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VIA ELECTRONIC SUBMISSION (www.regulations.gov)

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

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

To the Office of General Counsel:

The National Trans Bar Association (“NTBA”) appreciates this opportunity to provide comments in response to the Department of Housing and Urban Development’s (“HUD” or the “Department”) Notice of Proposed Rulemaking regarding Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs (the “Proposed Rule”).¹ As the leading national bar association composed of transgender and gender nonconforming legal professionals and allies who work to advance the position of transgender and gender nonconforming people in the law and society, NTBA believes that protection from discrimination in housing is critical to the health and wellbeing of transgender and gender nonconforming people. Accordingly, NTBA strongly opposes the changes to HUD’s shelter policies that are outlined in the Proposed Rule.²

I. Introduction

The Proposed Rule that HUD now has under consideration presents serious legal and practical concerns. NTBA emphatically recommends its withdrawal because:

¹ *Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs*, 85 Fed. Reg. 44,811 (proposed July 24, 2020) (to be codified at 24 C.F.R. pt. 576) (hereinafter “Proposed Rule”).

² The NTBA details herein several of the reasons for its opposition to the Proposed Rule. Omission of any proposed change from these comments should not be interpreted as tacit approval of any portion of the Proposed Rule.



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- (1) The Proposed Rule targets a population—transgender and gender nonconforming people—that is already subject to significant societal discrimination;
- (2) The Proposed Rule would exacerbate the extensive mistreatment and discrimination transgender and gender nonconforming people are already subject to in shelters;
- (3) The Proposed Rule is out of step with the prevailing medical consensus, which has been widely accepted by the federal courts, that gender identity, not sex assigned at birth, is the key factor for determining a person's sex;
- (4) The Proposed Rule flouts the Supreme Court's mandate that discrimination on the basis of transgender status constitutes sex discrimination;
- (5) The Proposed Rule cannot circumvent Supreme Court precedent by asserting that the Fair Housing Act ("FHA") does not apply to shelters;
- (6) HUD's stated justifications for the Proposed Rule are groundless;
- (7) The Proposed Rule fails to engage in cost/benefit analysis, as required by law;
- (8) The Proposed Rule's focus on and procedures for identifying "biological sex" are inherently harmful and inappropriate, because they fuel violence against transgender people by breathing new life into long-standing, pernicious anti-transgender stereotypes;
- (9) The Proposed Rule fails to consider the unique harms to particularly vulnerable populations, such as people of color, sex workers, persons with disabilities, immigrants and asylum seekers, and people living with HIV; and
- (10) The Proposed Rule contains no mention, much less meaningful consideration, of people with nonbinary and other gender nonconforming identities.

In sum, the purpose of the Proposed Rule is not to improve HUD's methods of alleviating the effects of inadequate housing and poverty, and of bettering the health and well-being of our nation's marginalized, vulnerable populations, but instead to enshrine discrimination against and entrench societal prejudices towards a vulnerable group in federal housing policy. In so doing, the Proposed Rule betrays the mission of the Department.



II. The Proposed Rule Targets a Population Already Subject to Significant Discrimination

The severe consequences the Proposed Rule would have for transgender³ and gender nonconforming people experiencing homelessness cannot be fully understood without addressing the background of significant discrimination and violence against transgender and gender nonconforming people in nearly all areas of life that contributes to their overrepresentation among people experiencing housing insecurity.

Violence, mistreatment, and rejection by family members and partners contributes to higher rates of housing instability among transgender people from a young age. Family rejection of transgender youth is a major factor contributing to their disproportionate levels of homelessness.⁴ In 2015, one out of ten of survey respondents who were out to their immediate family as transgender reported experiencing familial violence.⁵ Eight percent were kicked out of the house due to being transgender, while another ten percent ran away due to familial rejection.⁶ In addition to familial rejection, transgender people also report high levels of intimate partner violence. More than half of transgender people surveyed experienced some form of intimate partner violence, and nearly a quarter described this violence as “severe”—significantly higher than the overall U.S. population.⁷

Violence and discrimination can also place serious barriers for transgender people in education, housing, and employment. Studies have found that three quarters of openly transgender students experienced verbal harassment, mistreatment, and physical or sexual assault while they were students at K-12 schools.⁸ Seventeen percent experienced such severe mistreatment that they left school early.⁹ While transgender people overall report higher levels of educational attainment than the U.S. general population (32% over the age of 25 had attained a bachelor’s degree and 21% had attained a graduate or professional degree, compared to 19% and 12% of the general population), many still experience significant levels of discrimination at all levels of education.¹⁰ Additionally, nearly one quarter of survey respondents reported having experienced housing discrimination in the past year, including being evicted or denied housing because they are transgender.¹¹ Employment discrimination likewise disproportionately burdens transgender

³ As used in this comment, the term “transgender” is inclusive of all gender nonconforming identities, including but not limited to nonbinary, agender, gender fluid, genderqueer, and other identities that fall outside the boundaries of a strict male-female binary.

⁴ Adam P. Romero, Shoshana K. Goldberg, Luis A. Vasquez, *LGBT People and Housing Affordability, Discrimination, and Homelessness*, UCLA School of Law Williams Institute, 3 (Apr. 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf>.

⁵ National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey*, 71 (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

⁶ *Id.* at 72, 74.

⁷ *Id.* at 15, 198, 209.

⁸ *Id.* at 131.

⁹ *Id.*

¹⁰ *Id.* at 57.

¹¹ *Id.* at 13, 176.



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people. In 2015, the unemployment rate for transgender people in the U.S. was three times the national average.¹² Among transgender people who are employed, 30% reported being fired, being denied a promotion, or experiencing some other form of harassment or mistreatment in the past year because they are transgender.¹³

Together, these experiences take a significant toll not only on transgender people's wellbeing (almost one half of transgender people reported experiencing suicidal thoughts in the past year, a rate 120% higher than the general population), but on their economic stability.¹⁴ Multiple studies have found that nearly 30% of transgender people live in poverty, more than double the rate of the U.S. adult population as a whole.¹⁵ In 2015, one in eight transgender people reported experiencing homelessness in the past year, while almost one in three had experienced homelessness at some point in their lifetime.¹⁶ This year, an estimated 96,400 transgender people in America reported experiencing homelessness in the past twelve months.¹⁷

Additionally, anti-transgender violence and discrimination disproportionately impacts certain vulnerable populations, such as people of color, sex workers, persons with disabilities, immigrants and asylum seekers, and people living with HIV. Transgender people of color (approximately 40%), persons living with HIV (51%), and persons with disabilities (45%) experience higher rates of homelessness and poverty, and may be more likely to avoid seeking emergency shelter due to fear of mistreatment.¹⁸ These particularly vulnerable groups of transgender people, among others, have been historically excluded from or otherwise faced barriers in accessing homeless services, including shelter. The ongoing and devastating COVID-19 pandemic has only increased the need for temporary, emergency shelter, including among

¹² *Id.* at 12, 56, 140.

¹³ *Id.* at 4, 13, 148, 155.

¹⁴ *Id.* at 113, 197.

¹⁵ *Id.* at 5, 144; M. V. Lee Badgett, Soon Kyu Choi, Bianca D. M. Wilson, *LGBT Poverty in the United States*, UCLA School of Law Williams Institute, 2 (Oct. 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf>.

¹⁶ National Center for Transgender Equality, *supra* note 5, at 176.

¹⁷ Jody L Herman and Kathryn O'Neill, *Vulnerabilities to COVID-19 Among Transgender Adults in the US*, UCLA School of Law Williams Institute, 4 (Apr. 2020) <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-COVID19-Apr-2020.pdf>.

¹⁸ National Center for Transgender Equality, *supra* note 5, at 6, 144, 178.

The experiences of transgender people of color are also shaped by systemic racism and/or xenophobia. Transgender women of color, in particular, are targets of police violence and harassment; they are more frequently profiled as sex workers and/or criminalized based solely on their appearance. *Id.* at 162-64. They also report higher rates of physical and sexual assault, and they are more likely to be unemployed, forced to work in the underground economy, and incarcerated. *Id.* at 190, 202-08. Undocumented transgender people reported the highest rates of unemployment (49%), incarceration (12%), and poverty (69%). *Id.* at 141, 144, 190. And, the heightened antipathy and lethal violence engendered by the intersection of anti-black racism and transphobia is starkly reflected by the countless murders of black transgender women, who account for at least 70% of the reported murders of transgender and gender nonconforming since 2013. The more severe patterns of violence and discrimination experienced by transgender people of color and immigrants contribute to increased housing instability and homelessness.



transgender people. This increased need for shelter in the midst of a global public health crisis makes the Department's facially discriminatory proposal all the more reprehensible.

III. The Proposed Rule Would Exacerbate the Mistreatment and Discrimination Transgender People Already Experience in Shelters

The Proposed Rule would make it more difficult for transgender and gender nonconforming people in need of temporary shelter and homeless services to access such resources. Transgender people already experience high levels of harassment, violence, and discrimination when seeking access to shelter services, including being forced into sex-segregated facilities according to their sex assigned at birth.¹⁹ One study found that more than a quarter of transgender respondents who had experienced homelessness did not seek shelter because they feared discrimination and mistreatment because they are transgender.²⁰ Six percent were outright denied access to shelters, while the majority of those who were able to access shelters (70%) experienced violence, discrimination, and mistreatment while there.²¹ More than half reported that they were verbally harassed or physically or sexually assaulted at a shelter because they are transgender.²² Almost one in ten respondents were thrown out of a shelter when staff discovered they are transgender, while nearly half experienced such poor or unsafe treatment, including being forced to dress or present as the wrong gender by shelter staff, that they were forced to leave the shelter for their safety and wellbeing.²³ Although there is little existing research on nonbinary people experiencing homelessness, existing demographic data indicates that nonbinary individuals experience similar barriers in accessing shelter and often self-select out of seeking shelter. According to HUD's 2018 Point-in-Time Count, a staggering 82% of nonbinary individuals experiencing homeless were unsheltered.²⁴ By denying transgender and gender nonconforming people access to shelters that are consistent with their gender identity, the Proposed Rule would exacerbate the violence and discrimination they already face in shelters.

IV. The Proposed Rule Would Reverse HUD's Prior Implementation of Important Housing Protections for Transgender People

Since 2012, HUD has twice implemented regulations that expand and protect individuals' access to housing in temporary, emergency shelters that receive funding through HUD's Office of Community Planning and Development ("CPD"), regardless of sexual orientation or gender identity. In both instances, the public was afforded a meaningful opportunity to participate in the rulemaking process. A review of the prior rules, as well as HUD's responses to public comments on those rules, evidence how HUD has historically conceptualized its mandate as an agency and

¹⁹ Romero et. al., *supra* note 4, at 4.

²⁰ National Center for Transgender Equality, *supra* note 5, at 180.

²¹ *Id.* at 176.

²² *Id.*

²³ *Id.*

²⁴ National Alliance to End Homelessness, *Demographic Data Project—Part I: Gender Minorities* (June 2019), <https://endhomelessness.org/wp-content/uploads/2019/09/DDP-Gender-Minorities-Brief-09272019-byline-single-pages.pdf>.



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worked to balance the varied interests of HUD partners while protecting the rights of and access to housing among lesbian, gay, bisexual, transgender, and queer (“LGBTQ+”) individuals, including and particularly transgender people. Moreover, until now, the trend in HUD’s rulemaking has sought to expand protections for transgender and other gender nonconforming individuals and align agency regulations with current understandings of sexual orientation and gender identity.

In 2012 HUD issued a rule entitled “Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity” (the “2012 Rule”), citing “evidence suggesting that . . . [LGBTQ+] individuals and families are being arbitrarily excluded from housing opportunities in the private sector.”²⁵ The 2012 Rule amended 24 C.F.R. § 5.100²⁶ to include definitions of “sexual orientation” as “homosexuality, heterosexuality, or bisexuality” and “gender identity” as “actual or perceived gender-related characteristics.”²⁷ When implemented, the 2012 Rule prohibited owners and operators of HUD-assisted housing from making “inquiries regarding sexual orientation or gender identity,” but it did not prohibit inquiries regarding an applicant’s sex where housing involves the sharing of sleeping areas or bathrooms.²⁸

In response to the proposed 2012 Rule, HUD received several public comments regarding the proposed definition of “gender identity.” Commenters also expressed particular concern that the carve-out in the 2012 Rule allowing shelters to inquire about an applicant’s sex could be used to discriminate against transgender individuals in a way the rule sought to prevent.²⁹ Noting the variation among those comments, HUD decided that further changes to the rule or definitions therein “should be the subject of further review.”³⁰ Following further review, HUD agreed that the 2012 Rule had failed to “adequately address barriers and discrimination faced by transgender and gender nonconforming persons in accessing emergency shelters or other facilities with shared sleeping and/or bathing spaces.”³¹ Additionally, HUD found that transgender and gender nonconforming people continued to face violence, harassment, and discrimination when attempting to access services for accommodations.³² HUD’s findings in this regard are consistent with the substantial body of research documenting pervasive anti-transgender violence and discrimination, including with respect to housing access. *See supra* at Sections II-III.

