

September 22, 2020

VIA ELECTRONIC SUBMISSION

Hon. Ben Carson, Secretary
U.S. Department of Housing and Urban Development

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

To Whom It May Concern:

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) appreciates the opportunity provided by the U.S. Department of Housing and Urban Development (“HUD”) to offer comments in response to the Proposed Rule, “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 (“Proposed Rule” or “NPRM”), published in the Federal Register on July 24, 2020.¹

Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian gay, bisexual, transgender and queer/questioning (“LGBTQ”) people and everyone living with HIV through impact litigation, policy advocacy, and public education. Lambda Legal believes it is essential that LGBTQ people have access to safe and affordable housing, including emergency shelters, and we are committed to challenging the discriminatory barriers to that access which remain pervasive and harmful nationally.²

The Proposed Rule conflicts with local, state and federal law. It harmfully invites providers of sex-segregated shelters in particular to wrongfully discriminate against homeless LGBTQ youth/people in violation of both governing nondiscrimination laws and HUD’s statutory responsibilities, and misinforms shelters about their obligations under the law, placing their funding and services at risk. Lambda Legal strongly urges the Department to withdraw the Rule.

This comment focuses on the contributing factors that drive transgender people to need access to emergency housing at elevated rates,³ followed by how the NPRM contradicts and undermines HUD’s mission, its prior policy, research and findings, and statutory responsibilities.

¹ 85 Fed. Reg. 44811 et seq.

² See, e.g., *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856 (7th Cir. 2018), cert. dismissed sub nom. *Glen St. Andrew Living Com. v. Wetzel*, 139 S. Ct. 1249 (2019); *Smith v. Avanti*, 249 F. Supp. 3d 1194 (D. Colo. 2017).

³ The word “transgender” is used in this comment as an umbrella term to encompass transgender, gender nonconforming and nonbinary people.

The comment concludes with an explanation of why the primary justifications for the Proposed Rule fail. Requiring transgender people to be housed and to use facilities inconsistent with their gender puts them at serious risk for violent abuse of various kinds, compared with allowing them to be in spaces consistent with their gender, which prioritizes their safety. Recognizing transgender people appropriately has no downsides because doing so poses no safety risks for others and no one has a legal right to exclude others from this type of setting simply because they seem different. This kind of objection is not a legally recognized harm. Lastly, the comment will address the NPRM's inappropriate invitation to shelters who wish to exclude transgender people to establish a gender stereotyping protocol by which it will determine that a beneficiary should be deemed a different sex than the sex served by the shelter.

A. Transgender people are more likely to need access to homeless shelters due to discrimination in education, employment, housing and other areas.

Transgender people experience widespread discrimination in education, employment, housing, public accommodations, credit and many other areas of life. This discrimination often leads to long-term negative economic outcomes that make transgender people much more likely to need emergency housing in shelters. Although there continues to be a lack of data addressing transgender disparities, the studies that have been done verify that transgender people are almost four times more likely to earn \$10,000 a year less than the rest of the U.S. population, making them much more likely to need affordable housing and emergency shelter services.⁴

According to the largest survey to date of transgender people in the United States, the U.S. Transgender Survey, 20% of people who identify as transgender report having been discriminated against in housing and 12% report having experienced homelessness because of discrimination.⁵ The homelessness rate for transgender people skyrockets up to almost 40% for those who are forced to rely upon street economies such as drug sales and sex work to produce income. As with almost all disparities, the impact of discrimination is highest for transgender women of color who are substantially more likely to have been homeless in the past year because they are transgender.⁶ In addition, homeless transgender people are much more likely to be unsheltered than homeless cisgender people.⁷

Becoming homeless is a harrowing and anxiety-filled ordeal, and needing to access emergency housing only compounds that experience. Unfortunately, because of the high rates of discrimination transgender people often experience both when seeking shelter and in many other

⁴ The Movement Advancement Project, *Paying an Unfair Price; The Financial Penalty for Being Transgender in America* (Feb. 2015), available at <https://www.lgbtmap.org/file/paying-an-unfair-price-transgender.pdf>.

