the 2016 Rule in place.

Now more than ever it is critical to protect our communities from homelessness and discrimination when seeking access to shelter. The spread of the coronavirus and its continuing presence in the United States has caused the economy to decline, leading to job losses and an increase in homelessness while at the same time decreasing the amount of access to housing by forcing shelters to close or limit their capacity.⁵²

Therefore, even if the Proposed Rule passed, a transfer accommodation would by no means remedy shelter discrimination, leaving many in our communities without shelter or placed in unsafe shelters that do not conform to their gender identity at a time when access to shelter is more critical than ever as we cope with the continued effects of the coronavirus pandemic. Therefore, HUD should withdraw the Proposed Rule entirely to ensure transgender people have equal access to shelters that match their gender identities.

Conclusion

Those who knew her described Marilyn Cazares as outspoken, loved, beautiful, as “just fabulous.” She chose her name because she was a fan of Marilyn Monroe. Ashanti Carmon’s friends say that she was always cheerful; she loved to dance, and she loved glitter nail polish. Marilyn, Ashanti, and far too many others in our communities experienced homelessness, died violently, and died too young because of the very hatred and fear of transgender people that HUD’s Proposed Rule embodies.

⁵¹ Jack Harrison-Quintana, Sharon Lettman-Hicks, and Jaime Grant, Injustice at Every Turn: A look at Black respondents in the National Transgender Discrimination Survey, available at https://transequality.org/sites/default/files/docs/resources/ntds_black_respondents_2.pdf.

⁵² Donna Bryson, Head of Denver’s housing department says city needs more shelter beds (August 12, 2020), available at <https://denverite.com/2020/08/12/head-of-denvers-housing-department-says-city-needs-more-shelter-beds/>.

As this comment has made exceedingly clear, HUD's Proposed Rule is nothing more than a bare attempt to intentionally cause harm to transgender people when we are most vulnerable. The Proposed Rule even acknowledges that "HUD is aware that transgender individuals experience poverty, housing instability, mental health issues, domestic violence, and homelessness at high rates...HUD recognizes that shelter access for transgender persons is critical." But it is clear that this knowledge doesn't matter to this administration nor does following the laws and policies of the United States matter either. When it comes to transgender people, all that matters to this administration is continuously attacking our communities.

Whether it be kids in schools, workers trying to earn a living, patients in need of healthcare, asylees fleeing violence, military servicepeople, or civilians abused by the police, every step of the way this administration has worked to deprive transgender communities of our constitutional rights. And now the Administration is trying to get HUD to turn its back on its mission and legacy: to expand housing opportunities for all, regardless of race, color, religion, national origin, disability, familial status and sex—including sexual orientation and gender identity.

HUD must reject the Proposed Rule.

Sincerely,

Kris Hayashi, Executive Director
Lynly Egyes, Legal Director
Shawn Meerkamper, Senior Staff Attorney

Transgender Law Center