²⁵ Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5,662 (Feb. 3, 2012) (hereinafter, the “2012 Rule”).

²⁶ 24 C.F.R. § 5.100 (2017) provides definitions that apply to the United States Housing Act of 1937 (42 U.S.C. § 1437) and the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101).

²⁷ The definition of “sexual orientation” was borrowed from the definition used by the Office of Personnel Management in its publication “Addressing Sexual Orientation in Federal Civilian Employment: A Guide to Employee Rights;” the definition was borrowed from the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. 111-84, Div. E, Section 4707(c)(4) (18 U.S.C. § 249(c)(4) (2009)).

²⁸ 2012 Rule, 77 Fed. Reg. 5,662.

²⁹ *Id.* at 5,667-68.

³⁰ *Id.* at 5,665.

³¹ 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) (hereinafter, the “2016 Rule”).

³² *Id.*



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In 2016, HUD issued a second rule intended to address the shortcomings of the 2012 Rule—The Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs Rule (the “2016 Rule”). The 2016 Rule defines and delineates between “gender identity” and “perceived gender identity.”³³ “Gender identity” means “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,”³⁴ “Perceived gender identity” means the “gender with which a person is perceived to identify based on that person’s appearance, behavior, expression, other gender-related characteristics, sex assigned at birth, or identification in documents.”³⁵ In response to public comment, the phrase “identified in documents” was added to the definition to “make clear that the identification of gender or sex on an individual’s identity document may be different than a person’s actual gender identity.”³⁶ Furthermore, the 2016 Rule requires recipients of assistance under CPD programs to provide equal access to facilities, including single-sex facilities, in accordance with an individual’s gender identity.³⁷ Unlike the 2012 Rule’s carve-out that permitted operators of single-sex facilities to inquire about an individual’s sex,³⁸ the 2016 Rule revised 24 C.F.R. § 5.106(c) to provide that placement and accommodation of individuals shall be made *solely* in accordance with an individual’s gender identity, without inquiry into an individual’s assigned sex.³⁹ The 2016 Rule also removed language that would allow a provider to determine whether alternative accommodations for transgender individuals are necessary to ensure health and safety.⁴⁰

HUD now proposes to roll back the 2016 Rule, marshaling unfounded concerns with safety, privacy, religious liberty, and local control while disavowing its own regulatory authority—and responsibility—to protect transgender people from discrimination in federally funded shelters. The NTBA staunchly objects to HUD’s disingenuous about-face, which is out of step with the prevailing medical consensus concerning gender identity, as well as federal anti-discrimination laws.

V. The Proposed Rule is Out of Step with the Prevailing Medical Consensus, which Considers Gender Identity, Not Sex Assigned at Birth, the Key Factor for Determining a Person’s Sex

Medical science has accepted that biological sex is complex, more akin to a spectrum or a mosaic than a binary. Sex is an amalgamation of many characteristics, including chromosomes, genetic makeup, hormone production, sexual anatomy, secondary sex characteristics, and gender

³³ 24 C.F.R. § 5.100 (2017).

³⁴ *Id.*; 2016 Rule, 81 Fed. Reg. at 64,782.

³⁵ *Id.*

³⁶ 2016 Rule, 81 Fed. Reg. at 64,766.

³⁷ *Id.* at 64764.

³⁸ 24 C.F.R. § 5.105(a)(2).

³⁹ 2016 Rule, 81 Fed. Reg. at 64,767.

⁴⁰ *Id.* (explaining that the rule “removes language that permits an exception . . . where a provider makes a written case-by-case determination on whether an alternative accommodation for a transgender individual would be necessary to ensure health and safety”).



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identity.⁴¹ These factors do not necessarily align, even at birth: between 0.05% and 1.7% of the population is “intersex,” which means that they are born with “natural variations in sex characteristics that do not seem to fit typical binary notions of male or female bodies.”⁴²

Despite the prevalence of intersex traits and the fact that “[g]ender as a nonbinary construct has been described and studied for decades,”⁴³ many continue to falsely assume that sex assigned at birth governs biological sex. This misconception has devastating consequences for transgender people. Classifying transgender people according to their sex assigned at birth severely exacerbates transgender people’s gender dysphoria, which in turn can have a catastrophic effect upon their mental health.⁴⁴ It also leads to stigma and discrimination, which can also “directly impact mental health, affecting the individual’s ability to cope with external stressors and reducing resilience.”⁴⁵ Furthermore, binary classifications that rely on sex assigned at birth cannot accommodate—and therefore erase—a broad spectrum of nonbinary and other gender nonconforming identities.

Given the well-documented harm caused by classifying transgender people according to their sex assigned at birth, medical institutions have been unequivocal in recommending the clinical affirmation of transgender people’s gender identities. For instance, in their “Guidelines

⁴¹ Amanda Montañez, *Beyond XX and XY: The Extraordinary Complexity of Sex Determination*, Sci. Am. (Sept. 1, 2017), <https://www.scientificamerican.com/article/beyond-xx-and-xy-the-extraordinary-complexity-of-sex-determination/>. The American Psychological Association defines “gender identity” as one’s “deeply felt, inherent sense” of belonging to a given gender. Am. Psychol. Ass’n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832, 834 (2015), <https://www.apa.org/practice/guidelines/transgender.pdf>. One’s gender identity “may or may not correspond to a person’s sex assigned at birth or to a person’s primary or secondary sex characteristics;” for transgender people, “gender identity differs in varying degrees from sex assigned at birth.” *Id.* at 862. When the “discrepancy between a person’s gender identity and that person’s sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics)” causes discomfort or distress, an individual is said to have gender dysphoria. Eli Coleman, et al., World Prof’l Ass’n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, 5 (7th ed. 2012) (hereinafter “WPATH SOC”), https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf. Through treatment, individuals who suffer from gender dysphoria can “explore their gender identity” in order to find “a gender role and expression that is comfortable for them, even if these differ from those associated with their sex assigned at birth, or from prevailing gender norms and expectations.” *Id.*

⁴² InterACT & Lambda Legal, *Providing Ethical and Compassionate Health Care to Intersex Patients*, at 2 (2018), https://www.lambdalegal.org/sites/default/files/publications/downloads/resource_20180731_hospital-policies-intersex.pdf. At the upper end of this estimate, intersex traits would be about as prevalent as red hair. United Nations for LGBT Equality, *Intersex Fact Sheet 1* (2018), https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf.

⁴³ *Guidelines for Psychological Practice*, 70 Am. Psychologist 834, <https://www.apa.org/practice/guidelines/transgender.pdf>.

⁴⁴ Cooper K., Russell A., Mandy W., Butler C., *The Phenomenology of Gender Dysphoria in Adults: A Systematic Review and Meta-synthesis*, 80 Clinical Psychol. Rev. 1, 7 (Aug. 2020), <https://reader.elsevier.com/reader/sd/pii/S0272735820300635?token=3583CCFCCD7AC377298499911FDD47B935B00B63F2C0DD560DC2F38D25B0DBE54E569684A8A976D6B2E59B0DE38002C4>.

⁴⁵ Dolan I.J., Strauss P., Winter S., Lin A., *Misgendering and experiences of stigma in health care settings for transgender people*, 212 Med. J. Aust. 150 (Mar. 2, 2020), <https://www.mja.com.au/journal/2020/212/4/misgendering-and-experiences-stigma-health-care-settings-transgender-people>.



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for Psychological Practice With Transgender and Gender Nonconforming People,”⁴⁶ the American Psychological Association (“APA”) explicitly states that a “nonbinary understanding of gender is fundamental to the provision of affirmative care for [transgender and gender nonconforming] people.”⁴⁷ For this reason, the APA exhorts providers to improve the care they offer transgender people “[b]y understanding the spectrum of gender identities and gender expressions that exist, and that a person’s gender identity may not be in full alignment with sex assigned at birth.”⁴⁸

The American Medical Association (“AMA”) has also been an outspoken advocate for the affirmation of transgender status, and has explicitly endorsed the “medical spectrum of gender identity.”⁴⁹ The AMA House of Delegates has stated that gender is often “incompletely understood as a binary selection,” despite the fact that “an individual’s genotypic sex, phenotypic sex, sexual orientation, gender and gender identity are not always aligned or indicative of the other, and that gender for many individuals may differ from the sex assigned at birth.”⁵⁰ As a result, the AMA “opposes any efforts to deny an individual’s right to determine their stated sex marker or gender identity,”⁵¹ and it “supports policies that include an undesignated or nonbinary gender option for government records and forms of government-issued identification.”⁵² Similarly, the American Academy of Pediatrics distinguishes between an adolescent’s “genetic and anatomic characteristics” and their gender identity, and recommends “developmentally appropriate care that is oriented toward understanding and appreciating [a] youth’s gender experience.”⁵³

Because of the clinical benefits that result from recognizing transgender people according to their gender identity, the nation’s leading medical organizations have publicly opposed any policies that classify transgender people according to their sex assigned at birth. For instance, a group of 16 medical organizations—including the AMA and the American College of Physicians—submitted an amicus brief in the landmark Supreme Court case *Bostock v. Clayton County*.⁵⁴ In it, they note that past treatments would attempt to force transgender individuals to suppress their transgender status in favor of their sex assigned at birth. These treatments would “often result in substantial psychological pain by reinforcing damaging internalized attitudes,” and risked “damage [to] family relationships and individual functioning by increasing feelings of

⁴⁶ Am. Psychol. Ass’n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832 (2015), <https://www.apa.org/practice/guidelines/transgender.pdf>.

⁴⁷ *Id.* at 835.

⁴⁸ *Id.*

⁴⁹ Am. Med. Ass’n, *Medical Spectrum of Gender D-295.312* (last modified 2018), <https://policysearch.ama-assn.org/policyfinder/detail/gender%20and%20sex?uri=%2FAMADoc%2Fdirectives.xml-D-295.312.xml>.

⁵⁰ *Id.*

⁵¹ Am. Med. Ass’n, *Affirming the Medical Spectrum of Gender H-65.962* (last modified 2018), <https://policysearch.ama-assn.org/policyfinder/detail/medical%20spectrum%20gender?uri=%2FAMADoc%2FHOD.xml-H-65.962.xml>.

⁵² Am. Med. Ass’n, *Conforming Sex and Gender Designation on Government IDs and Other Documents H-65.967*, <https://policysearch.ama-assn.org/policyfinder/detail/transgender?uri=%2FAMADoc%2FHOD.xml-0-5096.xml>.

⁵³ Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 142 Pediatrics 4 (Oct. 2018), <https://pediatrics.aappublications.org/content/142/4/e20182162>.

⁵⁴ 140 S. Ct. 1731 (2020).



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shame.”⁵⁵ By contrast, these medical authorities emphasized, the last thirty years have seen the advent of “gender-affirming medical and mental health support and treatment,”⁵⁶ which now constitute the widely-accepted standard of care for transgender individuals.⁵⁷

Accordingly, American Medical Association Policy H-65.964, *Access to Basic Human Services for Transgender Individuals*, opposes all policies that prevent transgender individuals from accessing public facilities consistent with their gender identity, including restrooms, and recommends the creation of policies that “promote social equality and safe access to basic human services and public facilities for transgender individuals according to one’s gender identity.”⁵⁸ As several medical organizations have recently explained,

For transgender individuals, being treated differently from other men and women can cause tremendous pain and harm. Indeed, exclusionary policies that force transgender people to disregard or deny their gender identity every time they must use a restroom disrupt medically appropriate treatment protocols. While those protocols provide that transgender individuals should live all aspects of their life in the gender with which they identify, . . . exclusionary policies require transgender individuals to live one facet of their lives in contradiction with their gender identity. As a result, exclusionary policies threaten to exacerbate the risk of “anxiety and depression, low self-esteem, engaging in self-injurious behaviors, suicide, substance use, homelessness, and eating disorders among other adverse outcomes” that many transgender individuals face.⁵⁹

This medical consensus has been embraced by extensive case law. As the Eleventh Circuit has explained, the “[m]odern medical consensus” is that “forc[ing] transgender people to live in accordance with the sex assigned to them at birth is ineffective and cause[s] significant harm.”⁶⁰ Accordingly, federal courts have overwhelmingly endorsed the World Professional Association for Transgender Health (WPATH) Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, which outline standards of care that clinically affirm the

⁵⁵ Brief for Am. Med. Ass’n, et al., as Amici Curiae Supporting Petitioners, at 12-13, *Bostock*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623 and 18-107) (hereinafter “AMA Amicus”); see also *Grimm v. Gloucester Cnty. Sch. Bd.*, No. 19-1952, 2020 WL 5034430, at *3 (4th Cir. Aug. 26, 2020), amended Aug. 28, 2020.