⁵ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* (National Center for Transgender Equality 2016), (“U.S. Trans Survey”), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

⁶ *Id.*

⁷ See National Alliance to End Homelessness, Demographic Data Project: Gender Minorities 2018 Point-in-Time (June 2019), available at <http://endhomelessness.org/wp-content/uploads/2019/06/Gender-Minority-Homelessness-Article-Revised-6-24-19-JJ-002.pdf>. The term “cisgender” refers to people who are not transgender.

contexts, many homeless transgender people will simply choose to forego shelters altogether based on fear of discrimination. The U.S. Trans Survey found that more than a quarter of homeless transgender people avoided shelters based on fear of discrimination.⁸ The Proposed Rule would cause great harm to this population because it would invite providers to discriminate and would send a dangerous (and wrongful) message to transgender people that they are not protected against discriminatory shelter policies.

The discrimination reported by these transgender survey respondents has been independently verified. For example, the findings from a 2016 telephone study conducted of 100 homeless shelters in four different states found that only 30% of the shelters contacted were willing to properly house transgender women in sex-segregated facilities in accordance with their gender identity.⁹ Over 20% of the shelters refused to accept them at all.¹⁰ The study also found that, in addition to refusing services, the shelters improperly cited surgery requirements as prerequisites to placement, cited the discomfort of other residents as grounds for exclusion, and used the wrong pronoun when addressing callers.¹¹

Over 50% of transgender people report that it would be difficult, if not impossible, to find an alternative homeless shelter if they were turned away from a shelter.¹² And it is likely that the numbers have increased because research indicates that homelessness among transgender people has substantially increased since 2016.¹³

Studies also confirm that LGBT older adults often lack strong familial supports and a high prevalence of housing insecurity, both in terms of outright denials of housing and experiences of harassment and discrimination in senior living and long-term care settings, making the risk of

⁸ *U.S. Trans Survey*, *supra* note 5, at 180.

⁹ Caitlin Rooney, Laura E. Durso, and Sharita Gruberg, *Discrimination Against Transgender Women Seeking Access to Homeless Shelters* (Center for American Progress Jan. 7, 2016), available at <https://www.americanprogress.org/issues/lgbtq-rights/reports/2016/01/07/128323/discrimination-against-transgender-women-seeking-access-to-homeless-shelters/>.

¹⁰ *Id.*

¹¹ *Id.*

¹² Theo Santos, Lindsay Mahowald and Sharita Gruberg, *The Trump Administration's Latest Attack on Transgender People Facing Homelessness*, endnote 5 (Center for American Progress Sept. 3, 2020), available at <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/09/03/490004/trump-administrations-latest-attack-transgender-people-facing-homelessness/> (“Data are from a nationally representative survey of 1,528 LGBTQ+ identifying individuals, conducted in June 2020. Participants were asked to read and respond to the following two questions: “(Homeless shelter) Please rate how difficult it would be for you to find the same type of service at a different location if you are denied service” and “(Homeless shelter) Please estimate how far you would need to travel (in miles) to get the same type of service at another location.” Respondents who refused to answer or who did not use shelter services were excluded.”)

¹³ Jackie Janosko, *Changes to HUD's Equal Access Rule Could Exclude More Transgender People From Shelter* (National Alliance to End Homelessness July 29, 2020), available at <https://endhomelessness.org/changes-to-huds-equal-access-rule-could-exclude-more-transgender-people-from-shelter/>.

homelessness even higher.¹⁴ The number of older adults experiencing homelessness has continued to soar.¹⁵ And there are almost three million LGBT adults in the U.S. that are 50 or older.¹⁶ LGBT older adults are frequently victims of discrimination because of their sexual orientation or gender identity.¹⁷ A national survey of LGBT older adults in long-term care found that discriminatory treatment of transgender residents takes many forms, including refusal to refer to them by their correct names or pronouns; preventing them from dressing in accordance with their gender identity; having staff of a different gender bathe them; and preventing them from eating, speaking, or participating in social and recreational activities with other residents.¹⁸

Living without shelter is especially dangerous for older transgender adults who experience high rates of discrimination and harassment, and who also have greater rates of physical disabilities and other conditions that place them at great peril when they are homeless.

