OFFICE OF THE ATTORNEY GENERAL
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Dr. Benjamin S. Carson, Sr.
Secretary of Housing and Urban Development
U.S. Department of Housing and Urban Development
451 7th Street S.W., Room 10276
Washington, DC 20410-0500

Re: Comment on Proposed Rule, *Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs*, 85 Fed. Reg. 44,811 (July 24, 2020), Docket No. FR-6152-P-01

Dear Secretary Carson:

We, the undersigned State Attorneys General of Illinois, California, Colorado, Connecticut, Delaware, the District of Columbia, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Virginia, Washington, and Wisconsin, submit these comments to oppose the Proposed Rule, *Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs*, 85 Fed. Reg. 44,811 (July 24, 2020) ("NPRM" or "Proposed Rule"), issued by the Department of Housing and Urban Development ("HUD"). The Proposed Rule effectively rescinds a rule HUD implemented just four years ago through notice-and-comment rulemaking, *Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs*, 81 Fed. Reg. 64,763 (Sept. 21, 2016) ("2016 Equal Access Rule"), codified in 24 C.F.R. § 5.106, which expanded protections for transgender and gender nonconforming individuals in HUD-funded shelters. The Proposed Rule inflicts substantial, needless harm upon transgender and gender nonconforming individuals and should be withdrawn in its entirety.

As Attorneys General, we are charged with representing and protecting the safety and wellbeing of the people of our jurisdictions. Our offices enforce laws that protect individuals from harm and discrimination, including, in some states, laws that prohibit discrimination on the basis of gender or perceived gender identity.[1] Access to shelters is critical for transgender and gender nonconforming persons, particularly transgender youth,[2] and placement in single-sex facilities is most safely done in accordance with an individual's gender identity. The Proposed Rule permits shelters to establish policies and procedures regarding placement of transgender and gender nonconforming persons in single-sex temporary and emergency shelters and other buildings and facilities not covered by the Fair Housing Act ("FHA") based on a subjective and vague standard: a shelter provider's perception of an individual's "biological sex."[3] The Proposed Rule undermines HUD's mission to ensure "that its policies and programs serve as models for equal housing opportunity,"[4] will result in the exclusion of transgender and gender nonconforming persons from shelters, and will expose countless individuals to unnecessary risk. The Proposed Rule provides no sound basis or reasoning for rescinding and replacing the 2016 Equal Access Rule, nor evidence that the 2016 Equal Access Rule has been unsuccessful or harmful in its implementation. For these and other reasons described below, HUD should retain the 2016 Equal Access Rule and withdraw the Proposed Rule.

I. The 2016 Equal Access Rule was grounded in substantial research, evidence, and demonstrated community need.

HUD adopted the 2016 Equal Access Rule to clarify that a rule it had issued four years earlier applied to single-sex programs and facilities administered with funding from HUD. In 2012, HUD adopted *Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity*, 77 Fed. Reg. 5,662 (Feb. 3, 2012) ("2012 Rule") to protect individuals from discrimination on the basis of sexual orientation and gender identity in HUD-assisted or HUD-insured long-term housing and temporary housing programs. HUD adopted the 2012 Rule in an "effort to ensure that HUD's rental housing and homeownership programs remain open to all eligible persons regardless of sexual orientation, gender identity, or marital status."[5] In the 2012 Rule, HUD noted that many commenters expressed concern that the proposed rule failed to address how to appropriately place transgender and gender nonconforming persons in single-sex shelters in a nondiscriminatory manner. HUD acknowledged these concerns in light of "the serious problem of housing instability among transgender persons" and noted that the agency is "aware of

[1] *See* 775 ILCS 5/1-102, 103(O-1); Cal. Civ. Code § 51; 6 Del. C. § 4500–16; *Id.* at §§ 4502–3; Mass. Gen. Laws ch. 272, § 98; Me. Rev. Stat. Ann. tit. 5, § 4581; Minn. Stat. ch. 363A; Minn. Stat. §§ 363A.03, subd. 44; N.J. Stat. Ann. § 10:5-1, *et seq*.; N.Y. Exec. Law §§ 291–2, 296; Va. Code §§ 2.2-3900 *et seq.*; Va. Code § 36-96.3.

[2] Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64,763, 64,764 (Sept. 21, 2016).

[3] "Biological sex" is most commonly used to refer to sex assigned at birth based solely on a person's external reproductive organs. Though the Proposed Rule uses this term, it is reductive and ignores other biological factors like chromosomes, internal reproductive organs and brain activity and structure. Further, standard nomenclature when referring to sex assigned at birth is the term "sex," so going forward in this document we will use "sex" in lieu of the Proposed Rule's use of "biological sex," except where directly quoting the Proposed Rule or other document.

[4] Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5,662, 5,662 (Feb. 3, 2012).

[5] *Id.*

the significant challenges that transgender persons face when attempting to access shelters."[6] HUD concluded, however, that the agency needed "additional time to review this issue and determine whether setting national policy is appropriate."[7] It declined to issue guidance or regulations pertaining to this topic until the agency conducted further research.

During the subsequent four year period following the adoption of the 2012 Rule, HUD studied whether setting national policy regarding admissions and placement of transgender and gender nonconforming persons in single-sex shelters was appropriate. HUD monitored and reviewed its own programs, national research, and other Federal agency policies.[8] HUD also investigated individual cases where transgender persons were not provided equal access as required by the 2012 Equal Access Rule or faced unlawful discrimination.[9] HUD considered all of the information and evidence from the perspective of transgender and gender nonconforming persons, and from the perspective of those whose sex assigned at birth and gender identity are the same (i.e. cisgender people).[10] Among the sources HUD relied upon were findings from a 2016 study conducted by the Center for American Progress, which found that only 30% of shelters contacted by phone by individuals who identified as transgender were willing to house transgender women with other women.[11] In addition, the study found that one in five shelters turned away transgender women outright.[12] HUD also relied on a national survey on the experiences of transgender persons that showed that "nearly half (47 percent) of transgender respondents who accessed shelters left those shelters because of the treatment they received there—choosing the street over the abuse and indignity they experienced in shelters."[13] The survey showed that 25% of transgender individuals who stayed in the shelters were physically assaulted and 22% were sexually assaulted.[14]

HUD also examined a year of outcome data produced as a result of guidance the agency released on February 20, 2015, Notice CPD-015-02, "Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities,"[15] which recommended that shelters make placements based on the gender with which an individual identifies. Organizations

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[6] *Id.* at 5,669.
[7] *Id.*
[8] 81 Fed. Reg. at 64,772.
[9] *Id.* at 64,764.
[10] *Id.* at 64,772.
[11] *Id.* (citing Caitlin Rooney et al., *Discrimination Against Transgender Women Seeking Access to Homeless Shelters*, CTR. FOR AM. PROGRESS (Jan. 7, 2016), https://www.americanprogress.org/issues/lgbtq-rights/reports/2016/01/07/128323/discrimination-against-transgender-women-seeking-access-to-homeless-shelters/).
[12] *Id.*
[13] 80 Fed. Reg. 72,642, 72,644 (Nov. 20, 2015) (citing Jamie M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY, 118 (2011)).
[14] *Id.*
[15] U.S. DEPT. OF HOUSING AND URBAN DEV., CPD-015-02, APPROPRIATE PLACEMENT FOR TRANSGENDER PERSONS IN SINGLE-SEX EMERGENCY SHELTERS AND OTHER FACILITIES (2015), https://www.glad.org/wp-content/uploads/2017/01/hud-trans-shelter-guidance.pdf. We note that a copy of this Notice is only available on the internet via publication by an advocacy organization because HUD has removed this Notice from official agency archives. An archived HUD news release provides a direct link to the original text of the Notice, but this URL now links to a "Page Not Found" on the HUD website. George I. Gonzalez, *HUD Issues Guidance on Home Lending and Appropriate Placement for Transgender Persons in Homeless Shelters*, HUD ARCHIVES: NEWS RELEASES (Feb. 23, 2015), https://archives.hud.gov/news/2015/pr15-023.cfm.

began implementing this guidance and HUD's analysis of the outcome reports from shelters and social service providers showed that "transgender and other gender nonconforming persons can be and have been safely accommodated in accordance with their gender identity in single-sex facilities without" privacy, health, or safety concerns caused to other residents in shelters.[16] The results of a 2018 study affirm this conclusion: fears of increased safety and privacy violations as a result of gender identity-inclusive public accommodations nondiscrimination laws are not empirically founded.[17]

HUD's research concluded what members of transgender and gender nonconforming communities already knew: "lack of access to shelter for transgender and gender nonconforming persons, particularly those who were also homeless youths, was a pervasive problem."[18] This conclusion aligns with evidence released after the rule. Three months after the 2016 Equal Access Rule was published, the National Center for Transgender Equality released the results of its 2015 survey, which was the largest survey ever completed of transgender individuals. This survey found that nearly one-third (30%) of the 28,000 respondents who identified as transgender experienced homelessness at some point in their lives.[19] This number is striking considering only 4% of the total population of the United States will experience homelessness in their lifetimes.[20] Further, 70% of those respondents who stayed in a shelter during the previous year had reported some level of mistreatment as a direct result of being transgender.[21] Shelter and social service providers in our states report that the transgender women with whom they work will systematically decline referrals to men's single-sex shelters because of the high rates of verbal abuse, physical assault, or sexual violence they experience in these facilities.[22] Many transgender women find it safer to sleep on the streets than in men's shelters.

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[16] 81 Fed. Reg. at 64,773.