⁵⁶ AMA Amicus, at 13.

⁵⁷ *Id.* at 14.

⁵⁸ Am. Med. Ass’n, *Access to Basic Human Services for Transgender Individuals H-65.964* (2017), <https://policysearch.ama-assn.org/policyfinder/detail/transgender?uri=%2FAMADoc%2FHOD.xml-H-65.964.xml>.

⁵⁸ *Id.*

⁵⁹ Brief for Medical, Nursing, Mental Health, and Other Health Care Organizations as Amici Curiae Supporting Appellee, at 18, *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286 (11th Cir. 2020) (quoting Am. Psychol. Ass’n & Nat’l Ass’n of Sch. Psychologists, *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools* (2015), <http://www.apa.org/about/policy/orientation-diversity.aspx>).

⁶⁰ *Adams*, 968 F.3d at 1293 (citation omitted); see also *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050-51 (7th Cir. 2017).



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gender identities of transgender and gender nonconforming people, rather than their sex assigned at birth.⁶¹ For instance, the Fourth Circuit has described the WPATH Standards of Care as “the consensus approach of the medical and mental health community,” the “authoritative standards of care,” and the “modern accepted treatment protocols for gender dysphoria,”⁶² while the Ninth Circuit has described the WPATH Standards of Care as the “gold standard on this issue.”⁶³

In sum, medical experts and practitioners have learned over many years how damaging it is to forcibly segregate transgender and other gender nonconforming individuals according to their sex assigned at birth. The accepted standards of care dictate that practitioners “provide care . . . that affirms patients’ gender identities.”⁶⁴ Because the healthcare effects of affirming transgender status extend to the realms of law and public policy, policies that affirm transgender status provide better health outcomes for transgender people. As a result, medical practitioners have been vocal in opposing policies that require transgender people to be classified in accordance with their sex assigned at birth in public. By disregarding the collective experience and expertise of the medical community, the Proposed Rule risks exposing transgender people to extensive psychological and physical harm.

VI. The Proposed Rule Flouts the Supreme Court’s Mandate that Discrimination on the Basis of Transgender Status Constitutes Sex Discrimination

The Proposed Rule argues that “a shelter may place an individual based on his or her biological sex” while simultaneously “not discriminat[ing] against an individual because the person is or is perceived as transgender.”⁶⁵ But as the Supreme Court explained in *Bostock v. Clayton County* barely a month before the Proposed Rule was promulgated, discriminating against a transgender person by treating them as their sex assigned at birth constitutes discrimination on the basis of transgender status, which is a prohibited form of sex discrimination under federal laws that bar discrimination on the basis of sex.⁶⁶

In *Bostock*, the Supreme Court was clear: Discrimination on the basis of transgender status is prohibited. The court found that “homosexuality and transgender status are inextricably bound up with sex . . . because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.”⁶⁷ If an employer fires a transgender woman but “retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.”⁶⁸ In other words, transgender women must

⁶¹ See generally WPATH SOC.

⁶² *Grimm*, 2020 WL 5034430, at *3; see also *De’lonta v. Johnson*, 708 F.3d 520, 522-23 (4th Cir. 2013).

⁶³ *Edmo v. Corizon, Inc.*, 935 F.3d 757, 788 n.16 (9th Cir. 2019) (per curiam), *petition for cert. filed*, No. 19-1280 (U.S. May 12, 2020); accord *Flack v. Wis. Dep’t of Health Servs.*, 395 F. Supp. 3d 1001, 1005 (W.D. Wis. 2019); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 231-32 (D. Mass. 2012).

⁶⁴ WPATH SOC, at 3.

⁶⁵ Proposed Rule, 85 Fed. Reg. at 44,812.

⁶⁶ 140 S. Ct. at 1741-42.

⁶⁷ *Id.* at 1742.

⁶⁸ *Id.* at 1741.



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be treated the same as non-transgender women, just as transgender men must be treated the same as non-transgender men. Any “difference in treatment or favor” between transgender and non-transgender people is discrimination.⁶⁹

Although *Bostock* did not explicitly address access to facilities, its analysis dictates that it is illegal for shelters to turn away individuals on the basis of their transgender status.⁷⁰ If a transgender man is turned away from a homeless shelter, whereas a non-transgender man would have been accepted, he has been discriminated against on the basis of sex. Thus, any shelter that adopts a policy segregating according to sex assigned at birth violates the Fair Housing Act’s prohibition against sex discrimination.⁷¹ Because someone who discriminates on the basis of transgender status “inescapably intends to rely on sex,”⁷² it is impossible for shelters to lawfully turn away people on the basis of their transgender status.

Accordingly, every Court of Appeal that has considered the issue post-*Bostock* has ruled that it is sex discrimination to bar transgender people from accessing sex-segregated facilities on the basis of their sex assigned at birth. For instance, in *Grimm v. Gloucester County School Board*, the Fourth Circuit ruled that barring a transgender boy from using his high school’s male restroom constituted sex discrimination in violation of Title IX.⁷³ The court was unequivocal: “After the Supreme Court’s recent decision in *Bostock* . . . we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him ‘on the basis of sex.’”⁷⁴ Because the School Board “could not exclude Grimm from the boys bathrooms without referencing his ‘biological gender’ under the policy . . . the Board’s policy excluded Grimm from the boys restrooms ‘on the basis of sex.’”⁷⁵

Likewise, in *Adams ex rel. Kasper v. School Board of St. Johns County*, the Eleventh Circuit came to the same conclusion. “If Mr. Adams were a non-transgender boy, the School Board would permit him to use the boys’ restroom. The School Board allowed all non-transgender boys to use the boys’ restroom. . . . But because Mr. Adams is a *transgender* boy, the School Board singled him out for different treatment.”⁷⁶ The Eleventh Circuit also emphasized that even if “biological sex” is a relevant consideration, for legal purposes it should not be defined solely with reference to a person’s sex assigned at birth. As the Eleventh Circuit explained,

Even if we were to accept the School Board’s argument that sex is “founded in biology” or refers “only to biological distinctions between male and female,” . . . this interpretation does not establish that Mr. Adams is biologically female and belongs in the girls’

⁶⁹ *Id.* at 1740.

⁷⁰ *Id.* at 1753.

⁷¹ See 42 U.S.C. § 3604(a) (rendering it unlawful to “make unavailable or deny . . . a dwelling to any person because of . . . sex”).

⁷² *Bostock*, 140 S. Ct. at 1742.

⁷³ See generally *Grimm*, 2020 WL 5034430.

⁷⁴ *Id.* at *21.

⁷⁵ *Id.*

⁷⁶ 968 F.3d at 1306.



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restroom. As the District Court found, Mr. Adams—like some other transgender people—has confirmed his male sex not just legally and socially, but medically. . . . We will not rehash the details of Mr. Adams’s medical transition. But suffice it to say that the School Board’s preferred definition of “biological sex” reduces Mr. Adams “to nothing more than the sum of [his] external genitalia at birth,” to the exclusion of all other characteristics. . . . This understanding of “sex”—or, for that matter, “biological sex”—is as narrow as it is unworkable.⁷⁷

Both *Grimm* and *Adams* make plain that *Bostock* prohibits excluding transgender people from sex-segregated facilities, including shelters, on the basis of their sex assigned at birth.

In June, the Supreme Court spoke directly to the issue of what constitutes discrimination on the basis of sex when it comes to transgender individuals. At best, the Proposed Rule contradicts the teachings of *Bostock* by falsely suggesting that shelters will be able to turn away individuals on the basis of transgender status; at worst, the Proposed Rule will actively encourage shelters to defy *Bostock*’s clear protections. HUD’s failure to even mention *Bostock*—much less grapple with its implications in the Proposed Rule or revise its approach to the Proposed Rule—represents a brazen failure to respect the rule of law, the separation of powers, and the appropriate roles of the three branches under our constitutional system of government.⁷⁸ As a result, the enactment of this Proposed Rule would inevitably produce a miasma of litigation and widespread confusion in shelter systems, with transgender people bearing the brunt of the human suffering that would result.

VII. HUD Cannot Circumvent *Bostock* by Simply Asserting that the Fair Housing Act Does Not Apply to Temporary Emergency Shelters

As previously noted, the Fair Housing Act (FHA) provides that “it shall be unlawful” to “make unavailable or deny, a dwelling to any person because of . . . sex[.]”⁷⁹ HUD attempts to sidestep the common-sense extension of *Bostock* to the FHA by taking the position that the FHA does not “prohibit consideration of sex in temporary and emergency shelters.”⁸⁰ This blanket claim is not supported by case law and is inconsistent with HUD’s own prior positions.

⁷⁷ *Id.* at 1310 (alteration in original) (citations omitted); *see also Grimm*, 2020 WL 5034430, at *2-3.

⁷⁸ Several members of Congress have highlighted the conflict between the Supreme Court’s *Bostock* decision and HUD’s Proposed Rule. Shortly after HUD issued its Proposed Rule, a group of 145 members of Congress, including 23 senators, submitted a letter to HUD expressing their strong opposition to the Proposed Rule and observed that, aside from being “inappropriate and unjust,” the Proposed Rule is contrary to the Supreme Court’s *Bostock* decision. Letter from Members of U.S. Congress to Sec’y Ben Carson, HUD (July 30, 2020), https://wexton.house.gov/uploadedfiles/7.30.20_final_letter_to_hud_public_comment_letter_re_ear_with_signatures_final.pdf.

⁷⁹ 42 U.S.C. § 3604(a).

⁸⁰ Proposed Rule, 85 Fed. Reg. at 44,812.



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The FHA declares it “the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”⁸¹ Courts have instructed that “[t]he language of the FHA is ‘broad and inclusive,’ subject to ‘generous construction.’”⁸² Exemptions from the Act should therefore be “read ‘narrowly in order to preserve the primary operation’” of the national policy of fair housing.⁸³ Consistent with this guidance, several courts have held that shelters and other short-term accommodations satisfy the definition of “dwelling” under the FHA.⁸⁴

Even accepting for the sake of argument that all temporary homeless shelters may not fall within the FHA’s definition of “dwelling,” HUD’s categorical claim that Congress “has not acted to prohibit consideration of sex in temporary and emergency shelters” and that the FHA has no application to temporary shelters is demonstrably false. As defined by the FHA, a “dwelling” includes “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families.”⁸⁵ Similarly, HUD regulations define “dwelling unit” as “a single unit of residence for a family or one or more persons,” including “sleeping accommodations in shelters intended for occupancy as a residence for homeless persons.”⁸⁶ Because neither the FHA nor HUD regulations define what constitutes a “residence,” courts have admittedly grappled with the meaning of the term. Yet, any lack of consensus among federal courts on the question of whether shelters constitute “dwellings” for purposes of the FHA simply underscores that the inquiry is necessarily fact intensive and context specific.

By way of example, in *United States v. Hughes Memorial Home*, the court gave “residence” its ordinary meaning—“a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit.”⁸⁷ Considering that definition, along with the “generous” construction afforded to provisions of the FHA, the *Hughes* court concluded that a housing facility for children was a residence that

⁸¹ 42 U.S.C. § 3601.

⁸² *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 616 F.2d 1006, 1011 (7th Cir. 1980) (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972)).

⁸³ *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995).