LGBTQ youth are 120% more likely than straight and cisgender peers to be homeless.¹⁹ This higher rate of homelessness is driven by family rejection, harassment in schools, and disproportionate engagement with juvenile justice systems, and their experience of being homeless often involves violence, discrimination, and poor health.²⁰ Being homeless imperils a young person's physical and emotional security. Given the agency's statutory mandate, it is important that homelessness programs funded by HUD acknowledge these risks and support inclusive environments that reduce these problems for LGBTQ people rather than exacerbate them.

¹⁴ See Soon Kyu Choi & Ilan H. Meyer, *LGBT Aging: A Review of Research Findings, Needs, and Policy Implications*, The Williams Institute (Aug. 2016), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Aging-Aug-2016.pdf>; SAGE, *Out & Visible: The Experiences and Attitudes of Lesbian, Gay, Bisexual, and Transgender Older Adults, Ages 45-75* (Oct. 2014), available at https://www.lgbtagingcenter.org/resources/pdfs/LGBT_OAMarketResearch_Rpt.pdf.

¹⁵ Dennis Culhane et al., *The Emerging Crisis of Aged Homelessness: Could Housing Solutions be Funded by Avoidance of Excess Shelter, Hospital and Nursing Home Costs?* (Jan. 2019), available at https://www.bcsb.ca.gov/hcfc/documents/white_papers/dennis_culhane-the_emerging_crisis.pdf.

¹⁶ Karen I. Fredriksen-Goldsen, "The Future of LGBT+ Aging: A Blueprint for Action in Services, Policies, and Research," *Generations: Journal of the American Society on Aging*, Vol. 40, No. 2 (2016).

¹⁷ See National Center on Elder Abuse, *Mistreatment of Lesbian, Gay, Bisexual, and Transgender (LGBT) Elders*, available at [https://ncea.acl.gov/NCEA/media/publications/Mistreatment-of-Lesbian,-Gay,-Bisexual,-and-Transgender-\(LGBT\)-Elders-\(2013\).pdf](https://ncea.acl.gov/NCEA/media/publications/Mistreatment-of-Lesbian,-Gay,-Bisexual,-and-Transgender-(LGBT)-Elders-(2013).pdf).

¹⁸ Justice in Aging, *LGBT Older Adults in Long-Term Care Facilities: Stories from the Field*, at 14-16 (2015), available at <http://www.justiceinaging.org/customers.tigertech.net/wp-content/uploads/2015/06/Stories-from-the-Field.pdf>.

¹⁹ Nick Seip & Joe Moran, *At the Intersections; A Collaborative resource on LGBTQ Youth homelessness* (True Colors United April 2019), available at <https://truecolorsunited.org/wp-content/uploads/2019/04/2019-At-the-Intersections-True-Colors-United.pdf>; United States Interagency Council on Homelessness, *Homelessness in America: Focus on Youth* (Oct. 2018), available at https://www.usich.gov/resources/uploads/asset_library/Homelessness_in_America_Youth.pdf.

²⁰ Andrew Cray et al, *Seeking Shelter; The Experiences and Unmet Needs of LGBT Homeless Youth* (Center for American Progress Sept. 2013), available at <https://www.americanprogress.org/wp-content/uploads/2013/09/LGBTHomelessYouth.pdf>.



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Having taken note of these challenging realities, the United States Interagency Council on Homelessness' *Preventing and Ending Youth Homelessness: A Coordinated Community Response* calls for a focus on the needs of youth experiencing homelessness who are particularly vulnerable, including LGBTQ youth.²¹ Transgender youth in particular struggle to find safe and affirming housing. Because many of these youth are forced out of their homes or run away due to family rejection or abuse, they often rely on drop-in centers, street outreach programs, and housing programs at disproportionately high rates.²² Despite their overrepresentation in the homeless youth population, transgender homeless youth report higher rates than the general homeless youth population of needing assistance with both short- and long-term housing and inability to find services.²³