[17] Amira Hasenbush et al., *Gender Identity Nondiscrimination Laws in Public Accommodations: a Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, SEXUALITY RESEARCH & SOC. POLICY 16, 70–83 (2019), https://escholarship.org/content/qt4rs4n6h0/qt4rs4n6h0.pdf.

[18] 81 Fed. Reg. at 64,764.

[19] *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. 176 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf (finding that 70% of those who stayed in a shelter in the past year reported some form of mistreatment because of being transgender, and 52% were verbally harassed, physically attacked, and/or sexually assaulted because of being transgender).

[20] Jack Tsai, *Lifetime and 1-year Prevalence of Homelessness in the U.S. Population: Results from the National Epidemiologic Survey on Alcohol and Related Conditions-III*, 40 J. OF PUB. HEALTH 65-74 (Mar. 18, 2017), https://academic.oup.com/jpubhealth/article/40/1/65/3074503.

[21] *See supra* note 19 (explaining that 52% of those "who stayed at a shelter in the past year were verbally harassed, physically attacked, and/or sexually assaulted because of being transgender," 9% of "respondents were thrown out once the shelter staff found out that they were transgender" while "44% decided to leave the shelter because of poor treatment or unsafe conditions," 25% of respondents "decided to dress or present as the wrong gender in order to feel safe in a shelter, and 14% said that the shelter staff forced them to dress or present as the wrong gender in order to stay at the shelter").

[22] Noted by the TransLife Care Program at the Chicago House and Social Service Agency ("Since August 2014, Josie and other staff have worked with hundreds of chronically homeless transgender individuals residing on the streets, public transportation, abandoned buildings, cars, and other places unfit for human habitation. Many of these individuals were transgender women . . . . No transgender women we encountered would accept a referral to emergency shelters. Their previous experiences being placed in men's shelters always resulted in verbal abuse, physical assault, or sexual violence. They experienced greater personal safety in the places not suitable for human habitation than in the shelter system."). Letter from Elizabeth Ricks, Legal Director and Staff Attorney, TransLife Care Program, and Josie Lynne Paul, Senior Program Director, Chicago House and Social Service Agency to author

Even more alarming is the prevalence of homelessness among transgender and gender nonconforming youth. In the 2016 rulemaking, HUD cited evidence that a disproportionately high percentage of youth living on the streets identify as transgender.[23] That gap has only grown. The National Center for Transgender Equality estimates that as a result of family rejection and discrimination, 20-40% of the nearly 1.6 million homeless youth, or roughly 320,000-640,000 individuals, are transgender or gender nonconforming[24]—a staggering number given that only 2% of high school students identify as transgender.[25] A 2017 HUD-funded study found that LGBT youth are at a 120% increased risk of experiencing homelessness relative to heterosexual and cisgender youth.[26] In New York City, half of all youth experiencing homelessness or housing instability identify as LGBTQ, with 8% identifying as transgender or gender nonbinary.[27] According to a report HUD cited in the proposed 2016 Equal Access Rule, transgender youth are particularly at risk of emotional distress resulting from discrimination or harassment because of gender identity.[28]

After four years of extensive research, HUD concluded that the 2012 Rule "did not adequately address the significant barriers faced by transgender and gender nonconforming persons when accessing temporary and emergency shelters and other facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or bathing facilities."[29] HUD was therefore "ready to address the matter in regulation."[30] HUD proposed the 2016 Equal Access Rule to address this evident community need and ensure "equal access for individuals in accordance with their gender identity" in programs administered by HUD's Office of Community Planning and Development ("CPD").[31]

(Aug. 21, 2020). In California, Casa de Zulma, an organization that provides housing for transgender women in Los Angeles, expected that some transgender women would refuse housing if their only other option was a shelter that served only cisgender males. Telephone interview with Casa de Zulma (Aug. 14, 2020).

[23] 80 Fed. Reg. at 72,644 (citing Hannah Hussey, *Beyond 4 Walls and a Roof: Addressing Homelessness Among Transgender Youth*, CTR. FOR AM. PROGRESS 4 (2015); Administration for Children and Families, *Street Outreach Program: Data Collection Project Executive Summary*, U.S. DEP'T OF HEALTH AND HUMAN SERVS. (2014) (citing that a disproportionately high 6.8% of youth living on the streets identify as transgender, despite making up only 1% of the population)).

[24] *Housing & Homelessness*, NAT'L CENTER FOR TRANSGENDER EQUALITY (2020), https://transequality.org/issues/housing-homelessness (last visited Aug. 12, 2020).

[25] Valerie Strauss, *CDC: Nearly 2 Percent of High School Students Identify as Transgender—and More Than One-Third of Them Attempt Suicide*, WASH. POST (Jan. 24, 2019), https://wapo.st/2EVSWmb.

[26] Matthew Morton, et al., *Missed Opportunities: Youth Homelessness in America, National Estimates*, CHAPIN HALL AT THE UNIV. OF CHI. 12–13 (2017), http://voicesofyouthcount.org/wp-content/uploads/2017/11/ChapinHall_VoYC_NationalReport_Final.pdf.

[27] Matthew Morton, et al., *A Youth Homelessness System Assessment for New York City* CHAPIN HALL AT THE UNIV. OF CHI. 10 (2019), https://www.chapinhall.org/wp-content/uploads/Report_A-Youth-Homelessness-System-Assessment-for-NYC_2019_FINAL.pdf.

[28] *See supra* note 23 (citing Andrew Burwick et al., *Identifying and Serving LGBTQ Youth: Case Studies of Runaway and Homeless Youth Program Grantees*, MATHEMATICA POLICY RESEARCH & THE WILLIAMS INST. 19 (2014)).

[29] 81 Fed. Reg. at 64,764.

[30] *Id.* at 64,772.

[31] *Id.* at 64,763.

In our roles as Attorneys General, many of us have seen the positive impact of the 2016 Equal Access Rule in our communities.[32] To date, there is no reliable evidence that the 2016 Equal Access Rule has harmed any individuals or entities, including cisgender residents or staff of homeless shelters, or victims of abuse or domestic violence seeking shelter, nor is there any reliable evidence that the 2016 Equal Access Rule has chilled participation in HUD-funded shelter programs or resulted in unwarranted invasions of individual privacy, and the Proposed Rule identifies none. Further, the Proposed Rule cites no evidence or data that the protections enumerated in the 2016 Equal Access Rule are no longer necessary.

II. Rescinding and replacing the 2016 Equal Access Rule without evidence or justification is arbitrary and capricious.

In order to justify rescinding and replacing the 2016 Equal Access Rule only four years after its implementation, the Administrative Procedure Act ("APA") requires HUD to engage in reasoned decision-making and provide substantial justification for the change.[33] To determine whether agency action was "the result of reasoned decisionmaking . . . a court must determine what facts were before the agency at the time it acted, and whether the basis for the action is clearly set forth."[34] Under Section 706(2)(A) of the APA, a rule must be set aside if the findings and conclusions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[35] This ensures that federal agencies are held "accountable to the public and their actions subject to review by the courts."[36] A rule is arbitrary and capricious if an agency entirely fails to consider an important aspect of the problem, offers an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[37] When an agency issues a final rule that rescinds or revokes an existing rule, an agency need not always provide a detailed justification for their change in course, but "[s]ometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account."[38]

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[32] In Illinois, Legal Aid Chicago reports that the 2016 Equal Access Rule has provided transgender and gender nonconforming persons with access to critical safety-net programs, such as shelters, emergency solutions grants, and the Housing Opportunities for Persons with AIDS program. Further, social service and shelter providers, such as The Night Ministry, La Casa Norte, and the TransLife Care Program at the Chicago House & Social Service Agency, repeatedly affirm the necessity of placing transgender and gender nonconforming persons in single-sex emergency, temporary shelters in accordance with the individual's self-identified gender identity. Jaclyn Zarack Koriath, Supervisory Attorney, Legal Aid Chicago (Aug. 21, 2020).

[33] *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020) (citing *Michigan v. EPA*, 576 U.S. 743, 750 (2015)).

[34] *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 420, 416 (1971); *SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947)).

[35] 5 U.S.C. § 706(2)(A).

[36] *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

[37] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

[38] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009) (citing *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996)); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 106 (2015) (underscoring "the APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account," and affirming "it would be arbitrary and capricious to ignore such matters'").

The Proposed Rule violates the APA. It seeks to rescind the protections for transgender and gender nonconforming persons in single-sex shelters enumerated in the 2016 Equal Access Rule by modifying two sections of 24 C.F.R. part 5, Sections 5.100 and 5.106. Changes to Section 5.100 modify the definition of gender identity to revert to an outdated, vague definition that fails to appropriately include transgender and gender nonconforming persons. The Proposed Rule also removes provisions of Section 5.106 requiring that single-sex shelters permit individuals to self-identify their gender identity for purposes of admissions and placement. To justify such a dramatic change only four years after the initial rule was promulgated, HUD must demonstrate its action is reasoned and that there is substantial evidence to justify the change. Instead of providing any reasoned justification or evidence for the proposed change, HUD supports its vague prescriptions with anecdotes and mere conjecture about the experiences of those living in homeless shelters. In fact, HUD admits that the agency lacks evidence to support its conclusions.[39] Further, the Proposed Rule provides no evidence that the 2016 Equal Access Rule has been ineffective or created unintended harms. Rescinding the 2016 Equal Access Rule and replacing it with the Proposed Rule is arbitrary and capricious in violation of the APA.