⁸⁴ See, e.g., *Woods v. Foster*, 884 F. Supp. 1169, 1173 (N.D. Ill. 1995) (holding that homeless shelter was a “dwelling” under the FHA); see also, e.g., *Schwartz v. City of Treasure Island*, 544 F.3d 1201, 1215 (11th Cir. 2008) (halfway houses for recovering addicts); *Lakeside Resort Enters. v. Bd. of Supervisors of Palmyra Twp.*, 455 F.3d 154, 158-60 (3d Cir. 2006) (treatment facility); *Hovsons, Inc. v. Twp. of Brick*, 89 F.3d 1096, 1103 (3d Cir. 1996) (nursing home); *U.S. v. Columbus Country Club*, 915 F.2d 877, 881 (3d Cir. 1990) (summer bungalows); *Connecticut Hosp. v. City of New London*, 129 F. Supp. 2d 123, 135 (D. Conn. 2001) (halfway houses for substance abuse treatment); *Lauer Farms, Inc. v. Waushara Cnty. Bd. of Adjustment*, 986 F. Supp. 544, 557, 559 (E.D. Wis. 1997) (migrant farmworker housing); *La. Acorn Fair Hous. v. Quarter House*, 952 F. Supp. 352, 359-60 (E.D. La. 1997) (time-share unit); *Baxter v. City of Belleville*, 720 F. Supp. 720, 731 (S.D. Ill. 1989) (residence for terminally ill).

Other courts have assumed that the FHA applies to shelters without discussing the definition of “dwelling.” See, e.g., *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941, 942 (9th Cir. 1996) (applying the FHA to a homeless shelter); *Red Bull Assocs. v. Best Western, Int’l, Inc.*, 686 F. Supp. 447, 450 (S.D.N.Y. 1988) (assuming that the FHA applied to a motel that housed homeless persons pursuant to a contract), *aff’d*, 862 F.2d 963 (2d Cir. 1988).

⁸⁵ 42 U.S.C. § 3602(b).

⁸⁶ 24 C.F.R. § 100.201.

⁸⁷ 396 F. Supp. 544, 549 (W.D. Va. 1975).



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constituted a “dwelling” subject to the FHA. Several courts have since looked to *Hughes*’ plain-meaning analysis in determining whether a structure constitutes a dwelling under the FHA, examining several factors, such as the length of time an occupant remained in a given structure, any limits on the length of an occupant’s stay, and whether an occupant viewed the structure as a place to which they could return or otherwise treated it as a home. Taking just a few examples:

- in *Woods*, the court concluded that the FHA applied to a shelter, reasoning that “[b]ecause the people who live in the Shelter have nowhere else to ‘return to,’ the Shelter is their residence in the sense that they live there and not in any other place;”⁸⁸
- in *Jenkins v. New York City Department of Homeless Services*, the court held that a homeless shelter “could well fall within the definition of dwelling under the FHA,” noting that plaintiff “intend[ed] to stay at the shelter” as long as possible and had “no other home to go to;”⁸⁹
- in *Defiore v. City Rescue Mission of New Castle*, the court concluded that the FHA applied to an emergency homeless shelter in which residents generally stayed between one and ninety days, had medication dispensed by shelter staff, received mail at the shelter, and returned to their sleeping areas each evening;⁹⁰ and
- in *Boykin v. Gray*, the court declined to find that a shelter was not a “dwelling” under the FHA where “detailed information about the terms of residence” at the shelter were not known to the court.⁹¹

That other courts have declined to apply the FHA to temporary shelters does not bolster HUD’s conclusory and categorical dismissal of the FHA’s applicability, nor does it excuse HUD’s failure to consider the implications of *Bostock*. That is especially true given HUD’s own prior—and contradictory—declaration that “HUD does not categorically exclude temporary, emergency shelters providing short-term housing accommodations from coverage under the Fair Housing Act.”⁹²

⁸⁸ 884 F. Supp. at 1173-74.

⁸⁹ 643 F. Supp. 2d 507, 518 (S.D.N.Y. 2009), *aff’d on other grounds*, 391 F. App’x 81 (2d Cir. 2010).

⁹⁰ 995 F. Supp. 2d 413, 418 (W.D. Pa. 2013); *see also Hunter ex rel. A.H. v. District of Columbia*, 64 F. Supp. 3d 158, 175 (D.D.C. 2014) (holding that complaint filed by homeless father and child sufficiently alleged defendants’ failure to make reasonable accommodations to a “dwelling,” as required to state claim under the FHA, where complaint alleged that shelter provided families with their own rooms and allowed them to access their rooms at all times of the day, keep their belongings in their rooms, and return to the same room each day); *Boykin v. Gray*, 895 F. Supp. 2d 199, 207 (D.D.C. 2012) (rejecting argument, at the pleadings stage, that “low barrier” shelter could not qualify as a dwelling under the FHA because it was akin “transient” housing), *aff’d sub nom. Boykin v. Fenty*, 650 F. App’x 42 (D.C. Cir. 2016).

⁹¹ 895 F. Supp. 2d at 207.

⁹² 2016 Rule, 81 Fed. Reg. at 64,770-71.



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In fact, HUD's 2016 position that "shelters *generally are covered* within the definition of dwelling"⁹³ is consistent with that taken by HUD in other contexts. For example, in a January 28, 2020 guidance document, HUD explicitly included "domestic violence shelters, [and] emergency shelters" in its list of housing covered by the FHA.⁹⁴ And, as previously noted, a HUD regulation implementing FHA Amendments with respect to disability specifically identifies "sleeping accommodations in shelters intended for occupancy as a residence for homeless persons" as an example of a "dwelling unit."⁹⁵ Similarly, in a 2011 amicus brief, HUD argued that the FHA should apply to a homeless shelter and explained that "HUD regulations make it clear that the term 'dwelling' includes accommodations in homeless shelters" and that "HUD's interpretation is consistent with that of the courts."⁹⁶ The Proposed Rule contains no explanation whatsoever for HUD's sudden change of its long-held position (aside from obvious anti-transgender animus). Given HUD's complete failure to consider how and when the FHA applies to temporary, emergency shelters and whether the proposed changes run afoul of the FHA's prohibition on sex discrimination (which they most certainly do under *Bostock*), the Proposed Rule, if implemented as drafted, could not survive legal challenge.⁹⁷

VIII. HUD's Stated Justifications for the Proposed Rule are Groundless

The Proposed Rule cites five justifications for rolling back the 2016 Rule. None of the justifications are grounded in fact or evidence and, even if factual evidence could be marshalled, none would provide sufficient basis for eviscerating existing protections for transgender and gender nonconforming people.

⁹³ *Id.* (emphasis added).

⁹⁴ U.S. Dep't of Hous. & Urban Dev., Office of Fair Hous. & Equal Opportunity, FHEO-2020-01, Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act (2020), <https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf>.

⁹⁵ 24 C.F.R. § 100.201; *see also* Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers about the Guidelines, 56 Fed. Reg. 9,472, 9,500 (March 6, 1991); Implementation of the Fair Housing Amendments Act, 54 Fed. Reg. 3,232, 3,245 (January 23, 1989); Final Report of HUD Review of Model Building Codes, 65 Fed. Reg. 15,740, 15,746-47 (March 23, 2000) ("HUD specified as dwellings covered by the Act . . . such short-term housing as . . . homeless shelters."); *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1044-45 n.2 (9th Cir.2007) (noting that "the regulations interpreting the coverage of the FHA specifically contemplate that 'residences' within homeless shelters qualify as 'dwellings'").

⁹⁶ Brief for HUD as Amici Curiae, at 16-17, *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 657 F.3d 988 (9th Cir. 2011).

⁹⁷ In general, an agency decision is arbitrary and capricious and therefore violates the Administrative Procedures Act

if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered 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.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *id.* at 30 (explaining that the arbitrary-and-capricious standard requires that an agency "examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts and the choice made.'").



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A. HUD Acted Within Its Authority when Promulgating the 2016 Rule Expanding Shelter Access for Transgender People

HUD's stated mission is "to create strong, sustainable, inclusive communities and quality affordable homes for *all*."⁹⁸ "All" includes transgender and gender nonconforming people who may face barriers or experience discrimination in seeking housing, including temporary housing. Additionally, HUD's responsibility under the Department of Housing and Urban Development Act (the "HUD Act") is to address "the needs and interests of the Nation's communities and of the people who live and work in them."⁹⁹ Congress has given HUD broad authority to fulfill its mission, and the HUD Act specifically states that the Secretary "may make such rules and regulations as may be necessary to carry out his functions, powers, and duties."¹⁰⁰ Congress has also repeatedly passed legislation that calls on HUD to serve the nation's housing needs.¹⁰¹

In response to public notice of HUD's 2016 Rule, interested members of the public voiced concerns that HUD was attempting to create a new protected classification and lacked the statutory authority to do so.¹⁰² In response, HUD expressly took the position that the 2016 Rule fell squarely within the scope of its regulatory authority. HUD both invoked its broad mandate to provide housing for all, including to "provid[e] shelter for transgender and gender nonconforming persons, who have faced significant difficulty in obtaining access to shelters, and buildings and facilities that provide shelter," and defended the broad grant of congressional authority to fulfill its mission, including through rulemaking.¹⁰³ Additionally, Congress has charged HUD with administering and enforcing the FHA, which prohibits discrimination on the basis of sex, which encompasses discrimination on the basis of gender identity.¹⁰⁴ Rather than fashioning a new protected class in excess of its statutory authority, HUD acted within its established authority to ensure that all individuals seeking temporary shelter have equal access to it, regardless of their gender identity.¹⁰⁵

⁹⁸ Dep't Housing & Urban Dev., About Us - Mission, <https://www.hud.gov/about/mission> (emphasis added) (accessed Sept. 22, 2020).

⁹⁹ 42 U.S.C. § 3531.

¹⁰⁰ 42 U.S.C. § 3535(d).

¹⁰¹ See, e.g., Housing Act of 1949, 42 U.S.C. § 1441; Housing and Urban Development Act of 1968, 12 U.S.C. § 1701t; Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. § 12701-702.

¹⁰² 2012 Rule, 77 Fed. Reg. at 5,672-73; 2016 Rule, 81 Fed. Reg. at 64,769-70.

¹⁰³ 2016 Rule, 81 Fed. Reg. at 64,769.

¹⁰⁴ See *Bostock*, 140 S. Ct. 1731; cf. *Macy v. Dept. of Justice*, No. 0120120821, 2012 WL 1435995, at *13 (EEOC Apr. 20, 2012); *Lusardi v. Dept. of the Army*, No. 0120133395, 2015 WL 1607756, at *17 (EEOC Apr. 1, 2015); Attorney General Memorandum, Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014), <http://www.justice.gov/file/188671/download>; HUD Memorandum, Assessing Complaints that Involve Sexual Orientation, Gender Identity, and Gender Expression (June 15, 2010), <https://www.fairhousingnc.org/wp-content/uploads/2012/03/HUD-Memo-re-Sexual-Orientation-Discrimination-6-15-2010.pdf>.

¹⁰⁵ Several other federal agencies have similarly adopted policies that recognize and respect transgender rights. In 2016, the Department of Labor's Office of Federal Contract Compliance Programs adopted a rule requiring that all federal contractors subject to Executive Order 11246 allow transgender employees to use restrooms and other facilities consistent with their gender identity. See 41 C.F.R. § 60-20.2 (2016). Similarly, the General Services Administration



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HUD now attempts to delegitimize the 2016 Rule on the basis that it was promulgated in reliance on the HUD Secretary's "plenary authority to issue regulations" rather than a "more specific affirmative grant of authority."¹⁰⁶ HUD's arguments mischaracterize the scope of an administrative agency's power. While an agency's power must be derived from authority granted by Congress, no principle or precedent limits an agency's rulemaking power to *express* grants of Congressional authority, as HUD contends. Furthermore, an agency's *power* to act does not turn on whether the exercise of that power will impose "a regulatory burden" or limit "individual freedom" (notwithstanding that such prudential considerations may, in some circumstances, influence and otherwise bear on the propriety of agency decision-making). An agency either has the power to act (explicit or implied) or it does not.