Transgender homeless youth often are especially unsafe at shelters that assign them to facilities that are inconsistent with their gender identity. These shelter policies and practices often cause transgender youth who identify as female to be placed in facilities designated for males, where they are at increased risk of rape and other abuse. Furthermore, sex-segregated bathrooms, locker rooms and dressing areas within these facilities are often inappropriate and unsafe for transgender youth. As is the case with lesbian, gay, bisexual and questioning youth, transgender youth who are unsafe in shelters are more likely to forego shelter.²⁴

The studies referenced herein exemplify the substantial, uncontroversial research findings confirming that transgender people—especially youth and older adults—are especially vulnerable and often require specialized protections in the context of emergency shelters.

B. The NPRM undermines HUD's mission as established by Congress and fails to provide a reasoned explanation for the agency's change in position.

On any given night, there are approximately 550,000 people experience homelessness in the United States.²⁵ HUD's stated mission, pursuant to congressional mandate, is to "create strong,

²¹ U.S. Interagency Council on Homelessness, *Preventing and Ending Youth Homelessness: A Coordinated Response* at 3, available at https://www.usich.gov/resources/uploads/asset_library/Ending_Youth_Homelessness_Coordinated_Response.pdf (last visited Sept. 20, 2020).

²² See Soon Kyu Choi et al., *Serving Our Youth 2015: The Needs and Experiences of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth Experiencing Homelessness* (The Williams Institute June 2015), available at <https://williamsinstitute.law.ucla.edu/publications/serving-our-youth-lgbtq/>.

²³ See Andrew Cray et al., *Seeking Shelter: The Experiences and Unmet Needs of LGBT Homeless Youth*, at 23 (Center for American Progress 2013), available at <https://www.americanprogress.org/wp-content/uploads/2013/09/LGBTHomelessYouth.pdf>.

²⁴ See Lambda Legal, *Working with Homeless LGBTQ Youth*, available at <https://www.lambdalegal.org/know-your-rights/article/youth-homeless> (last visited Sept. 20, 2020).

²⁵ Meghan Henry et al., *The 2017 Annual Homelessness Assessment Report (AHAR) to Congress, Part 1: Point-in Time Estimates of Homelessness* (U.S. Dep't Housing & Urban Dev. Dec. 2017), available at <https://www.hudexchange.info/resources/documents/2017-AHAR-Part-1.pdf>.

sustainable, inclusive communities and quality affordable homes for all.”²⁶ As HUD recognized in its 2016 Final Rule, part of that mission is to provide “shelter for transgender and gender nonconforming persons, who have faced significant difficulty in obtaining access to shelters, and buildings and facilities that provide shelter.”²⁷ The NPRM repudiates that responsibility by encouraging shelters to exclude transgender people from HUD-funded emergency shelters. The NPRM also subverts Congress’s requirement under the Department of Housing and Urban Development Act which mandates that HUD advance the needs and interests of all the communities of the Nation.²⁸ The NPRM flips HUD’s mission on its head by offering legally unjustified ways to deny safe and affordable housing for transgender people seeking shelter.

Where an agency has already released a rule regarding a certain topic, “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”²⁹ The 2016 Final Rule represented the culmination of several years of research and monitoring of their programs to determine if there was a need for additional guidance to ensure equal access to emergency shelters for transgender people. After this thorough investigation and following the release of a guidance document on the topic from Community Planning and Development (“CPD”), HUD determined that the issue warranted rulemaking, resulting in the 2016 Rule.³⁰

The 2016 Final Rule found that “transgender persons continue to experience significant violence, harassment, and discrimination in attempting to access programs, benefits, services, and accommodations.”³¹ HUD explained that it made this 2016 finding after having conducted listening sessions, investigated individual cases, reviewed national research, sought guidance from other federal agencies, and reviewed existing case law precedent.³²

On the other hand, the 2020 NPRM failed to cite any studies demonstrating the research HUD had conducted in the prior years was flawed in any material way that would explain and justify HUD’s about-face departure from the 2016 Final Rule. Instead, HUD offers specious legal arguments for the change and speculative anecdotal support that, even if widespread and

²⁶ <https://www.hud.gov/about/mission>.