A. *The Proposed Rule offers no justification for ignoring the substantial evidence that supported HUD's 2016 change to the definition of gender identity.*

First, the Proposed Rule rescinds the definition of gender identity in the 2016 Equal Access Rule, which defines gender identity as "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."[40] This definition is consistent with the generally accepted definition of gender identity.[41] The Proposed Rule reinstates the vague definition of gender identity in the 2012 Rule: "actual or perceived gender-related characteristics."[42] This ambiguous definition finds no support in common usage. What is more, in the eight years since the 2012 Rule was enacted, federal and state agencies have moved toward an interpretation of gender identity aligned with the definition as it exists in the 2016 Equal Access Rule.[43] HUD is seeking to step back in time by implementing the definition

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[39] Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. 44,811, 44,815 (proposed July 24, 2020) (to be codified at 24 C.F.R. pt. 5) ("HUD is not aware of data suggesting that transgender individuals pose an inherent risk to biological women.").

[40] 24 C.F.R. § 5.100.

[41] *See Gender identity*, MERRIAM-WEBSTER DICTIONARY, https://www merriam-webster.com/dictionary/gender%20identity (defining "gender identity" as "a person's internal sense of being male, female, some combination of male and female, or neither male nor female"); *Guidelines for Psychological Practice With Transgender and Gender Nonconforming People*, AM. PSYCHOLOGICAL ASS'N (Dec. 2015) ("Gender identity is defined as a person's deeply felt, inherent sense of being a girl, woman, or female; a boy, a man, or male; a blend of male or female; or an alternative gender.); *see also Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1292 (11th Cir. 2020) (referring to gender identity as one's "consistent, internal sense of gender"; *Flack v. Wis. Dep't of Health Servs.*, 395 F. Supp. 3d 1001, 1003–04 (W.D. Wis. 2019) (finding that "gender identity is understood by the medical profession to mean one's internal sense of one's sex" and that transgender people have a gender identity different from their sex assigned at birth).

[42] 85 Fed. Reg. at 44,812.

[43] *See* 81 Fed. Reg. at 64,767 ("In 2010, HUD issued a memorandum recognizing that sex discrimination includes discrimination because of gender identity. In 2012, the Equal Employment Opportunity Commission (EEOC) reached the same conclusion with regard to gender identity claims, 'clarifying that claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition.' Following the EEOC's decision, the U.S. Attorney General also concluded that:

of gender identity described in the Proposed Rule, which would cause confusion and conflict with current agency, state, and local laws and regulations. Further, the Proposed Rule enacts a vaguer standard than existed previously. The 2012 Rule explained that the definition of gender identity was intended to cover actual and perceived gender-related characteristics not stereotypically associated with a person's designated sex at birth, but the Proposed Rule lacks any explanation as to how to interpret its proposed definition of gender identity.[44]

HUD gave due weight to the gravity of changing the definition of gender identity when it did so in 2016; the definition was a focus area during HUD's four-year research period.[45] HUD considered "its program recipient practices, reviewed research on discrimination of transgender individuals in shelter settings, solicited input on the experiences and concerns of both clients and providers, and reviewed its own guidance,"[46] as well as guidance and regulations issued by other federal agencies regarding their gender identity nondiscrimination practices.[47] After the conclusion of this research period, HUD determined that a change to the definition was necessary because "gender identity is distinct from sex assigned at birth, is not associated with physical anatomy, and may not be indicated in medical records"; therefore, "it is important that transgender or gender nonconforming persons can self-identify their gender identity orally."[48] HUD concluded that subjecting transgender or gender nonconforming persons to intrusive questioning, or demanding they produce documentary, physical, or medical evidence of gender identity was invasive and inappropriate.[49] It is clear that the definition of gender identity set forth in the 2016 Equal Access Rule was founded upon substantial facts.

The Proposed Rule offers no justification or evidence upon which to dismiss HUD's extensive research and evidence collection in the 2016 rulemaking process. In fact, the Proposed Rule is silent as to the reasons for modifying this definition.[50] Absent clear evidence of reasoned decision-making for rescinding HUD's 2016 definition of gender identity, such an action is arbitrary and capricious and wholly unlawful.

'the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status.'"); *see also* Cal. Civ. Code § 51(e)(5) ("'Gender' means sex, and includes a person's gender identity and gender expression. 'Gender expression' means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.").

[44] 77 Fed. Reg. at 5,665.

[45] 81 Fed. Reg. at 64,777.

[46] *Id.* at 64,775.

[47] *See id.* at 64,767 ("In 2010, HUD issued a memorandum recognizing that sex discrimination includes discrimination because of gender identity. In 2012, the Equal Employment Opportunity Commission (EEOC) reached the same conclusion with regard to gender identity claims, 'clarifying that claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition.' Following the EEOC's decision, the U.S. Attorney General also concluded that: 'the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status.'").

[48] *Id.*

[49] *Id.*

[50] The Proposed Rule fails to explicitly note that it is modifying the definition of gender identity in the text of the rule. The only explicit mention of this change is found at the very end of the Proposed Rule where the actual proposed new regulations are written out. 85 Fed. Reg. at 44,818.

B. *The Proposed Rule provides no substantial justification for replacing a standard for admissions and placement that respected individuals' self-identity and maximized the safety of all residents.*

The second major change in the Proposed Rule is a revocation and replacement of parts (b)-(d) of 24 C.F.R. § 5.106. As written in the 2016 Equal Access Rule, parts (b)-(d) of Section 5.106 requires placement and accommodation decisions in single-sex temporary and emergency shelters to be made based on an individual's gender identity and requires providers with shared sleeping quarters or bathing facilities take nondiscriminatory steps to address privacy concerns raised by residents or occupants.[51] In its stead, HUD drafted two new sections of the regulation in the Proposed Rule. Section 5.106(c) as drafted in the Proposed Rule addresses the specifics of admissions and placement decisions, and states that recipients, subrecipients, owners, operators, managers, or providers of temporary or emergency shelters or other buildings or facilities with physical limitations or configurations:[52] (1) "may make admission and accommodation decisions based on [their] own policy for determining sex" provided that such policy complies with the rest of the regulation, federal, state, and local law; (2) may take privacy, safety, and "other relevant factors" into consideration when establishing policies; (3) must apply their policies in a uniform and consistent manner and upon a good faith belief that an individual is not the sex with which they identify, "may request information or documentary evidence of the person's sex, except that the shelter may not request evidence which is unduly intrusive of privacy"; and (4) must use the centralized or coordinated assessment system to provide a transfer recommendation to an alternative shelter for any individual denied accommodations.[53]

The Proposed Rule's new Section 5.106 runs counter to research-based principles identified during the 2016 rulemaking process, opens the door to discrimination on the basis of gender identity, and provides no reason for disregarding the substantial research collected during the 2016 rulemaking process. HUD disregards its own research that indicated that placement of transgender and gender nonconforming persons should be done in accordance with an individual's gender identity to ensure safety and security, and to combat discrimination.[54] While HUD does not limit providers from establishing policies permitting applicants for admission to a facility to self-identify their gender identity for purposes of placement, HUD simultaneously permits providers who choose not to do so to establish policies based on a subjective evaluation of an individual's

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[51] The Proposed Rule removes all language from the 2016 Equal Access Rule's version of 24 C.F.R. § 5.106(b)-(d) except the following text from Section 5.106(b): "The admissions, occupancy, and operating policies and procedures of recipients, subrecipients, owners, operators, managers, and providers identified in paragraph (a) of this section . . . shall be established or amended, as necessary, and administered in a nondiscriminatory manner to ensure that . . . [e]ligibility determinations are made and assisted housing is made available in CPD programs as required by § 5.105(a)(2)." *Id.* at 44,811.

[52] Applicability of this regulation is "to assistance provided under Community Planning and Development (CPD) programs, including assistance under the following CPD programs: HOME Investment Partnerships program (24 CFR part 92), Housing Trust Fund program (24 CFR part 93), Community Development Block Grant program (24 CFR part 570), Housing Opportunities for Persons With AIDS program (24 CFR part 574), Emergency Solutions Grants program (24 CFR part 576), Continuum of Care program (24 CFR part 578), or Rural Housing Stability Assistance Program (24 CFR part 579)." 24 C.F.R. § 5.106(a).

[53] 85 Fed. Reg. at 44,818.

[54] "Transgender and gender nonconforming persons must not be placed based on perceived gender identity when it is in conflict with an individual's self-identified gender identity. This approach is consistent with current research, with HUD's existing guidance, and with other Federal agency policy." 81 Fed. Reg. at 64,775.

sex that may be founded in bias, unfounded fear, and stereotypes. HUD has not offered a substantial justification for this change.

1. The Proposed Rule fails to address the impact of its proposed changes on the safety of transgender and gender nonconforming individuals.

The Proposed Rule fails to consider a critical aspect of the problem that led to the development of the 2016 Equal Access Rule: the safety of transgender and gender nonconforming persons. In promulgating the 2016 Equal Access Rule, HUD was responding to evidence that transgender individuals experienced violence and harassment in shelters and nearly half of these individuals left shelters because of the violence and harassment they experienced.[55] HUD was particularly concerned about homeless transgender youths' access to housing and services because evidence demonstrated that they were particularly at risk for emotional distress resulting from discrimination and harassment based on gender identity.[56] HUD resolved that admissions and placement decisions should be based on gender identity as identified by the individual seeking access to the shelter, because such a policy best facilitates access to shelter for transgender and gender nonconforming persons and is least likely to subject them to violence and harassment. HUD reviewed evidence indicating that prior to the 2016 Equal Access Rule, most shelters were unwilling to house transgender women with other women and heard from commenters that reported that many transgender shelter-seekers would choose the streets over a shelter designated based on their sex at birth.[57] The Proposed Rule does not consider this problem, much less address the adverse impact that the Proposed Rule will have on access to safe housing for transgender and gender nonconforming persons. Instead, it simply reimplements a policy that was proven unsuccessful, and allows shelter providers to turn transgender and gender nonconforming persons, as well as other individuals who providers deem not to appear male or female, away.