An agency's ability to promulgate regulations "must always be grounded in a valid grant of authority from Congress"¹⁰⁷—either "expressly granted or necessarily implied."¹⁰⁸ With respect to the latter, an administrative agency possesses "such powers as are reasonably and necessarily implied in the exercise of its duties in accomplishing the purposes of the act."¹⁰⁹ Determining the scope of an agency's authority involves statutory interpretation.¹¹⁰ Courts "analyze[] whether the relevant statute unambiguously grants authority for an administrative agency to act in the manner at issue,"¹¹¹ "interpret[ing] the words used in a statute with regard to both their literal meaning and the purpose and history of the statute within which they appear."¹¹² A grant of agency authority "need not necessarily be traced to specific words."¹¹³

Here, Congress has not only authorized HUD's broad mission, but has "given HUD broad authority to fulfill that mission and discharge its responsibilities through rulemaking."¹¹⁴ Hence, HUD acted pursuant to a valid grant of congressional authority when it issued the 2016 Rule pursuant to Section 7(d) of the HUD Act. HUD's reliance on its "plenary" rule-making authority

issued a bulletin clarifying that all federal offices under its purview must allow employees and visitors to federal buildings to access restrooms consistent with their gender identity. 81 Fed. Reg. 55,148 (Aug. 18, 2016). The U.S. Department of State also allows transgender individuals to change the gender marker on their passport so that it is consistent with their gender identity. See U.S. Dep't of State, Change of Sex Marker, <https://travel.state.gov/content/travel/en/passports/need-passport/change-of-sex-marker.html> (accessed Sept. 22, 2020).

¹⁰⁶ Proposed Rule, 85 Fed. Reg. at 44,813.

¹⁰⁷ *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1058 (N.D. Cal. 2018) (internal quotations omitted).

¹⁰⁸ *B.B. v. Tacoma Sch. Dist.*, No. 08-5512 RJB, 2009 WL 159204, at *4 (W.D. Wash. Jan. 22, 2009) (internal quotations omitted).

¹⁰⁹ *Sansom v. Commtec/Pomeroy Computer Res., Inc.*, No. Civ.A. 2:05-CV-00444, 2006 WL 363170, at *3 (S.D.W. Va. Feb. 15, 2006) (citation omitted); see also generally 73 C.J.S. *Pub. Admin. L. & Pro.* § 150 (2020) (explaining that administrative agencies possess "powers reasonably necessary and fairly appropriate to make effective the express powers granted to, or duties imposed on them, and to accomplish the purposes of the legislation which established them"); *In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *Friends of Boundary Waters Wilderness v. Bosworth*, 437 F.3d 815 (8th Cir. 2006); *Hawes v. Colo. Div. of Ins.*, 65 P.3d 1008 (Colo. 2003).

¹¹⁰ 73 C.J.S. *Pub. Admin. L. & Pro.* § 151 (2020).

¹¹¹ *Id.*

¹¹² *Mass. Hosp. Ass'n Inc. v. Dep't of Med. Sec.*, 588 N.E.2d 679, 683 (Mass. 1992).

¹¹³ 73 C.J.S. *Pub. Admin. L. & Pro.* § 151.

¹¹⁴ 2016 Rule, 81 Fed. Reg. at 64,769.



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does not render the 2016 Rule improper, as the Department suggests. HUD, in fact, implicitly concedes as much. HUD rightly does not question whether it had authority to implement the 2012 Rule, which the Secretary also issued pursuant to his plenary authority under the HUD Act to “make such rules and regulations as may be necessary to carry out his functions, powers, and duties.”¹¹⁵

B. “Local Control” is a Thinly Veiled Euphemism for “License to Discriminate”

HUD contends that the Proposed Rule is warranted because the 2016 Rule improperly minimized local control, “adopt[ing] a one-size-fits-all approach to admission and accommodation by gender identity in temporary shelters, despite significant variation in State and local law.”¹¹⁶ The NTBA objects to HUD’s “local control” concerns on several grounds, including that “local control” is nothing more than a thinly veiled license to discriminate.

First, HUD fails to support its assertion that the Proposed Rule better reflects constitutional principles of democracy and federalism.”¹¹⁷ HUD hangs its hat on an Executive Order, which states that “‘issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people,’ and that the ‘national government should be deferential to the States when taking action that affects the policymaking of the States.’”¹¹⁸ But preventing discrimination on the basis of a protected class or characteristic is of such national import that Congress has passed countless laws advancing civil rights, and the federal judiciary is a guiding force for the advancement of civil rights. Indeed, the U.S. Supreme Court’s recent decision in *Bostock*, holding that discrimination based on transgender status necessarily entails discrimination based on sex, *see supra* at Section VI, underscores that issues concerning discrimination against transgender people are “national in scope [and] significance,”¹¹⁹ and they require national solutions. HUD’s responsibility to provide equal access to housing for all is similarly national in scope. The Department’s arbitrary proposal to abandon its mission in the name of federalism and democracy while enshrining the current administration’s antipathy toward transgender people in federal housing policy should be rescinded in its entirety.

Second, HUD contends that the 2016 Rule failed to properly take into account “significant” variations in state and local laws.¹²⁰ Yet, all three examples of divergent local laws included in the Proposed Rule all prohibit discrimination based on gender identity. Even assuming there is some variation in the precise contours of protections across the laws of different geographic territories, that variation does not warrant abandoning federal protections entirely. If anything, local variation in how “gender identity” is understood and defined counsels in *favor* of retaining a uniform, national policy governing admission to federally funded homeless shelters.

¹¹⁵ 42 U.S.C. § 3535.

¹¹⁶ Proposed Rule, 85 Fed. Reg. at 44,813.

¹¹⁷ *Id.*

¹¹⁸ *Id.* (quoting Exec. Order No. 13132, 64 Fed. Reg. 43,255, 43,256 (Aug. 10, 1999)).

¹¹⁹ *Id.*

¹²⁰ *Id.*



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Third, HUD's proposal to jettison clear directives in the name of "local control" would undoubtedly sow chaos and confusion while inviting exploitation. The Proposed Rule would empower operators to deny transgender people access to emergency homeless shelters and justify that denial by pointing to HUD's unclear guidance as to whether the FHA applies to those shelters. Additionally, the proposal would have the (perhaps unintended, yet inevitable, consequence) of exposing shelter operators to liability not only under the FHA but also more prescriptive local laws. For example, if a shelter operator in New York City were to follow HUD's proposed guidance and deny access to a woman because she has an Adam's apple or facial hair, that operator would have violated New York City's human rights laws.¹²¹ Such violations are not merely hypothetical, as it would be counterintuitive for HUD to issue regulations with no expectation or intention that operators would, in fact, turn to the regulations for guidance.

The lack of clear directives would be similarly harmful to transgender individuals seeking shelter. The very prospect of having to navigate a patchwork of varied and inconsistently enforced shelter policies and admission guidelines, coupled with the increased risk of being discriminated against or otherwise violated before even being admitted to a shelter, would discourage many transgender people from even seeking shelter in the first instance. Indeed, existing data confirm that several transgender and other gender nonconforming individuals who have experienced homelessness did not seek shelter because they feared discrimination and mistreatment because of their gender identity. *See supra* at Section III. The Department's ill-suited attempt to restore so-called "local control," would, in fact, only exacerbate existing inequalities in access to safe shelters. Less than half of all states have enacted laws prohibiting discrimination against transgender individuals in housing, and several states have enacted laws prohibiting local governments and municipalities from enacting their own protections for transgender individuals in housing.¹²² In many respects, the Proposed Rule is an open invitation to roll back existing protections and freely discriminate against transgender individuals. The NTBA is particularly concerned that the harms that would flow from the Proposed Rule would disproportionately impact geographic areas with limited housing options. Absent the protections provided by the 2016 Rule, transgender individuals in such localities will inevitably be turned away from shelters (or elect not to access shelter in the first instance) and onto the streets.

Take, for example, Ms. C, a transgender immigrant and human trafficking survivor, and former client of an NTBA member. Following release from detention, Ms. C sought shelter at a single-sex women's shelter. She was declined admission because she is transgender. Desperate

¹²¹ *See* N.Y.C. Admin. Code §§ 8-107(4),(5) (2020). HUD's argument that New York City Human Rights Law (NYCHRL) does not cover shelters is unsupported. Section 8-107(5)(k) of the New York City Administrative Code does *not* wholesale exempt shelters from the prohibition against discrimination or permit shelter providers to turn away transgender women from women's shelters. Instead, it simply allows providers to operate single-sex facilities. Indeed, the New York City Commission on Human Rights, enforces the law to redress discrimination, including against transgender people, in single-sex shelters. *See e.g.*, New York City Commission on Human Rights, *Acacia Housing Network Inc. & New York City Department of Homeless Services (DHS) Settle Gender Discrimination Claim by Former Shelter Resident for \$65,000 Damages and Penalties*, <https://www1.nyc.gov/site/cchr/enforcement/2019-settlements.page> (accessed Sept. 18, 2020).

¹²² Movement Advancement Project, *Equality Maps: State Nondiscrimination Laws*, https://www.lgbtmap.org/equality-maps/non_discrimination_laws/housing (accessed Sept. 19, 2020).



for shelter, Ms. C eventually sought admission at the only other nearby shelter—a single-sex men’s shelter. She described the process of seeking shelter as confusing and degrading. Shortly after being admitted to the shelter, Ms. C reported having been verbally harassed by other residents. Shelter staff were unresponsive to her complaints, and Ms. C had no recourse, as they were no available state or local protections. When the harassment escalated from slurs to unwanted physical contact, Ms. C left the shelter in fear of her own safety, electing to instead stay on the street. Two nights after leaving the shelter, she was brutally attacked by strangers. Recounting her experiences, Ms. C commented that, for her, there were “no safe options.” Outcomes such as this are plainly antithetical to HUD’s purpose and mission to “ensure fair and equal housing opportunity for all,”¹²³ not to mention inconsistent with federal law.

C. HUD’s Claim that the 2016 Rule Unduly Burdens the Religious Liberty of Faith-Based Shelters is Overinflated and Unsubstantiated

HUD’s assertion that religious liberty was “not discussed in the 2016 Rule” is plainly wrong. During the rulemaking process, HUD thoughtfully addressed concerns that the rule “may place a significant burden upon the associational and religious liberty of beneficiaries and other stakeholders; for example, by requiring residents to share facilities with opposite-sex adults where their religions prohibit that.”¹²⁴ HUD responded:

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. . . . 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.

Faith-based organizations have long been involved in HUD’s programs and provide many valuable services to low-income populations served by HUD. It is HUD’s hope that faith-based organizations will continue to actively participate in HUD’s CPD programs and provide services to transgender persons in accordance with the requirements set in this rule.¹²⁵

In other words, less than four years ago, HUD unambiguously stated that, just as it would not tolerate discrimination on the basis of race, color, national origin, or disability, it would not tolerate

¹²³ Agency Details - U.S. Dep’t of Hous. & Urban Dev., USA.gov, <https://www.usa.gov/federal-agencies/u-s-department-of-housing-and-urban-development> (accessed Sept. 22, 2020).

¹²⁴ 2016 Rule, 81 Fed. Reg. at 64,773.

¹²⁵ *Id.*



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discrimination against transgender individuals to appease religious objectors. HUD cites no new evidence that would support reversal of this prior position with respect to religious liberty.¹²⁶

As detailed in the Proposed Rule, existing law and regulations already provide a process by which religious organizations may seek a waiver and appropriate accommodations under the Religious Freedom Restoration Act (RFRA).¹²⁷ Hence, religious organizations that may be unwilling to accommodate all individuals, regardless of gender identity, can apply for a waiver and, if approved, can obtain HUD funding for their single-sex shelters. HUD complains that the waiver process is “time consuming and burdensome,”¹²⁸ thereby discouraging faith-based organizations from applying for or accepting HUD funding. Yet HUD does not support this claim with any data showing a decline in the number of faith-based shelters that have sought or received HUD funding since the 2016 Rule was implemented.

The omission of key supporting data (which should be readily accessible to HUD) is not in compliance with the rule-making process, which requires that agencies provide the “essential facts upon which the administrative decision was based,”¹²⁹ and explain the justification for its determinations with actual evidence beyond a “conclusory statement.”¹³⁰ Here, HUD has not offered any supporting data, presumably because there is none. In May 2017, The Center for American Progress submitted a Freedom of Information Act Request to HUD requesting the production of requests for RFRA waivers; HUD failed to locate any such requests, indicating that none were requested, and, moreover, failed to locate any complaints filed pertaining to the 2012 and 2016 Rules.¹³¹ And to the extent such waiver requests now exist, HUD omits this key supporting data, without which it is impossible to assess the purported burdensomeness of the waiver process.