²⁷ 81 FR 64769 (Sept. 21, 2016).

²⁸ 42 U.S.C. § 3531. *Also see* the Housing Act of 1949, 42 U.S.C. § 1441 (“The Department of Housing and Urban Development, and any other departments or agencies of the Federal Government having powers, functions, or duties with respect to housing, shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established.”).

²⁹ *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 (2009).

³⁰ Office of Comm. Planning & Dev., *Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities* (Feb. 20, 2015), available at <https://www.hud.gov/sites/documents/15-02CPDN.PDF>.

³¹ *Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs*, 81 F.R. 64763-01 (Sept. 21, 2016)

³² *Id.*

substantiated by data (which it is not), would not justify the rule change because unwarranted fears on the part of some do not justify exclusion of others.³³

C. HUD’s justifications for the rule fail as a matter of law and policy.

HUD’s justifications for the rule fail as a matter of law and policy. This section will address each of those justifications individually.

- 1. The NPRM wrongfully states that all sex-segregated shelter facilities are not dwellings and therefore are exempt from the Fair Housing Act, and wrongfully invites shelters to violate existing nondiscrimination laws.**
 - a. The NPRM improperly asserts that sex-segregated shelters categorically fall outside the purview of the Fair Housing Act.**

HUD acknowledges that Congress passed the Fair Housing Act to prevent discrimination on the basis of sex in dwellings, but argues that, since Congress has not acted to prohibit sex-based considerations within shelters, sex-segregated shelters are presumptively exempt from the Fair Housing Act.³⁴ Secretary Carson confirmed this analysis in a letter responding to concerns raised by members of Congress in which he asserted that sex-segregated emergency shelters “by virtue of their temporary nature, are not deemed ‘housing’, [and] do not fall within the purview of the Fair Housing Act.”³⁵

HUD confuses congressional inaction with implied action. There are multiple reasons why Congress may have not moved to clarify that emergency shelters are “housing” and fall under the purview of the Fair Housing Act. As Justice Gorsuch recently clarified, there is no “such thing as a ‘canon of donut holes,’ in which Congress’s failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception.”³⁶

The NPRM seeks to shore up this logical error by pointing to language from the 2015 proposed rule that states that “temporary, emergency shelters” are not covered under the Fair Housing Act.³⁷ But the 2016 Final Rule exhaustively clarified that “HUD does not categorically exclude

³³ *Making Admissions or Placements Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs*, 85 F.R. 44811, at 44815 (July 24, 2020) (“While HUD is not aware of data suggesting that transgender individuals pose an inherent risk to biological women, there is anecdotal evidence that some women may fear that non-transgender, biological men may exploit the process of self-identification under the current rule in order to gain access to women’s shelters.”).

³⁴ 85 FR at 44812.

³⁵ Letter from Ben Carson, Secretary, U.S. Dep’t. Hous. & Urban Dev. to Maxine Waters & Jennifer Wexton, U.S. H.R., (July 13, 2020) (on file with author).

³⁶ *Bostock v. Clayton Cty., Georgia*, ___ U.S. ___, 140 S. Ct. 1731, 1747, 207 L. Ed. 2d 218 (2020).

³⁷ <https://www.federalregister.gov/documents/2015/11/20/2015-29342/equal-access-in-accordance-with-an-individuals-gender-identity-in-community-planning-and-development>

temporary, emergency shelters providing short-term housing accommodations under the Fair Housing Act.”³⁸

The 2016 Final Rule included a robust discussion of the case-by-case analysis used to determine whether a shelter is considered a dwelling, which considers multiple factors that HUD itself applies to making such determinations.³⁹ The 2016 Rule clarified that following the required individualized dwelling assessment, there may be shelters that are not considered “dwellings” and therefore are not covered by the Fair Housing Act or other federal, state or local law, and that the 2016 Rule would apply to those entities.⁴⁰ That assessment is far different from the current NPRM’s sweeping assertion that *all* sex-segregated facilities fall outside the Fair Housing Act and are therefore free to develop policies that exclude transgender people. To the contrary, as the discussion below will elucidate, those entities would still be subject to state and local laws prohibiting gender identity and sex discrimination, as well as constitutional provisions protecting transgender people from discrimination. In any case, most sex-segregated emergency shelters would likely be considered “dwellings” and therefore subject to the Fair Housing Act because sex-segregated facilities typically serve homeless people who stay for more than one night and are likely to return to the facility.