The Proposed Rule also fails to address any reliance interests engendered by the existing Rule. Individuals who have been safely accommodated in shelters based on their gender identity may be removed from their existing housing and may be unable to find shelter that accommodates them based on their gender identity. The Proposed Rule will restrict housing options for transgender and gender nonconforming persons without substantial justification.

To purportedly ameliorate the impact of its decision to restrict housing options for transgender and gender nonconforming persons, HUD proposes a requirement that providers who refuse to admit transgender or gender nonconforming persons on a "good faith belief that a person seeking access to the shelter is not of the sex which the shelter accommodates"[58] must refer the shelter-seeker to another shelter.[59] But in many suburban and rural areas, there are few shelters

[55] *Id.* at 64,764.
[56] *Id.*
[57] *Id.*
[58] 85 Fed. Reg. at 44,818.
[59] HUD seeks comment on whether the Proposed Rule's requirement of providing a transfer recommendation is unduly burdensome. It is not and should remain in the Proposed Rule, should HUD disregard our recommendation to withdraw the Proposed Rule in its entirety.

available,[60] which means there may be no alternate shelters available for a referral within a reasonable distance. The Proposed Rule includes no indication that HUD considered this problem and includes no provision for addressing this situation. Allowing shelter providers to deny admission to transgender and gender nonconforming individuals will inevitably result in the displacement of transgender and gender nonconforming persons across the country from geographic areas where they may have established connections, relationships with social service providers, and/or employment. It will also place undue burden on the few shelters in rural areas that are willing to admit transgender or gender nonconforming persons and place these persons in accordance with their gender identity.[61] The Proposed Rule will cause direct harm to transgender and gender nonconforming persons experiencing homelessness across the country.[62] HUD fails to provide any justification for imparting this harm.

For transgender homeless persons, finding shelter is vital. The unsheltered homeless population faces a dramatically higher mortality rate than sheltered homeless persons and, as noted above, a disproportionate percentage of the transgender and gender nonconforming population experiences homelessness at some point in their lives.[63] The dangers unsheltered homeless transgender persons face, especially those of color, were tragically highlighted in the recent brutal murder of transgender woman Marilyn Cazares, who was experiencing homelessness at the time she was found stabbed to death in an abandoned building in July 2020.[64] In July alone, Ms. Cazares was one of six transgender or gender nonconforming persons who were victims of violent deaths in the United States, all but one of whom were also people of color.[65] To date in 2020, 26 transgender or gender nonconforming persons have died of fatal violence.[66] In 2019, the Human

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[60] The Night Ministry in Chicago, an organization that provides housing, health care, outreach, spiritual care, and social services, to adults and youth experiencing homelessness, reports that "[j]ust because the rule requires that a shelter utilize the COC's [Continuum of Care] coordinated entry system to provide a transfer recommendation to an alternative shelter or accommodation, doesn't mean that there will be an immediate accommodation available in the area. Many COC's that are not in urban areas consist of catchment areas that span hundreds of miles." Kim Hunt, Executive Director, Pride Action Tank (Aug. 22, 2020).

[61] We note that the overburdening of shelters is likely to occur in our states, many of which have existing statutory nondiscrimination provisions for individuals on the basis of gender identity.

[62] The Los Angeles Downtown Women's Center and Casa de Zulma explained they would not have capacity for the influx of "transfer recommendations" contemplated by the Proposed Rule, as their beds are already consistently full. Telephone Interview with Casa de Zulma (Aug. 14, 2020). Indeed, the Proposed Rule lacks any survey of shelters serving transgender or gender nonconforming individuals as to the unsupported the projected number of transfers, or the ability to receive transfers.

[63] Jill S. Roncarati, ScD, MPH, PA-C et al., *Mortality Among Unsheltered Homeless Adults in Boston, Massachusetts 2000-2009*, JAMA INTERNAL MED. (July 30, 2018), https://nhchc.org/wp-content/uploads/2019/08/boston-mortality-study_2018.pdf (finding unsheltered individuals die at nearly three times the rate of sheltered individuals); *see supra* note 19.

[64] Elliot Kozuch, *HRC Mourns Marilyn Cazares, Trans Latina Killed in California*, THE HUMAN RIGHTS CAMPAIGN (July 16, 2020), https://www.hrc.org/news/hrc-mourns-marilyn-cazares-trans-latina-killed-in-california.

[65] Sakshi Venkatraman, *'Brave' and 'Outspoken' Marilyn Cazares Among Six Transgender Americans Killed in July*, NBC NEWS (Aug. 4, 2020), https://www nbcnews.com/feature/nbc-out/brave-outspoken-marilyn-cazares-among-six-transgender-americans-killed-july-n1235642.

[66] *Violence Against the Transgender and Gender Non-Conforming Community in 2020*, THE HUMAN RIGHTS CAMPAIGN (2020), https://www hrc.org/resources/violence-against-the-trans-and-gender-non-conforming-community-in-2020.

Rights Campaign tracked at least 27 transgender or gender non-conforming persons in the U.S. who died of fatal violence, the majority of whom were Black transgender women.[67]

Before the 2016 Equal Access Rule, one domestic violence advocate described the experience of a transgender woman who sought refuge at a shelter in Massachusetts from her partner who had almost killed her.[68] There, shelter staff asked her intrusive questions about her body before ultimately deeming her a man and turning her away. She returned to her abuser because she had nowhere else to go. According to Mara Keisling, executive director of the National Center for Transgender Equality, "[t]he programs impacted by this rule are lifesaving for transgender people, particularly youth rejected by their families, and a lack of stable housing fuels the violence and abuse that takes the lives of many transgender people of color across the country."[69] Transgender and gender nonconforming persons who are turned away at shelters because of the Proposed Rule will face increased risks and a higher rate of preventable violence and death.[70]

2. <u>The Proposed Rule ignores the overwhelming evidence that housing transgender women in women's shelters has proven to be an effective and safe option for individuals facing homelessness.</u>

During the 2016 rulemaking process, HUD specifically sought to address concerns about any possible effects upon the safety of shelter residents, particularly cisgender women who may be housed with transgender women. There are inherent security risks in running any sort of shelter; individuals experiencing homelessness are often in the midst of the trauma of losing stable housing, and a high proportion of these individuals have a history of trauma.[71] The Substance Abuse and Mental Health Services Administration reports that "30% of people experiencing chronic homelessness have a serious mental illness, and around two-thirds have a primary substance use disorder or other chronic health condition."[72] Individuals experiencing homelessness

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[67] *Id.*

[68] Rishita Apsani, *Are Women's Spaces Transgender Spaces? Single-Sex Domestic Violence Shelters, Transgender Inclusion, and the Equal Protection Clause*, 106 CAL. L. REV. 1689 (2018) (citing GLBT Domestic Violence Coal. & Jane Doe Inc., *Shelter/Housing Needs for Gay, Lesbian, Bisexual and Transgender (GLBT) Victims of Domestic Violence* (2005), https://perma.cc/XJ4L-G8QH).

[69] Press Release, Nat'l Ctr. for Transgender Equal., Trump Administration Announces Plan to Gut Protections for Trans People in Shelters (May 22, 2019), https://transequality.org/press/releases/trump-administration-announces-plan-to-gut-protections-for-trans-people-in-shelters.

[70] *See e.g.*, Karma Allen, *Transgender Woman's Murder Underscores Problem of Partner Violence Plaguing Community, Advocates Say*, ABC NEWS (Sept. 13, 2019), https://abcnews.go.com/US/transgender-womans-murder-underscores-problem-partner-violence-plaguing/story?id=65203137 (reporting on the violent murder of Tracy Williams, a homeless transgender woman); Elliott Kozuch, *HRC Mourns Neulisa Luciano Ruiz, Trans Woman Killed in Puerto Rico*, THE HUMAN RIGHTS CAMPAIGN (Feb. 25, 2020), https://www hrc.org/news/hrc-mourns-neulisa-luciano-ruiz-trans-woman-killed-in-puerto-rico (reporting on the violent murder of Neulisa Luciano Ruiz, a homeless transgender woman); Doha Madani, *Police Investigate 11th Murder of a Black Transgender Woman this Year*, NBC NEWS (June 27, 2019), https://www nbcnews.com/feature/nbc-out/police-investigate-11th-murder-black-transgender-woman-year-n1023526 (reporting on the violent murder of Brooklyn Lindsey, a homeless transgender woman).

[71] *Trauma*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN. (2020), https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/trauma.

[72] *Grant Programs and Services*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN. (2020), https://www.samhsa.gov/homelessness-programs-resources/grant-programs-services.

are highly vulnerable to violence and re-traumatization.[73] Housing many people, simultaneously, who may be experiencing significant trauma has risks. But there is no evidence that individuals who are transgender or gender nonconforming are a cause of any additional risk or trauma to others in shelters as a result of their gender identity. To the contrary, the 2016 Equal Access Rule made temporary and emergency shelters safer for a greater number of individuals by extending nondiscrimination provisions to transgender and gender nonconforming persons, encouraging the use of privacy accommodations for any person who may require such protections, and thereby reducing homelessness.