In support of its religious burden argument, HUD instead offers a wholly conclusory statement, immediately followed by a statement undermining that conclusion:

Further, the 2016 Rule’s approach discourages some religious providers from accepting HUD funding at all, to avoid being forced to either comply with the rule or the need to request a waiver. The large percentage of single-sex facilities sponsored by religious organizations that do not participate in HUD programs *may* reflect

¹²⁶ See *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43-52.

¹²⁷ Proposed Rule, 85 Fed. Reg. at 44,814.

¹²⁸ *Id.*

¹²⁹ *United States v. Dierckman*, 201 F.3d 915, 926 (7th Cir. 2000) (quoting *Bagdonas v. Dep’t of Treasury*, 93 F.3d 422, 426 (7th Cir. 1996)).

¹³⁰ *Allied-Signal*, 988 F.2d at 152.

¹³¹ Sarah Kellman, et al., *The Dire Consequences of the Trump Administration’s Attack on Transgender People’s Access to Shelters*, Center for American Progress (July 31, 2019, 9:00 AM), <https://www.americanprogress.org/issues/lgbtq-rights/news/2019/07/31/472988/dire-consequences-trump-administrations-attack-transgender-peoples-access-shelters>.



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the burden or perceived burden of both current HUD requirements and the waiver process.¹³²

HUD effectively admits that it does not have any proof that the 2016 Rule's protections for transgender people "discourage" religious organizations from accepting HUD funding; instead, HUD merely hypothesizes that this "may" be the case.¹³³ This is sloppy rulemaking and certainly not sufficient justification for reversing the 2016 Rule.¹³⁴

If the waiver process was so burdensome that religious organizations determined instead to forego HUD funding after the 2016 Rule was implemented, HUD should also be able to point to that data. Yet, HUD has not produced any documentation evidencing that shelters run by religious organizations that opted out of funding from HUD after the 2016 Rule went into effect. Without any sort of supporting documentation, HUD argues that rolling back the 2016 Rule is necessary to allow some unaccounted-for religious organizations to continue to obtain HUD funding while running shelters that discriminate against transgender individuals. HUD has not sufficiently supported its purported justification with respect to religious liberty, precisely because such concerns are unsupported.

D. HUD's Purported Privacy Concerns are Misplaced

As its fourth purported justification for the Proposed Rule, HUD states that "the current rule gives little consideration to a shelter's need to take care of the mental health and privacy concerns of at-risk clients, particularly 'the special needs of program residents that are victims of domestic violence' along with 'dating violence, sexual assault, and stalking.'"¹³⁵ This argument is flawed for several reasons, not least of which is that HUD seems to conveniently omit transgender persons from its perception of "at-risk clients" and focus instead solely on the privacy concerns of cisgender persons. Furthermore, the very individuals whose privacy interests HUD purports its proposal would protect—survivors of sexual assault and domestic violence—overwhelmingly *oppose* policies that "perpetuate the myth that protecting transgender people's access to restrooms and locker rooms endangers the safety or privacy of others."¹³⁶ In a 2018 national consensus statement, several sexual assault and domestic violence organizations both implicitly rejected HUD's claim that allowing transgender individuals' access to shelter would "force homeless women to sleep alongside and interact with men in intimate settings" and expressed their support for "transgender-inclusive nondiscrimination protections" to address the

¹³² Proposed Rule, 85 Fed. Reg. at 44,185 (emphasis added).

¹³³ *Id.*

¹³⁴ See *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43-52.

¹³⁵ Proposed Rule, 85 Fed. Reg. at 44,814.

¹³⁶ National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community (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>.



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“unconscionably high rates of assault experienced by transgender individuals.”¹³⁷ As they aptly stated:

Nondiscrimination laws do not allow men to go into women’s restroom’s—period. The claim that allowing transgender people to use the facilities that match the gender they live every day allows men into women’s bathrooms or women into men’s is based on a flawed understanding of what it means to be transgender or a misrepresentation of the law. . . . The efforts to ban transgender people from using public restrooms obscures the fact that all of us, including transgender people, are deeply concerned about safety and privacy. . . . *[D]iscriminating against transgender people does nothing to decrease the risk of sexual assault.*¹³⁸

HUD nonetheless disregards this clear consensus, instead highlighting alleged “anecdotal evidence”¹³⁹ bearing on privacy concerns. HUD’s failure to examine all of the relevant data not only violates basic tenets of agency rule-making, which require a “rational connection between the facts and the choice made,”¹⁴⁰ but obfuscates the ways in which the Proposed Rule would impede, not improve, the provision of care to “vulnerable populations”¹⁴¹ seeking shelter.

- i. HUD provides no legal basis for its assertion that certain persons should be free from discomfort.*

An individual’s purported discomfort with transgender persons having access to sex-specific facilities does not implicate any legally cognizable privacy right. Courts have regularly held that such an expansive right to privacy does not exist, particularly where it concerns access to public resources.¹⁴² Here, HUD is seeking to manufacture a nonexistent privacy right and use that right to permit shelters to exclude individuals, specifically transgender individuals, from

¹³⁷ *Id.*

¹³⁸ *Id.* (emphasis added).

¹³⁹ Proposed Rule, 85 Fed. Reg. at 44,811, 44,815.

¹⁴⁰ *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019).

¹⁴¹ Proposed Rule, 85 Fed. Reg. at 44,811, 44,814.

¹⁴² *See Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 531 (3d Cir. 2018), *cert. denied sub nom. Doe v. Boyertown Area Sch. Dist.*, 139 S. Ct. 2636 (2019) (“[W]e decline to recognize such an expansive constitutional right to privacy—a right that would be violated by the presence of students who do not share the same birth sex. Moreover, no court has ever done so. As counsel for the School District noted during oral argument, the appellants are claiming a very broad right of personal privacy in a space that is, by definition and common usage, just not that private.”).



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emergency housing.¹⁴³ Such a determination is a question of discomfort, not a constitutional right to privacy.¹⁴⁴

Courts have regularly found that the use of a public facility for its intended purpose, by itself, cannot implicate a right to privacy.¹⁴⁵ Or, stated otherwise, discomfort with another individual's appropriate usage of public facilities cannot, by itself, implicate a privacy interest.¹⁴⁶ More specific concerns must be alleged in order to implicate such an interest; and implication of a privacy interest would not justify discrimination against an *entire class* of people based on sex, gender, transgender status, or any other protected characteristic.¹⁴⁷ As discussed below, the concerns that HUD does outline are, by its own admission, "anecdotal" at best and may even be indicative of a discriminatory animus in crafting the Proposed Rule. HUD has entirely failed to advance any adequately specific concerns to implicate a right to privacy. Moreover, promulgating a rule on the basis of merely these concerns would be arbitrary and capricious, as any resident's discomfort or privacy concerns can be addressed by shelter operators in numerous nondiscriminatory ways and does not warrant denying admission to transgender people as the Proposed Rule contemplates.

HUD has conceded that it has neither examined the relevant data nor articulated a satisfactory explanation for its decision. In reviewing the promulgation of a rule that changes a policy, a court looks at "whether the Secretary examined 'the relevant data' and articulated 'a satisfactory explanation' for his decision, 'including a rational connection between the facts found

¹⁴³ In support of its position, HUD selectively quotes three cases that are entirely distinguishable and have little, if anything, to do with the interests implicated by transgender and cisgender women residing together in shelters. If anything, *United States v. Virginia*, which required an all-male institution to admit women despite its objections that accommodating women would be burdensome, undermines HUD's position instead of supporting it. 518 U.S. 515, 550, n.19 (1996) (noting, "Experience shows such adjustments are manageable," in the footnote excerpted by HUD) (citation omitted). HUD's intentional decision to look exclusively at far-removed case law when much more specific and applicable case law exists, especially when coupled with its misrepresentation of the ultimate outcome in some of the cases it does cite, suggests that it is motivated by an improper animus, rather than rigorous legal reasoning or factual analysis, in promulgating the Proposed Rule. The NTBA submits that HUD's discriminatory motivations become even more obvious when one considers the dearth of objective or statistical data leveraged by HUD in advancing its newly proposed rule.

¹⁴⁴ Indeed, as discussed in section iii below, shelter providers can mitigate residents' discomfort without discriminating against transgender residents, or cisgender people who do not conform to gendered expectations.

¹⁴⁵ See e.g., *Parents for Privacy v. Barr*, 949 F.3d 1210, 1228-29 (9th Cir. 2020) (rejecting a Title IX claim, claim of constitutional right to bodily privacy, and due process claim; "Plaintiffs allegedly feel harassed by the mere presence of transgender students in locker and bathroom facilities. This cannot be enough. The use of facilities for their intended purpose, without more, does not constitute an act of harassment simply because a person is transgender."), *petition for cert. filed*, No. 20-62 (U.S. July 23, 2020).

¹⁴⁶ The use of the men's restroom by a student who identified as male did not implicate a claim to privacy by the school board barring any specific behavior by the individual that would breach another student's privacy. The student's gender on his birth certificate and enrollment documents did not constitute a legal basis to deny him access to facilities. See *Adams*, 968 F.3d at 1286 (school bathroom policy was a violation of equal protection and Title IX and school did not have a cognizable "privacy" interest in restricting bathrooms to only those born to specific genders without specific actions by the student implicating an actual privacy concern).

¹⁴⁷ *Id.*



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and the choice made.”¹⁴⁸ In its justification for the rule change, HUD asserts that it is balancing equities by revising a rule that “manifested privacy issues.”¹⁴⁹ Yet HUD’s analysis of privacy issues fails under scrutiny as it fails to provide support in several instances and fails to adequately consider relevant data in others.

ii. HUD concedes that its rule is not supported by relevant data.

HUD’s failure to marshal any data in support of its decision suggests that its new rule is arbitrary and capricious and represents a failure to adequately balance any equities. HUD acknowledges that there is no data “suggesting that transgender individuals pose an inherent risk to biological women.”¹⁵⁰ Unable to marshal data in support of its argument, HUD points to *anecdotal* evidence that transgender inclusive anti-discrimination *may* be exploited by cisgender men to harm women. The “anecdotal”¹⁵¹ evidence that HUD offers is entirely one-sided and lacks any indicia of reliability. The first anecdote, about women in Alaska who would “rather sleep in the woods” fails to include any statements provided directly by the women in the shelters at issue.¹⁵² Instead, HUD cites to an article that discusses a case wherein a conservative Christian law firm, which purportedly argues similar cases across a variety of localities to advance a policy objective, is arguing against a local housing rule.¹⁵³ In the case at issue, the article states that the attorney told the District Judge that “women have told shelter officials that if biological men are allowed to spend the night alongside them, ‘they would rather sleep in the woods.’”¹⁵⁴ This statement evinces a fundamental misunderstanding of transgender women, who are not “biological men.” Even putting that aside, it is not clear from HUD’s provided sources that any affidavits were offered. Equally unclear from the article is whether this was something women in the shelter stated or the shelter officials’ understanding of the women’s statements. The civil complaint against Naomi’s House that HUD references as anecdotal evidence similarly lacks indicia of reliability. That case is currently delayed due to COVID-19.¹⁵⁵ However, it would be, at best, problematic if HUD were to rely on untested allegations advanced in a complaint in a civil suit seeking damages as the sole basis for the promulgation of a new rule that deprives vulnerable individuals of shelter at their time of greatest need.

iii. HUD entirely fails to consider the impact of the Proposed Rule on individuals to whom it would deny shelter.

When there is an assessment of individuals’ right to privacy, such an assessment requires that the interests of the individual seeking to enforce this right and the public be weighed. The Proposed Rule fails to weigh a significant factor, namely, the impacts on individuals to whom the

¹⁴⁸ *Dep’t of Commerce*, 139 S. Ct. at 2569 (quoting *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43).

¹⁴⁹ Proposed Rule, 85 Fed. Reg. at 44,814.

¹⁵⁰ *Id.* at 44,815.

¹⁵¹ *Id.* at 44,815.

¹⁵² *Id.*

¹⁵³ *Id.* (quoting Rachel D’Oro, Faith-based shelter fights to keep out transgender women (Jan. 11, 2019), <https://apnews.com/85494d367c2d4a38b1749f76a89f49c3>).

¹⁵⁴ *Id.*

¹⁵⁵ *McGee v. Poverello House*, No. 1:18-cv-00768-LJO-SAB (E.D. Cal.).