Research HUD collected during the 2016 rulemaking process showed that transgender and gender nonconforming persons can be safely accommodated in accordance with their gender identities, a conclusion affirmed by experiences in our states. HUD studied the year-long effects of implementation of the guidance it released on February 20, 2015,[74] which recommended shelters make admissions placement decisions based on self-identified gender identity. Agencies that began implementing this guidance found that "transgender and other gender nonconforming persons can be and have been safely accommodated in accordance with their gender identity in single-sex facilities without" privacy, health, or safety concerns caused to other residents in shelters.[75] Further, HUD analyzed whether the 2016 Equal Access Rule would conflict with other statutory guidance that seeks to ensure the safety of female domestic violence victims living in shelters and found no conflict with existing laws. HUD reviewed the Department of Justice's guidance regarding the Violence Against Women Act's ("VAWA") nondiscrimination provision and found no conflict between VAWA and the 2016 Equal Access Rule.[76] HUD acknowledged the inherent risks of operating a shelter and acknowledged that incidents involving any shelter resident causing an unsafe situation may arise, but noted that when an incident arises that threatens the safety of any resident, the agency expects that the shelter will take appropriate steps to immediately mitigate the risks.[77]

The evidence HUD collected in 2016 aligns with studies and trials that have been carried out by social service agencies in our States. In 2015, the TransLife Care Program at the Chicago House, located in Illinois, collaborated on a grant to integrate housing for homeless transgender women at a local women's shelter, Sarah's Circle. The agency integrated 24 transgender women into the women's shelter in the first year and reported that "transgender women and cisgender women were successfully integrated into one shelter with minimal difficulties." Further, the majority of the transgender women went on to achieve permanent housing and saw an end to the chronic homelessness they had previously faced. The program required minimal ongoing specialized consultation and training to implement and demonstrated that transgender and cisgender individuals can feel safe enough to access housing options where individuals are housed in accordance with their gender identity.[78] The Los Angeles Downtown Women's Center, the first

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[73] *See supra* note 71.
[74] *See supra* note 15.
[75] 81 Fed. Reg. at 64,773.
[76] *Id.* at 64,774.
[77] *Id.* at 64,772.
[78] Elizabeth Ricks, Legal Director and Staff Attorney, TransLife Care Program, and Josie Lynne Paul, Senior Program Director, Chicago House and Social Service Agency (Aug. 21, 2020).

permanent supportive housing center for women in the United States, affirms that any assertion of risk posed by housing transgender individuals is "categorically false."[79]

The evidence is clear and abundant: housing transgender women in accordance with their gender identity is safe and effective at reducing homelessness, which aligns with HUD's mission. In 2018, 300 anti-sexual assault and domestic violence organizations signed a national consensus statement that all of these leaders agree: housing transgender women with women is appropriate and is not a safety issue.[80] Furthermore, the organizations added that as of 2018, "[o]ver 200 municipalities and 18 states have [enacted] nondiscrimination laws protecting transgender people's access to facilities consistent with" their self-identified gender and "[n]one of those jurisdictions have seen a rise in sexual violence or other public safety issues due to nondiscrimination laws."[81] On July 2, 2020, the National Task Force to End Sexual and Domestic Violence emphasized its support of the 2016 Equal Access Rule and issued a statement that it "strongly supports full and equal access to housing and shelter for the transgender community."[82] The statement condemns rolling back the 2016 Equal Access Rule's protections for transgender and gender nonconforming homeless persons because the long history of violence and harassment experienced by transgender and gender nonconforming persons clearly indicates that these individuals will be placed in immediate harm without the protections enumerated in the 2016 Equal Access Rule.[83]

In instances where privacy measures are required, the 2016 Equal Access Rule states that shelter providers may make policy adjustments to accommodate the needs of all residents. For example, HUD noted that shelters could use schedules to "provide equal access to bathing facilities, and modifications to facilities, such as the use of privacy screens."[84] While such accommodations certainly assist transgender and gender nonconforming persons, these are also measures that benefit all residents by providing safer, more private environments for all. "[A]ll of us, including transgender people, are deeply concerned about safety and privacy in restrooms."[85] Privacy measures can be easy to implement, and the benefits to all are substantial.[86]

The Proposed Rule provides mere anecdotes and speculation of unfounded fear and safety issues to justify its proposed changes, but fails to provide any evidence that housing transgender and gender nonconforming persons in accordance with their gender identity poses a threat to the safety of any residents in shelters. Indeed, in the Proposed Rule, HUD acknowledges a lack of data

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[79] California Attorney General's Office call with LA Downtown Women's Center, (Aug. 19, 2020).
[80] *National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community*, THE NAT'L TASK FORCE TO END SEXUAL & DOMESTIC VIOLENCE (Apr. 13, 2018), http://www.4vawa.org/ntf-action-alerts-and-news/2018/4/12/national-consensus-statement-of-anti-sexual-assault-and-domestic-violence-organizations-in-support-of-full-and-equal-access-for-the-transgender-community.
[81] *Id.*
[82] *Statement on Housing and Urban Development (HUD) Rollback on Equal Access Rule Protection*s, THE NAT'L TASK FORCE TO END SEXUAL & DOMESTIC VIOLENCE (July 2, 2020), http://www.4vawa.org/ntf-action-alerts-and-news/2020/7/2/wa1koo9jrmb2jeuruffjfp9j5y6q6p.
[83] *Id.*
[84] 81 Fed. Reg. at 64,772.
[85] *See supra* note 80.
[86] As an example, the Los Angeles Downtown Women's Center explains that providing shelter to transgender women was no additional cost. Telephone Interview with LA Downtown Women's Center (Aug. 19, 2020).

that transgender individuals pose any risk to cisgender women.[87] For example, in defense of an argument that transgender women may pose a risk to other residents in a women-only shelter, HUD cites a news article that relays an attorney's statement in court that women in an Alaska shelter expressed a preference to shelter officials that transgender women not be admitted.[88] That case, however, does not apply to the conclusion HUD propounds as the case was decided on the technical ground that the shelter was exempted from a local ordinance, not on the substance of the plaintiff shelter's claims of any alleged risks caused by the transgender woman.[89]

The Proposed Rule acknowledges the high rate of sexual assault and abuse among homeless women, but the conclusion it draws from these statistics—that "some homeless women would be expected to distrust and feel unsafe around biological men"[90]—is pure conjecture. The Proposed Rule also cites one federal case in Fresno, California in which homeless women who had resided at a women-only shelter filed a complaint against shelter staff for inappropriately handling an instance involving a transgender woman allegedly acting in a sexually harassing manner toward others in the shelter.[91] The shelter has denied these allegations, but even if the allegations were true, HUD's reference to this incident is based on the incorrect and discriminatory assumption that this person's gender identity contributed to, caused, or was otherwise related to the harassing conduct. The imputation of the anecdote is that transgender women will act inappropriately. But using alleged misconduct by one person to draw conclusions about an entire protected class is discriminatory, unscientific, and wrong. Moreover, nothing in the 2016 Equal Access Rule altered shelter providers' obligation to provide a safe environment for all residents.[92]

The results of the research conducted between 2012 and 2016 is overwhelming and clear: housing transgender women in women's shelters poses no risks to the safety of any residents and provides a safer environment for transgender women. The 2016 Equal Access Rule provides a critical lifeline for transgender and gender nonconforming persons without adversely impacting the safety or privacy of other shelter residents. The Proposed Rule provides no reasonable basis for disregarding these facts, and in lieu of evidence, research, or data, the Proposed Rule has supplemented with isolated stories of bias, unfounded fear, and speculation, and it has drawn conclusions that have no sound basis in fact.

3. <u>The Proposed Rule is impractical and cannot be realistically implemented; HUD itself admits it does not know how the proposed changes can be applied in a nondiscriminatory manner.</u>

The Proposed Rule not only fails to provide justification for its proposed changes, but HUD is unable to explain how the changes in the Proposed Rule will be implemented in a

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[87] 85 Fed. Reg. at 44,815 ("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 non-transgender, biological men may exploit the process of self-identification under the current rule in order to gain access to women's shelters.").
[88] *Id.*
[89] *Downtown Soup Kitchen v. Municipality of Anchorage*, 406 F. Supp. 3d 776, 796–97 (D. Alaska 2019).
[90] 85 Fed. Reg. at 44814–15.
[91] *Id.* at 44,815 (citing *McGee v. Poverello House*, No. 1:18-cv-00768-LJO-SAB, 2018 U.S. Dist. LEXIS 189174, at *3 (E.D. Cal. Nov. 5, 2018)).
[92] 24 C.F.R. § 5.106.

nondiscriminatory manner—because it is impossible to implement the policies propounded by the Proposed Rule in a nondiscriminatory manner. The Proposed Rule purports that shelter providers may establish reasonable, nondiscriminatory policies that rely upon staff working at the shelters to determine an individual's sex by perception only, but fails to provide any standards or guidance in establishing these policies aside from stating that such policies must comply with federal, state, and local laws. This means that admissions decisions may be made based upon subjective factors that can differ widely across providers, a needlessly vague and harmful regulation. HUD does not even know what may constitute a reasonable policy to determine an individual's gender identity by perception alone, as evidenced by the Proposed Rule's request for comment on this topic.[93]

In a particularly flagrant display of the lack of research that underlies the Proposed Rule, and the proposed changes to Section 5.106(c) in particular, HUD requests commenters to provide input as to how to identify "good faith considerations that are indicative of a person's biological sex."[94] HUD explains in the Proposed Rule that perception-based determinations of sex might be gleaned from "factors such as height, the presence (but not absence) of facial hair, the presence of an Adam's apple, and other physical characteristics."[95] None of the aforementioned features are determinative of an individual's sex at birth: individuals born as female can have facial hair[96] and visible Adam's apples,[97] and height and other physical characteristics are widely known to vary dramatically from person to person, regardless of sex. The Proposed Rule will therefore also impact cisgender people who do not fit into gender stereotypes of physical appearance. HUD provides no reasonable measure in the Proposed Rule by which to determine an individual's sex by perception alone because it is impossible to determine sex by perception alone. Moreover the indignity that a transgender woman—or a cisgender woman—would face by a shelter operator eyeing them up and down and being judged on their perceived womanliness may cause some women to forego seeking shelter.[98]

The proposed changes to Section 5.106 permit shelter providers to inquire further into an individual's self-identified sex by requesting documents or other evidence that might depict sex, but also notes that all such evidence is not fully determinative of an individual's sex. The Proposed Rule states that "lack of government identification alone cannot be the sole basis for denying admittance on the basis of sex,"[99] appropriately bars any request for evidence that may be "unduly

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[93] 85 Fed. Reg. at 44,817 ("HUD requests comments on what are good faith considerations that are indicative of a person's biological sex. Should HUD define what constitutes a good faith belief for determining biological sex and what type of evidence would be helpful for determining an individual's biological sex? How, if at all, should government IDs be considered?").
[94] *Id.*
[95] 85 Fed. Reg. at 44,816.
[96] S*ee* Melissa H. Hunter et al., *Evaluation and Treatment of Women with Hirsutism*, 67 AM. FAMILY PHYSICIAN 2565 (2003), https://www.aafp.org/afp/2003/0615/afp20030615p2565.pdf.
[97] "The broader angle in women causes it to protrudes less, not push up against the skin of the neck, and ultimately be less visible." Thomas H. Fitzpatrick et al., *Anatomy, Head and Neck, Adam's Apple*, STATPEARLS (Dec 6, 2018), https://www.ncbi.nlm.nih.gov/books/NBK535354/.
[98] Casa de Zulma in Los Angles emphasized that the indignity transgender women would face under this rule coupled with individuals who may be dealing with other mental or physical health problems and who may have been victimized and abused for their transgender status, will cause some women to forego seeking shelter. Telephone Interview with Casa de Zulma (Aug. 14, 2020).
[99] 85 Fed. Reg. at 44,816.

intrusive of privacy, such as private physical anatomical evidence,"[100] and therefore begs the question: what is acceptable proof of sex? Individuals who are homeless may have difficulty retaining belongings, including, but not limited to, vital paperwork or identification materials.[101] HUD is aware of this concern, as it acknowledged these issues in the 2016 Equal Access Rule.[102] Requiring an individual to present undefined evidence of their sex if their appearance is contrary to another's perception of their sex sets a policy that is impermissibly vague and unfair. Further, this policy establishes a standard that is self-contradictory and impossible for shelter providers to implement. Admissions, placement, and accommodation decisions will therefore most likely be entirely based upon staff members' perceptions. Further evidence of the Proposed Rule's contradictory reasoning is demonstrated by the statement that if "a person voluntarily self-identifies as the biological sex that is opposite that served by a single-sex facility," such self-identification can constitute a good faith basis to deny the individual access to the facility.[103] The Proposed Rule simultaneously permits a provider to rely on self-identification to deny an individual access to its facilities but to refuse to rely on self-identification to admit an individual access to its facilities. In either case, the decision may have no relationship to the sex of the individual.

The Proposed Rule is sloppily drafted[104] and lacks reasoned thought on its implementation. HUD has failed to consider a key element of the proposed changes to the regulations: how the regulations can be implemented in shelters in a nondiscriminatory manner. The Proposed Rule propounds vague guidelines that are difficult to interpret and opens the door to pernicious sex stereotyping and discriminatory denial of shelter.

III. The additional reasons HUD cites to justify the Proposed Rule do not support rescinding the life-saving provisions of the 2016 Equal Access Rule.

The Proposed Rule cites several additional reasons for rescinding the core protections in the 2016 Equal Access Rule. The Proposed Rule alleges that the 2016 Equal Access Rule impermissibly restricted single-sex facilities in a way not supported by congressional enactment; failed to reflect the constitutional principles of democracy and federalism; burdened religious organizations; and imposed regulatory burdens. On close examination, each of these arguments lacks basis in fact and law and does not support the changes outlined in the Proposed Rule.

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[100] *Id.*

[101] *See*, *e.g.*, *Enrolling Children and Youth Experiencing Homelessness in School*, NAT'L CTR. FOR HOMELESS EDUC. 3 (Aug. 2017), https://nche.ed.gov/wp-content/uploads/2018/10/enrollment.pdf.

[102] 81 Fed. Reg. at 64,767 ("Homeless persons encounter difficulties in maintaining their identification documents, and individuals whose gender identities differ from sex assigned at birth experience varying levels of difficulty in updating gender markers on identification documents.").

[103] 85 Fed. Reg. at 44,816.

[104] HUD directly attributes quotes as from the "2016 Rule" in the text of the Proposed Rule, but in footnotes 8 and 10, which correspond to such quotes, cites to the proposed version of the 2016 Equal Access Rule released for public comment on November 20, 2015. The final 2016 Equal Access Rule contained significant revisions based on comments submitted, as detailed in the final 2016 Equal Access Rule. 85 Fed. Reg. at 44,811.

A. *HUD acted within its statutory authority in promulgating the 2016 Equal Access Rule and the rule reflects the constitutional principles of democracy and federalism.*

The Proposed Rule incorrectly asserts that HUD exceeded its authority in the 2016 Equal Access Rule by failing to rely on an explicit grant of authority and by prohibiting temporary and emergency shelters from operating as single-sex facilities, purportedly in contravention of the FHA. HUD acted under appropriate agency authority in promulgating the 2016 Equal Access Rule, as the FHA prohibits discrimination on the basis of gender identity in shelters and HUD reasonably added this prohibition to agency rules, a permissible agency action. For facilities not covered by the FHA, HUD is permitted to set program rules for all facilities that receive funding from the agency and is permitted to enforce those rules.

First, contrary to the Proposed Rule's contention, HUD relied in part on its authority under the FHA in promulgating the definition of gender identity found in the rule.[105] The FHA prohibits discrimination on the basis of protected characteristics, including sex.[106] As HUD explained during the 2016 rulemaking, "[d]iscrimination because of gender identity is covered within the Fair Housing Act's prohibition of sex discrimination."[107] This interpretation is consistent with the Supreme Court's decision in *Bostock v. Clayton County, Georgia*, which concluded that discrimination against transgender persons is discrimination based on sex under Title VII.[108] Title VII and the FHA use similar language and courts often look to precedent under Title VII as persuasive when interpreting similar language in the FHA.[109]

Second, in the 2016 Equal Access Rule, HUD regulated under its authority to set program rules for all facilities that receive funding from the agency, and to enforce those rules. It is HUD's responsibility to address "the needs and interests of the Nation's communities and of the people who live and work in them."[110] The 2016 Equal Access Rule sought to carry out HUD's mission of supporting "effective models at reducing homelessness and providing emergency shelter for those in need, including through supporting single-sex or sex-specific shelters" in a nondiscriminatory manner.[111] Congress has granted HUD broad authority to fulfill its mission and implement its responsibilities through rulemaking.[112] Section 5.106 of both the 2016 Equal Access

[105] 81 Fed. Reg. at 64,770.
[106] 42 U.S.C. §§ 3604–05.
[107] 81 Fed. Reg. at 64,770.
[108] *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1741 (2020).
[109] *See, e.g.*, *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 545–46, (2015) (citing the Title VII interpretation outlined in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) as a basis for its holding that disparate impact claims are cognizable under the FHA); *Prop. Cas. Insurers Ass'n of Am. v. Donovan*, 66 F. Supp. 3d 1018, 1053 (N.D. Ill. 2014) ("Courts have repeatedly turned to Title VII precedent for guidance evaluating disparate impact liability under the FHA (Title VIII) and vice versa.").
[110] *See* 42 U.S.C. § 3531.
[111] 85 Fed. Reg. at 44,811.
[112] 81 Fed. Reg. at 64,769 (citing Section 2 of the Housing Act of 1949 (42 U.S.C. § 1441); Section 2 of the Housing and Urban Development Act of 1968 (12 U.S.C. § 1701t); Sections 101 and 102 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. §§ 12701–702); and Section 2(b) of the Housing and Community Development Act of 1974 (42 U.S.C. § 5301 note)). Moreover, statutes that created the CPD programs covered by the 2016 Equal Access Rule give HUD the authority explicitly or implicitly to set standards for receipt of funding. *E.g.*, 42 U.S.C. § 11386(b)(8) ("The Secretary may not provide assistance for a proposed project under this part unless the collaborative

Rule and the Proposed Rule apply to recipients and subrecipients of assistance under HUD programs, as well as to owners, operators, and managers of shelters and other buildings and facilities and providers of services funded in whole or in part by HUD.

Under its enabling statute, HUD may "make such rules and regulations as may be necessary to carry out [its] functions, powers, and duties."[113] As the Nation's housing agency, HUD reasonably ensured that its own programs do not involve arbitrary discrimination against any individual or family otherwise eligible for HUD-assisted or -insured housing and that its policies and programs serve as models for equal housing opportunity.[114] In the 2016 Equal Access Rule, HUD designed a rule that assured that the programs it funds facilitate access to those most in need. Shelters may elect not to be bound by HUD regulations by declining HUD funding. There is no penalty for not accepting HUD funding, and indeed, many shelters across the country successfully run programming without any funding from the federal government. HUD's 2016 Equal Access Rule created program requirements for the administration of HUD-assisted and HUD-insured facilities—a wholly permissible action that was well within the scope of HUD's authority.[115]

Further, contrary to HUD's contention, the Proposed Rule does not "better reflect the constitutional principles of democracy and federalism."[116] Notably, the 2016 Equal Access Rule only impacts the admissions and placement policies of the subset of single-sex temporary and emergency shelters that receive federal funding. It has no impact on the operation or interpretation of states' and localities' laws protecting against gender identity discrimination more broadly.