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new policy would deny shelter. This failure contravenes precedent. If any legitimate right to privacy were implicated here, which, as discussed above, it is not, “[t]he constitutional right to privacy is not absolute. It must be weighed against important competing governmental interests.”¹⁵⁶

Here, HUD offers merely one-sided anecdotal “evidence,” which, as discussed above, is not only of questionable reliability, but undermined by an overwhelming body of research and experience showing that transgender women do *not* pose a risk to cisgender women. While making a bare minimum acknowledgment that transgender individuals, like other individuals, have mental health and safety needs, HUD nonetheless fails to assess the harmful impact of its new policy on those it would exclude from emergency housing. As discussed in sections III, VII(B), *supra*, and IX, *infra*, when transgender people cannot access shelters according to their gender identity, many cannot safely access shelter at all. Indeed, for many transgender people, being forced into shelter based on sex assigned at birth would itself unavoidably communicate that they are transgender, and potentially also reveal information about their medical history to others, exposing them to risk of harassment and worse, while also injuring privacy interests.¹⁵⁷ Courts have found that denying transgender individuals access to resources that correspond to their gender identity can result in significant psychological harm. For example, examining an amicus brief, the court in *Doe* found that “Policies that exclude transgender individuals from private facilities that are consistent with their gender identities have detrimental effects on the physical and mental health, safety, and well-being of transgender individuals.”¹⁵⁸ *See also supra* at Sections II, III (discussing additional harms of exclusionary and discriminatory policies). HUD’s failure to adequately weigh or consider the myriad challenges transgender individuals already face when seeking access to housing or the harmful impact its proposed policy would have on transgender people suggests that the primary purpose of the rule is its inevitable result—increased harm to transgender people.

iv. HUD fails to provide any support for its contention that the 2016 Rule has proven unworkable.

HUD asserts, without providing any support, that the 2016 Rule allowing post-admission accommodations to address residents’ comfort and privacy concerns has proven unworkable. By its Proposed Rule, HUD has adopted the mindset that, because “[s]helters operate in difficult

¹⁵⁶ *Doe*, 897 F.3d at 528 (denying a suit seeking to enjoin transgender students from using bathrooms that match their gender identities against the risks faced by a transgender individual using a facility that does not match their identity, which are detailed at length and include: social risks, psychological risks, medical risks, risks of violence and harassment, and the psychological toll created by gender dysphoria to support a policy allowing the student to use facilities matching their gender identity); *see also Grimm*, 2020 WL 5034430 (holding that school’s policy prohibiting transgender students from using restroom corresponding to their gender identity was not “not substantially related” to any government interest in privacy).

¹⁵⁷ *See, e.g., Powell v. Schriver*, 175 F.3d 107, 111 (2nd Cir. 1999) (involuntary disclosure that inmate was transgender implicated privacy interest and created risk of harm).

¹⁵⁸ 897 F.3d at 523 (internal quotation and citation omitted).



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conditions,”¹⁵⁹ shelters should be permitted to discriminate against transgender individuals rather than providing accommodations for those whose comfort may be challenged by their presence.

This is not the first time that issues of privacy and security have been raised, unfoundedly, with regard the sharing of public accommodations by transgender and cisgender persons, particularly cisgender women. During the rulemaking process for the 2016 Rule, there was concern from the public about opening female, single-sex spaces to individuals who were assigned the sex of male at birth. Commenters to the 2016 Rule worried that individuals would deliberately misrepresent their gender to gain access to female shelters and thereby put vulnerable women at risk of harm. That concern is unfounded and, in any case, must not be dealt with through wholesale discrimination against transgender people. Moreover, HUD responded to it by reiterating that in developing both the 2012 Rule and the 2016 Rule, it spent considerable time studying the issue and understanding the perspective of both transgender and cisgender individuals. HUD concluded both times that privacy concerns can be addressed through small physical modifications to facilities, such as adding screens to bathing areas, and policy changes, such as implementing bathing facility schedules.¹⁶⁰ HUD now says that this places an impossible burden on many shelters without, in fact, pointing to any such shelter that has asserted that measures as simple as scheduling bathing times are unworkable.

E. Regulatory Burdens are No Excuse for Failing to Prevent Discrimination Against Transgender People

HUD’s final purported justification for its Proposed Rule is no more credible or persuasive than the others. Citing “regulatory burdens” allegedly imposed by the 2016 Rule, HUD asserts:

The rule imposes several different types of regulatory burdens. It imposes a special document retention requirement applicable to determinations of “sex” that is burdensome and not supported either by statute or practice. This burden is inconsistent with Executive Orders directing agencies to “alleviate unnecessary regulatory burdens placed on the American people,” [34] and “manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.” [35] Additionally . . . shelters may not have the resources to build individual privacy screens or single occupant restrooms and bathing facilities to address any privacy concerns that may arise.¹⁶¹

¹⁵⁹ Proposed Rule, 85 Fed. Reg. at 44,815.

¹⁶⁰ 2016 Rule, 81 Fed. Reg. at 64,772.

¹⁶¹ Proposed Rule, 85 Fed. Reg. at 44,816.



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Much like HUD did with respect to its “local control” argument, here too does HUD greatly misconstrue an Executive Order to fit its own agenda.

HUD’s conjecture that the burden of mitigating privacy concerns outstrips shelter resources is unsupported. Moreover, it should be apparent to any casual observer that the issues HUD complains of are, in fact, within HUD’s own regulatory control. The document retention policy, of which HUD now complains, is the result of attempts to vastly scale-down the document retention requirements contemplated between the initial and final iterations of the 2016 Rule. As HUD responded to a commenter in its final 2016 Rule:

This final [2016] rule eliminates most of the provisions of the proposed rule that required recordkeeping requirements, and as a result HUD has removed most of the recordkeeping requirements in this final rule. The only recordkeeping requirement that remains is the requirement to maintain records of policies and procedures to ensure that equal access is provided, and individuals are accommodated, in accordance with their gender identity. This requirement will aid HUD in monitoring compliance with this rule and taking enforcement action where needed.¹⁶²

Given that the primary purpose of the 2016 Rule’s document retention policy is for HUD’s own compliance and monitoring efforts, it is within HUD’s purview to eliminate this requirement if it is satisfied that it can enforce housing access for transgender individuals without such documentary evidence. Furthermore, the burden of having to retain documents can hardly be considered a reasonable justification for the wholesale elimination of any uniform standard to prevent discrimination against transgender persons, which is HUD’s reasoning here.

Aside from the nonsensical nature of HUD’s purported justification based on “burdensome” document retention, HUD seems to imply that transgender people themselves are a “burden” on shelters because they may need specifically tailored accommodations, a burden that HUD seems unwilling to shoulder. Although the Proposed Rule would not allow shelters to take into consideration the “burden” of accommodating transgender applicants in their admission decisions, HUD’s inclusion of these alleged concerns as justifications for the Proposed Rule *signals* to shelters that they are permitted to deny transgender people admission on the basis of any “burdensome” accommodations that may be required. After this, if HUD’s Proposed Rule were in effect, the operator would be given the benefit of the doubt that they acted in “good faith” when denying the person admission. This result, along with HUD’s purported justification for the Proposed Rule, is antithetical to HUD’s mission and unconstitutional under federal law.¹⁶³

¹⁶² 2016 Rule, 81 Fed. Reg. at 64,774.

¹⁶³ See Dep’t Housing & Urban Dev., About Us - Mission, <https://www.hud.gov/about/mission> (accessed Sept. 22, 2020); *Bostock*, 140 S. Ct. 1731.



IX. The Proposed Rule Fails to Engage in Cost/Benefit Analysis, as Required by Law

Executive Orders 12866 and 13563 require agencies to assess all costs and benefits of regulatory changes, including both quantifiable and qualitative factors, and choose the regulatory alternative that maximizes net benefits.¹⁶⁴ The Department has failed to perform its obligations under these executive orders. The Proposed Rule overstates the purported benefits of the proposed changes while minimizing the costs and other harms to the beneficiaries of the rule, especially transgender people. This failure to assess all costs and benefits violates Executive Orders 12866 and 13563.

The purported benefits of the Proposed Rule are overstated and almost wholly speculative. For example, HUD claims that the Proposed Rule would lead to an increase in shelters participating in HUD's emergency shelter programs.¹⁶⁵ However, HUD offers no explanation, beyond mere speculation, as to why this would be the case. The Proposed Rule cites no evidence that shelters have avoided participation in HUD's programs as a result of the 2016 Rule, nor does it attempt to quantify how much shelter capacity it believes will increase as a result of the rule change. Similarly, the Proposed Rule claims the changes will decrease administrative burdens for shelters, but cites no evidence for its claim that the 2016 Rule was administratively burdensome, nor for its belief that the Proposed Rule will be less so.¹⁶⁶ Indeed, the Proposed Rule would impose significant new administrative burdens for shelters. For example, it would complicate the intake system by allowing shelter employees to demand evidence of a person's sex assigned at birth.

The Proposed Rule would also impose significant harms on all shelter residents. In addition to the severe harm caused by allowing shelters to subject transgender people to humiliating and stigmatizing invasions into their privacy, this invasive screening would impact *every* person seeking shelter, so long as they do not conform with shelter employees' expectations of gender performance or appearance. Potentially large swaths of the population seeking shelter would be caught up in this complex and invasive intake process, and, if unable to produce "evidence" of their sex, would be denied shelter, regardless of whether or not they are transgender.

This is just one example of the ways in which the Proposed Rule fails to sufficiently consider the costs associated with the rule change, particularly the harms that will fall upon transgender people. As outlined above, as many as a quarter of transgender people experiencing homelessness avoid seeking shelter because they fear mistreatment because they are transgender, while half of those who sought shelter experienced such profound mistreatment from staff and fellow residents that they were forced to leave.¹⁶⁷ Allowing shelters to refuse to accommodate transgender people in a manner aligned with their gender identity will lead to a decrease in transgender-friendly shelter beds, and will likely lead to an increase in homeless transgender

¹⁶⁴ Exec. Order No. 12866 (1993), <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>; Exec. Order No. 13563 (2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>; Proposed Rule, 85 Fed. Reg. at 44,817.

¹⁶⁵ Proposed Rule, 85 Fed. Reg. at 44,816.

¹⁶⁶ *Id.* at 44,815.

¹⁶⁷ National Center for Transgender Equality, *supra* note 5, at 176, 180.



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people who choose to avoid seeking shelter, who are forced to prematurely leave shelter, or who are unable to find safe shelter at all. This alone is a significant cost that the Proposed Rule fails to consider, in addition to qualitative harms like the emotional, physical, and mental toll of discrimination on an already marginalized community. The Rule, however, does not acknowledge this cost or any other harms transgender people may suffer as a result of the rule change.

In addition to the agency's failure to consider the costs to transgender people in general, it also fails to consider the costs to particularly vulnerable populations within that group, such as sex workers, people of color, persons with disabilities, immigrants and asylum seekers, and people living with HIV. Transgender people of color and undocumented residents are more likely to experience family violence, to be kicked out of their family home, to run away from home due to mistreatment, and to have attempted suicide at some point in their lives.¹⁶⁸ Transgender people of color (approximately 40%), persons living with HIV (51%), and persons with disabilities (45%) experience higher rates of homelessness and poverty, and may be more likely to avoid seeking emergency shelter due to fear of mistreatment.¹⁶⁹ Fully one half of undocumented transgender people have experienced homelessness in their lifetimes.¹⁷⁰ These populations would be particularly affected by the rule change, and HUD has completely failed to address the harms they would suffer.

HUD also fails to consider the impact of the Proposed Rule on nonbinary and other gender nonconforming people whose gender identities fall outside the male-female binary. Simply put, the Proposed Rule exacerbates the already substantial risk that nonbinary people are shut out of shelter entirely. The Proposed Rule, in its entirety, is premised on an outmoded notion of biological sex that conflicts with the prevailing medical consensus that biological sex is a spectrum, not a binary. *See supra* at Section V. Such policymaking is inherently harmful to nonbinary and other gender nonconforming individuals as it invalidates their identities, sending the message that consideration of their concerns is neither needed nor wanted. Although the violence and discrimination experienced by nonbinary and other gender nonconforming people shares much in common with that experienced by binary transgender people, they also face unique challenges, including with respect to shelter access. For example, seeking admission to single-sex shelters is itself problematic for nonbinary people, as those shelters hold themselves out as serving *either* women *or* men, forcibly slotting all residents into binary identity categories that undermine the gender identities of nonbinary people. As previously noted, HUD's own data reveals that 82% of nonbinary individuals experiencing homeless that were identified in connection with its 2018 Point-In-Time count where unsheltered (as compared to 56% of transgender individuals and 48% of cisgender individuals).¹⁷¹ Additionally, because only a handful of states permit nonbinary gender markers on state-issued identity documents, nonbinary people experience unique challenges with respect to obtaining documentary "evidence" of their sex, which the Proposed Rule would allow shelter operators to require as a condition of admission. The NTBA submits

¹⁶⁸ *Id.* at 72, 74, 113.