Finally, the Proposed Rule provides no support for HUD's assertion that the 2016 Equal Access Rule restricts shelters from operating as single-sex facilities contrary to the FHA. Transgender women whose gender identity is female are women and are therefore appropriately placed in a designated women's facility. The Proposed Rule focuses only on "biological sex," but provides no support for the notion that Congress, in passing the FHA, had any intention with respect to shelter providers' admissions and placement policies for transgender and gender nonconforming persons. There is no evidence that Congress considered this issue or defined "sex" in accordance with HUD's proposed new policy choice, which is based primarily on perception.

B. *The 2016 Equal Access Rule protects against unlawful discrimination in federally funded facilities without limiting the religious freedom of shelter providers or residents.*

In the Proposed Rule, HUD suggests that the nondiscrimination provisions in the 2016 Equal Access Rule burden shelters with deeply held religious convictions but provides no evidence

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applicant involved agrees . . . to comply with such other terms and conditions as the Secretary may establish to carry out this part in an effective and efficient manner."); 42 U.S.C.§ 11408(d) ("In order to be eligible to receive a grant . . . an organization shall submit an application to the Secretary at such time, in such manner, and containing such information as the Secretary may require").

[113] 42 U.S.C. § 3535(d).

[114] 77 Fed. Reg. at 5,662.

[115] *See Thorpe v. Hous. Auth. of City of Durham*, 393 U.S. 268, 281 (1969) (recognizing HUD's authority to make rules that support its purpose of assuring a decent home and suitable living environment for every American family).

[116] 85 Fed. Reg. at 44,813.

to substantiate this supposition. The 2016 Equal Access Rule does not impose upon any religious liberties; it enacts necessary nondiscrimination provisions that simply ensure that as many individuals may have access to temporary and emergency shelter as possible.

The Proposed Rule primarily relies on a single district court case, *Downtown Soup Kitchen v. Anchorage*, to support its contention that "the 2016 Rule burdened those shelters with deeply held religious convictions." Yet HUD neglects to point out that this case did not even mention, let alone turn on, the 2016 Equal Access Rule. The plaintiff in the case, the Hope Center, a homeless shelter, asserted that sex is immutable, and only accepted persons it believed to be "biological females" into its overnight shelter for women.[117] The Hope Center alleged that Anchorage violated the First and Fourteenth Amendments, the Establishment Clause, and the Alaska Constitution by investigating a transgender woman's complaint against the shelter for violations of anti-discrimination provisions in the Anchorage municipal code.[118] The court granted a preliminary injunction, finding a likelihood of success that the Hope Center was not a public accommodation under an Anchorage ordinance, and the parties subsequently settled the case.[119] *Downtown Soup Kitchen* says nothing about the impact of the 2016 Equal Access Rule: it was not decided based on federal constitutional grounds, and it did not involve or cite the 2016 Equal Access Rule.[120] In short, the case fails entirely to support HUD's analysis of the impact of the 2016 Equal Access Rule on the religious liberty of shelter providers.

The 2016 Equal Access Rule does not impose upon any individual or entity's religious liberty in any manner. Faith-based shelters remain free to establish policies and practices, including those expressing their religious beliefs in such a way that best fits their beliefs and programs, separate and outside the reach of HUD-funded programs. HUD has cited no evidence in the Proposed Rule that the 2016 Equal Access Rule has deterred faith-based shelters from entering HUD programs. Even the case cited in the Proposed Rule as supposed justification for this claim does not state that the Hope Center was deterred from receiving HUD funds by HUD's regulations.[121] Moreover, HUD has rightly concluded that religious beliefs should not be used to justify discrimination in federally-funded facilities:

> The exclusion of an individual or family from CPD-funded shelter because the individual is transgender or the family has one or more transgender members is inconsistent with HUD's mission to ensure decent housing and a suitable living environment for all. It is equally inappropriate to isolate or ostracize individuals because their gender identity is not the same as their sex assigned at birth. It is incumbent on HUD to ensure that the regulations governing its housing programs make clear that such arbitrary exclusion, isolation, and ostracism will not be tolerated in HUD-assisted housing and shelters. Moreover, . . . in dwellings covered by the Fair Housing Act, exclusion or unequal treatment based on an individual's gender

[117] *Downtown Soup Kitchen*, 406 F. Supp. 3d at 782.
[118] *Id.* at 785.
[119] *Id.* at 793–97.
[120] *Id.*
[121] *Id.*

> identity or nonconformance with gender stereotypes is discrimination because of sex and violates the Act. HUD would not tolerate denial of access, isolation, or ostracism on the basis of race, color, national origin, or disability relating to one shelter resident in order to accommodate the religious views of another shelter resident. The same is true with respect to the treatment of transgender and other gender nonconforming persons.[122]

There is no basis upon which to justify permitting shelter providers' and residents' religious beliefs to justify excluding transgender or gender nonconforming persons from shelters. HUD has rightly concluded that the federal government should not fund shelters that are unwilling to serve all individuals without discrimination on the basis of membership in a protected class.

C. *The 2016 Equal Access Rule enumerates reasonable methods by which to provide accommodations for transgender and gender nonconforming persons in a cost-effective manner without imposing regulatory burdens.*

The 2016 Equal Access Rule requires that shelter providers provide privacy accommodations, where necessary, to enhance safety and privacy for all residents, and enumerates low-cost and easily implemented options to ensure accommodations can be utilized by all providers.[123] While the 2016 Equal Access Rule encourages shelters to provide larger scale privacy upgrades to facilities, such as private rooms and bathrooms and showers with locks, in 2016 HUD specifically noted that such improvements are not mandated.[124] The 2016 Equal Access Rule observed that reasonable and low cost measures that increase privacy for all shelter residents can be implemented without a cost burden upon facilities, and can measurably improve the safety of all residents in shelters.[125] Should facilities wish to implement larger-scale privacy accommodations but encounter issues with accessing funding to implement such changes, HUD provided examples of potential funding sources for any changes that may require funding to implement.[126] The Proposed Rule concludes, without any evidentiary support, that implementing accommodations for individuals after admission will be unduly burdensome and overly costly—yet the 2016 Equal Access Rule already addressed these concerns and has clearly enumerated that these provisions will be neither burdensome nor costly.

In the Proposed Rule, HUD also asserts that the 2016 Equal Access Rule "imposes a special document retention requirement applicable to determinations of 'sex' that is burdensome and not supported either by statute or practice."[127] Section 5.106(d) of the 2016 Equal Access Rule requires only that providers document and maintain records of their admissions, occupancy, and operating

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[122] 81 Fed. Reg. at 64,773.
[123] *Id.* at 64,772 (providing that privacy concerns can be addressed through policy adjustments, such as the use of schedules that provide equal access to bathing facilities, and the use of privacy screens).
[124] *Id*. at 64,778.
[125] *Id*. at 64,772.
[126] *Id*. (noting that "for additional modifications that are necessary, some funded facilities, such as those under the ESG program, can use ESG funds to modify the shelter facility or provide additional security").
[127] 85 Fed. Reg. at 44,816.

policies and procedures for five years.[128] This is a minimal requirement for facilities that receive federal funds to support their operations. HUD has not provided any analysis in the Proposed Rule demonstrating how this insignificant records requirement is "special" or unusual for entities receiving federal funding, and further has offered no details or examples of how this supposed burden has affected a single facility in the previous four years.

IV. HUD's 2016 Equal Access Rule is an appropriate uniform standard for protecting transgender and gender nonconforming persons from discrimination in shelters without imposing an undue burden on either shelter providers or other shelter residents.

The 2016 Equal Access Rule created a uniform national nondiscrimination standard, aligned with recent research and evidence, for placement of transgender and gender nonconforming persons in single-sex temporary and emergency shelters, thereby reducing confusion when applicants cross state lines or jurisdictions. This uniform standard successfully protects and provides accommodations for transgender and gender nonconforming persons without imposing burdens upon the religious liberties, privacy, or safety of other shelter residents. Further, a uniform standard ensures that when an individual is turned away from one shelter, they are able to identify alternate facilities for shelter in which they qualify for admissions for that evening.

HUD's mission is to ensure that the agency is "responsible for national policy and programs that address America's housing needs, that improve and develop the Nation's communities, and enforce fair housing laws."[129] The 2012 Rule states that "it is important not only that HUD ensure that its own programs do not involve arbitrary discrimination against any individual or family otherwise eligible for HUD-assisted or -insured housing, but that its policies and programs serve as models for equal housing opportunity."[130] Creating a national uniform nondiscriminatory standard for determining admissions and placement of transgender and gender nonconforming persons in single-sex emergency and temporary shelters, aligned with recent research and evidence, addresses a pressing housing need and does so in such a way that ensures housing is available for as many individuals as possible. The 2016 Equal Access Rule directly serves the public in line with HUD's mission. Rescinding this uniform standard will only cause confusion and inconsistency in admission standards across jurisdictions and serve as a barrier to entry for individuals who are transgender or gender nonconforming and seeking temporary or emergency shelter.

The Proposed Rule contends that the 2016 Equal Access Rule's "one-size-fits-all approach to admission and accommodation by gender identity in temporary shelters" minimizes local control, and the Proposed Rule argues that "shelters are best able to serve their beneficiaries when they can develop their own policies on accommodating those whose gender identity conflicts with their biological sex."[131] The Proposed Rule provides examples of three localities with differing

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[128] 24 C.F.R. § 5.106(d) ("Providers shall document and maintain records of compliance with the requirements in paragraph (b) of this section for a period of 5 years.").
[129] *Questions and Answers About HUD*, U.S. DEP'T OF HOUS. AND URBAN DEV. (2020), https://www.hud.gov/about/qaintro.
[130] 77 Fed. Reg. at 5,662.
[131] 85 Fed. Reg. at 44,813.

policies for admissions and placement of individuals in single-sex shelters on the basis of gender identity.[132] These differences underscore the need for uniformity. Federal laws establishing nondiscrimination standards in housing, employment, and public accommodations prevent arbitrary discrimination nationwide.[133] Uniform, national standards align with HUD's mission to prevent housing discrimination and ensure individuals have reliable access to shelter in all jurisdictions.

As noted above, HUD conducted significant research and analysis between 2012 and 2016 to determine whether there was the need to modify the 2012 Rule. By clarifying admissions and placement program requirements for transgender and gender nonconforming persons in single-sex temporary and emergency shelters, HUD was able to ensure uniformity and clarify for transgender and gender nonconforming homeless persons across the nation. This uniform access is lifesaving. Without uniformity among admissions and placement policies at single-sex shelters, transgender and gender nonconforming persons may be unexpectedly denied shelter after a potentially time-consuming or arduous application process and be left without shelter on any given night.[134] Standard admissions policies ensure certainty about individuals' eligibility at shelters so they can devise a plan to find stable housing, creating stability amidst the chaos and trauma of homelessness.

Many of the signatory states have codified explicit protections against discrimination on the basis of gender identity.[135] But, twenty-three states and five territories currently lack explicit protections on the basis of gender identity in housing.[136] Through the 2016 Equal Access Rule, the federal government ensured there was consistency in access to shelters nationwide for transgender and gender nonconforming persons facing homelessness. The Proposed Rule rescinds this uniformity and will cause access to vary widely across jurisdictions, and potentially even from

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[132] *Id.* (detailing local nondiscrimination provisions in Anchorage, Alaska, New York City, and Massachusetts).

[133] *See* 42 U.S.C. § 2000d (codifying that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); 24 C.F.R. § 5.105(a) (describing federal nondiscrimination provisions applicable to all HUD-funded and -insured housing); 42 U.S.C. § 2000e *et seq.* (establishing a federal prohibition against employment discrimination).

[134] The Proposed Rule includes a provision that shelter providers are required to provide a "transfer recommendation" for an individual denied placement in a shelter on the basis of gender identity, but this is only a "recommendation" and does not guarantee an individual will be placed in an alternate facility. The Proposed Rule also fails to enumerate specifics regarding the requirements of the recommendation—such as that it be in a particular geographic area or be accessible by transit—and thereby will dramatically lower the rate of actual placement. 85 Fed. Reg. at 44,816.

[135] States that have codified explicit protections against discrimination on the basis of gender identity include, though this list is not exhaustive, Illinois, California, Delaware, Massachusetts, Minnesota, New Jersey, New York, and Virginia. *See* 775 ILCS 5/1-103(O-1); Cal. Gov't Code § 12955; 6 Del. C. §§ 4500-516; *Id.* at §§ 4502-503; Mass. Gen. Laws ch. 272, § 98 (prohibiting discrimination on the basis of sex, sexual orientation, and gender identity in places of public accommodation, including homeless shelters); Mass. Gen. Laws ch. 151B, § 4; Minn. Stat. ch. 363A; Minn. Stat. Ann. § 363A.03, subd. 44; N.J. Stat. Ann. § 10:5-12 (codifying in the New Jersey Law Against Discrimination explicit protections for individuals against discrimination on the basis of sexual orientation, gender identity, and gender expression); N.Y. Exec. Law § 296; Va. Code §§ 2.2-3900 *et seq.*; Va. Code § 36-96.3.

[136] *Nondiscrimination Laws*, MOVEMENT ADVANCE PROJECT (2020), https://www.lgbtmap.org/equality-maps/non_discrimination_laws/housing (stating that 22 states plus the District of Columbia have explicit sexual orientation and gender identity protections against housing discrimination, four interpret existing sex discrimination protections to include sexual orientation and gender identity discrimination, one only has express prohibitions on sexual orientation discrimination, and 23 states and five territories have no state-level protections).

shelter to shelter. This will cause confusion and harm to transgender and gender nonconforming persons seeking shelter as it directly excludes these individuals from the provision of HUD's services.

Even states that prohibit discrimination against transgender and gender nonconforming persons may experience harmful impacts in their states. For example, many shelters in California, which has enacted a state statutory nondiscrimination provision on the basis of gender identity,[137] receive both state and HUD funding. The Proposed Rule will cause confusion with existing state law, as it signals denial of shelter to transgender or gender nonconforming persons in single-sex facilities is acceptable, despite state law protections that state otherwise. California state agencies report they will likely need to expend resources providing guidance to shelter providers about their obligations under state law to avoid having the Proposed Rule undermine state anti-discrimination protections. If transgender and gender nonconforming homeless persons fear that they will face discrimination and will not be accepted at a shelter, these individuals may not seek or access those services. Reducing transgender and gender nonconforming persons' access to shelters will not only limit access to a safe place to sleep, but will also limit access to the accompanying services available at shelters.

V. HUD should maintain the nondiscrimination provisions in the 2016 Equal Access Rule.

HUD seeks comment on an issue it does not discuss or raise until the conclusion of the Proposed Rule: whether the agency should maintain the nondiscrimination protections in the 2012 Rule.[138] HUD explains that "it believes all federally supported housing opportunities should be provided to all in a nondiscriminatory manner, including for sexual orientation and gender identity" and that HUD "is not aware of any relevant party that has raised any material concerns about the 2012 rule."[139] It is inexplicable that HUD would seek comment about a change that it neither purports to support nor has reason to change and that it would do so with so little discussion. HUD's request for comment raises serious concerns that it intends to roll back vital protections against discrimination based on gender identity and sexual orientation for individuals seeking access to HUD programs, despite HUD's assurances that the agency would not do so.[140]

HUD should retain the nondiscrimination provisions in the 2012 Rule, as strengthened in the 2016 Equal Access Rule. As HUD said over eight years ago when it prohibited discrimination on the basis of gender identity and sexual orientation in HUD-funded programs: "excluding any eligible person from HUD-funded or HUD-insured housing because of that person's sexual orientation or gender identity contravenes HUD's responsibility under the Department of Housing

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[137] *See* Cal. Gov't Code § 12955.

[138] 85 Fed. Reg. at 44,817 ("HUD is maintaining the nondiscrimination protections from its 2012 rule, even though they lack an explicit statutory authorization, because HUD is not aware of any relevant party that has raised any material concerns about the 2012 rule. HUD believes all federally supported housing opportunities should be provided to all in a nondiscriminatory manner, including for sexual orientation and gender identity. HUD specifically seeks comments on whether HUD should maintain the anti-discrimination protections?").

[139] *Id.*

[140] Tracy Jan, *Proposed HUD rule would strip transgender protections at homeless shelter*, WASH. POST (May 22, 2019) https://www.washingtonpost.com/business/2019/05/22/proposed-hud-rule-would-strip-transgender-protections-homeless-shelters/.

and Urban 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.'"[141] Mere months after the Supreme Court's historic decision in *Bostock v. Clayton County, Georgia* upheld the civil rights of employees to be free from discrimination based on gender identity and sexual orientation,[142] any suggestion that HUD would undo anti-discrimination protections in federally funded housing programs is counter to HUD's mission and cruel.

VI. Conclusion

The signatory states oppose the Proposed Rule and urge HUD to withdraw it. The nondiscrimination provisions in the 2012 Rule, which were later amended in the 2016 Equal Access Rule, are critical to the safety and well-being of transgender and gender nonconforming homeless persons and they should all remain intact as written. Temporary and emergency shelters often provide the best access point for individuals seeking safe housing and access to social service supports, a need made even more critical during a global pandemic and economic crisis causing a dramatic drop in employment. HUD offers no valid justification for undoing the protections enumerated in the previous versions of this rule, the Proposed Rule is arbitrary and capricious, and will cause irreparable harm to transgender and gender nonconforming persons, particularly youth. In the Proposed Rule, HUD repeatedly identifies its commitment to anti-discrimination efforts and the safety and wellbeing of all individuals as animating a need for change. But the Proposed Rule permits shelter providers to enact biased, arbitrary policies that will result in discrimination against transgender and gender nonconforming persons. As HUD stated in 2016, "the denial of equal access cannot be justified based on unfounded concerns about safety or security."[143]

For the foregoing reasons, OMB should withdraw the Proposed Rule and refrain from making any changes to the existing 2016 Equal Access Rule.

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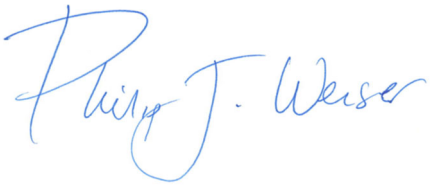

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[141] 77 Fed. Reg. at 5,672.
[142] *Bostock*, 140 S. Ct. at 1741.
[143] 81 Fed. Reg. at 64,774.

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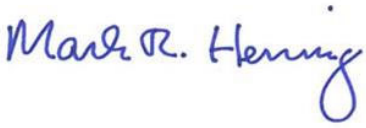

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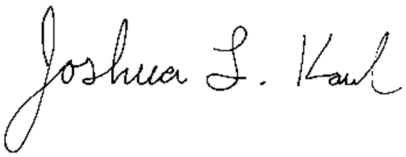

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