¹⁶⁹ *Id.* at 6, 144, 178.

¹⁷⁰ *Id.* at 6.

¹⁷¹ National Alliance to End Homelessness, *supra* note 24.



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that, in failing to take into account the distinct experiences and needs of nonbinary people, the Proposed Rule would necessarily violate the executive mandate that agencies assess all costs and benefits of regulatory changes.

Furthermore, the Proposed Rule fails in its cost/benefit analysis by making no mention of the ongoing COVID-19 pandemic. Both people experiencing homelessness and transgender people in general have risk profiles that make them uniquely vulnerable to COVID-19, such as having higher rates of underlying health conditions and potentially lacking social supports that allow them to engage in best practices to avoid becoming ill.¹⁷² The CDC recommends keeping shelters open during the pandemic to protect vulnerable populations.¹⁷³ Despite this, the Rule proposes to alter the ability of transgender people to access emergency shelter during the pandemic, while engaging in no analysis of the additional burdens this Rule would place on a population already vulnerable to the pandemic's effects. This failure to take COVID-19 into consideration does not satisfy the agency's obligations under the law.

The NTBA also objects to HUD's suggestion that the transfer provision would mitigate the harms caused by this rule change. The harm caused by the Rule's fundamentally discriminatory approach to shelter access cannot be mitigated or reduced by including this provision. As one recent national study indicates, 87% of transgender and gender nonconforming people who use shelter services would find it somewhat difficult (31%), very difficult (40%), or impossible (16%) to find an alternative homeless shelter if they were refused, and few, if any, alternative shelter options exist within a 10 mile radius for those who are refused shelter.¹⁷⁴ Access to transfer mechanisms, when these transfers are available *at the request of the shelter resident*, is essential to ensure safe and secure housing for all individuals, including transgender residents, who may find themselves unsafe even when housed in a shelter consistent with their gender identity. However, no transfer recommendation can alter the overwhelming harms of discrimination that would flow from the Proposed Rule.

X. The Proposed Rule's Focus on and Procedures for Identifying "Biological Sex" Are Inherently Harmful, Transphobic, and Inappropriate

HUD has requested comments on "good faith considerations that are indicative of a person's biological sex." The NTBA objects to both the Proposed Rule's focus on identifying "biological sex," as well as its reliance on a "good faith" or other standard for shelters seeking to do so. The NTBA opposes altogether any policy that permits shelters to deny admission "based

¹⁷² Center for Disease Control and Prevention, *People Experiencing Homelessness* (updated Aug. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/homelessness.html>; Jody L Herman and Kathryn O'Neill, *Vulnerabilities to COVID-19 Among Transgender Adults in the US*, UCLA School of Law Williams Institute, 2-3 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-COVID19-Apr-2020.pdf>, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-COVID19-Apr-2020.pdf>.

¹⁷³ Center for Disease Control and Prevention, *supra* note 172.

¹⁷⁴ Santos T., Mahowald L., Gruberg S., *The Trump Administration's Latest Attack of Transgender People Facing Homelessness*, Center for American Progress, 2-3 (Sept. 3, 2020), https://cdn.americanprogress.org/content/uploads/2020/09/02125223/HUD-Shelter-Ruling.pdf?_ga=2.14090609.790430584.1599320063-1453739489.1599320063.



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on [their] own policy for determining sex” and to deny admission “based on a good faith belief that an individual seeking accommodation or access to the temporary, emergency shelters is not of the sex which the shelters’ policy accommodates.”¹⁷⁵

The Proposed Rule’s language about identifying “biological sex,” both in the primacy it places on an erroneous concept of “biological sex” in its proposals for methods by which shelter staff might make such identifications, is based on and feeds into anti-transgender stereotypes which will encourage more violence and discrimination against transgender individuals. Studies have shown that belief in stereotypes about transgender people—such as beliefs that gender is a voluntary choice, or that transgender people are “gay, confused, abnormal... outcasts”—contribute to the prevalence of anti-transgender discrimination.¹⁷⁶ Institutional and systemic policies that promote these stereotypes and anti-transgender behaviors (by, for example, encouraging the misgendering of transgender people or treating them in a manner different than their gender identity) worsen outcomes for transgender people interacting with those systems, and have been repeatedly linked to poor mental health outcomes.¹⁷⁷ The Proposed Rule, which is premised on the framework that transgender people should be treated in accordance with their sex assigned at birth on a systemic level, would do exactly this, by normalizing harmful anti-transgender stereotypes and worsening outcomes for homeless transgender people interacting with the shelter system.

In this respect, this Proposed Rule is in keeping with broader anti-transgender actions from the current Administration. Earlier this year, the Administration finalized a rule removing non-discrimination protections for LGBTQ+ people in health care. That rule, like the present one, placed an undue (and medically inaccurate) focus on “biological sex,” at the expense of transgender people’s ability to access non-discriminatory healthcare.¹⁷⁸ Similarly, in 2019, the Administration reinstated restrictions preventing transgender people from openly serving in the military, again placing primacy on the concept of “biological sex.”¹⁷⁹ Additionally, in 2018, the Bureau of Prisons rolled back protections for transgender inmates in federal prisons, requiring that they be housed with their “biological sex” in all but “rare” cases.¹⁸⁰ In each of these actions, and other anti-transgender actions taken by the Administration, the Administration has focused on

¹⁷⁵ Proposed Rule, 85 Fed. Reg. at 44,816, 44,818.

¹⁷⁶ Stephanie Papas, *Transgender Stereotypes Could Explain Discrimination*, *Livescience* (Sept. 16, 2014), <https://www.livescience.com/47858-transgender-stereotypes-cause-discrimination.html>.

¹⁷⁷ Cate Swannell, *Misgendering Harms Health of Trans Individuals*, *Med. J. Aus.* (Mar. 2, 2020), <https://www.mja.com.au/journal/2020/misgendering-harms-health-trans-individuals>; Cooper K., Russell A., Mandy W., Butler C., *The Phenomenology of Gender Dysphoria in Adults: A Systematic Review and Meta-Synthesis*, 80 *Clinical Psychol. Rev.* 1 (Aug. 2020), <https://www.sciencedirect.com/science/article/pii/S0272735820300635>.

¹⁷⁸ *Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority*, 85 Fed. Reg. 37,160 (effective Aug. 18, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-06-19/pdf/2020-11758.pdf>.

¹⁷⁹ Office of the Deputy Secretary of Defense, *Directive-type Memorandum (DTM)-19-004 - Military Service by Transgender Persons and Persons with Gender Dysphoria* (Mar. 12, 2019), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dtm/DTM%2019-004.PDF?ver=2020-03-17-140438-090>.

¹⁸⁰ U.S. DOJ Fed. Bureau of Prisons, *Transgender Offender Manual* (May 11, 2018), <https://www.bop.gov/policy/progstat/5200-04-cn-1.pdf>.



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“biological sex” as the basis of its rulemaking, causing very real harms to transgender people and exposing them to increased discrimination by promoting dangerous anti-transgender stereotypes. The same is true of the Proposed Rule.

Not only does the Proposed Rule’s focus on identifying “biological sex” go against medical and legal consensus, as outlined above, *see supra* at Sections V, IV, but the Department’s proposed guidance on how to identify “biological sex” is illogical, intrusive, and harmful. The Proposed Rule’s suggestion that shelter staff may consider physical characteristics to determine an individual’s “biological sex” not only plays into anti-transgender stereotypes (by assuming that transgender people are visibly distinguishable from cisgender people), but will be unworkable and harmful on the ground. Many of the physical characteristics the Proposed Rule cites as evidence of “biological sex,” such as height and the presence of facial hair, are by no means exclusive to any gender or sex.¹⁸¹ Encouraging shelter staff, or anyone, to attempt to identify transgender individuals based on these physical characteristics will only fuel inaccurate and harmful anti-transgender stereotypes about appearance, and in turn will encourage the spread of these stereotypes and of anti-transgender violence more generally.

The Proposed Rule suggests that shelter employees may demand “evidence” (birth certificate, IDs, medical records, etc.) of a person’s “biological sex” at intake, but fails to acknowledge that, for many people experiencing homelessness, obtaining and producing the identify documentation is infeasible. Many of the requirements states pose for those seeking to obtain photo IDs or other forms of identification, such as requiring a physical address (something that, by definition, many experiencing homelessness lack) or payment, pose significant barriers to homeless individuals seeking ID.¹⁸² A survey conducted in 2004 found that 36% of homeless individuals lacked photo ID because they could not afford to obtain one.¹⁸³ Difficulties in producing documentation already pose substantial barriers for homeless persons seeking needed services, including shelter—the survey found that 54.1% of homeless respondents were denied shelter or housing services in the past month due to their inability to produce a photo ID.¹⁸⁴ These difficulties have not been mitigated in the time since the survey was conducted.¹⁸⁵ And, as mentioned above, identity document requirements would pose particular challenges for individuals with nonbinary gender identities because those identities are, by and large, not legally recognized. Requiring only transgender people (or people believed by shelter staff to be transgender) to produce documentation to “prove” their sex in order to gain access to shelter—a task that many

¹⁸¹ As an example of the many ways in which the Proposed Rule’s cited physical characteristics are not indicative of gender, cisgender women with hormonal conditions like Polycystic Ovary Symptom (PCOS), may develop facial hair, <https://www.mayoclinic.org/diseases-conditions/pcos/symptoms-causes/syc-20353439>.

¹⁸² National Law Center on Homelessness and Poverty, *Photo Identification Barriers Faced by Homeless Persons: The Impact of September 11*, 5 (Apr. 2004), https://nlchp.org/wp-content/uploads/2018/10/ID_Barriers.pdf.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Teresa Wiltz, *Without ID, Homeless Trapped in Vicious Cycle*, Pew Trusts (May 15, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/05/15/without-id-homeless-trapped-in-vicious-cycle>.



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experiencing homelessness will find challenging to accomplish—constitutes both de jure and de facto discrimination that will leave many unable to access much needed emergency shelter.

The Proposed Rule's reliance on a "good faith" standard by employees leaves these, and many other vital questions, unanswered. If an individual is incapable of producing identity documents upon demand, what will happen to them? What if the identity documents they are able to provide are inconsistent as to their sex? This is a likely scenario, as a 2015 study found that more than 20% of transgender respondents had inconsistent gender markers on their identification documents and records.¹⁸⁶ And it is worth reiterating that this policy could also adversely affect cisgender people who do not possess identity documents because it would afford shelter employees the discretion to demand evidentiary proof of sex from all people, including cisgender people whose sex they may deem suspect. If a person wishes to dispute shelter staff's "good faith" belief that they are transgender, will there be mechanisms in place for them to do so? The last question is particularly important, as the Proposed Rule's "good faith" standard is highly arbitrary, and leaves significant room for bias and abuse on the part of shelter employees, and little room for recourse or protection on the part of transgender and gender nonconforming shelter residents. For these reasons, the NTBA opposes the Rule's proposal for "good faith" identification of "biological sex," which is transphobic, intrusive, unworkable, and deeply harmful.

XI. Conclusion

This Proposed Rule exacerbates an existing landscape of severe discrimination towards transgender people, flouts federal law and the prevailing medical consensus on the appropriate clinical treatment for transgender people, advances wholly speculative benefits while ignoring substantial evidence of harm to vulnerable groups, and fuels dangerous anti-transgender stereotypes that will exacerbate violence towards transgender and gender nonconforming people. At the same time, HUD entirely fails to examine relevant data and articulate a satisfactory explanation for the changes it proposes, instead offering explanations that run counter to the evidence documenting the harms to transgender and gender nonconforming people that would most certainly flow from the Proposed Rule. The NTBA emphatically recommends and requests that HUD set aside this Proposed Rule.

Most respectfully,

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¹⁸⁶ National Center for Transgender Equality, *supra* note 5, at 87.