There is growing case law regarding what constitutes a “dwelling.” Courts have interpreted “dwellings” logically to include diverse types of structures, including summer bungalows,⁴¹ cabins for migrant workers,⁴² nursing homes,⁴³ group homes for recovering addicts,⁴⁴ and a converted office building turned into a hospice facility,⁴⁵ concluding that all of these are subject to the Fair Housing Act. With consistent reasoning, numerous courts – including multiple circuit courts – have held that shelters constitute dwellings under the Fair Housing Act.⁴⁶

³⁸ 81 FR at 64770 (“The Act defines ‘dwelling’ as “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families” and includes vacant land. Thus, shelters generally are covered within the definition of dwelling, and many courts have held shelters and other short-term accommodations to be dwellings covered by the Fair Housing Act.”).

³⁹ HUD cited the Final Report of HUD Review of Model Building Codes identifying these factors. *See* 65 FR 15746 (“Factors that should be considered in determining whether an occupancy is transient or not are: (1) Length of stay; (2) Whether the rental rate for the unit will be calculated based on a daily, weekly, monthly or yearly basis; (3) Whether the terms and length of occupancy will be established through a lease or other written agreement; (4) What amenities will be included inside the unit, including kitchen facilities; (5) How the purpose of the property is marketed to the public; (6) Whether the resident possesses the right to return to the property; and (7) Whether the resident has anywhere else to which to return.”).

⁴⁰ 81 FR 64771.

⁴¹ *United States v. Columbus Country Club*, 915 F.2d 877, 880 (3d Cir. 1990).

⁴² *Villegas v. Sandy Farms, Inc.*, 929 F.Supp. 1324, 1327–28 (D.Or.1996).

⁴³ *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1102 (3d Cir.1996).

⁴⁴ *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1214 (11th Cir. 2008).

⁴⁵ *Baxter v. City of Belleville*, 720 F.Supp. 720, 721 (S.D.Ill.1989).

⁴⁶ *See Community House v. City of Boise*, 490 F.3d at 1048 (9th Cir. 2007) (applying the FHA to a homeless shelter); *Lakeside Resort Enters., LP v. Bd. of Supervisors of Palmyra Twp.*, 455 F.3d 154, 159 (3d Cir. 2006) (holding that a shelter was a dwelling because it was intended for occupants to remain for more than one night and was a place to which they would return); *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941, 942 (9th Cir.1996).

When assessing whether a shelter should be considered a “dwelling,” courts typically consider whether the otherwise homeless residents intend to remain in the shelter for more than one night and whether they view the shelter as a place to return to.⁴⁷ For example, in one case, the court determined that a homeless shelter was a dwelling because the homeless people staying at the shelter had no other place to return to.⁴⁸ Given the breadth of case law and guidance documents explaining why shelters should be considered dwellings under the FHA even though they are not intended to provide permanent residences, it is clear that just because a particular facility might have a “temporary nature” does not presumptively exclude it from the purview of the FHA.

Applying this analysis to sex-segregated emergency shelters designated for women shows that courts are likely to and should view them as dwellings. Sex-segregated shelters for homeless women often provide accommodations for more than one night, and often are places to which homeless women are likely to return. Indeed, very few sex-segregated women’s facilities allow their beneficiaries to stay for one night only and, accordingly, many homeless women view these facilities as places to return. As HUD itself acknowledged last January, domestic violence shelters, emergency shelters, homeless shelters, and other forms of emergency shelter are covered under the Fair Housing Act.⁴⁹

Thus, the NPRM is mistaken and misleading when it informs sex-segregated shelters that they presumptively fall outside the purview of the Fair Housing Act. This legal error places those entities at great risk of liability were they to follow the Proposed Rule’s interpretation because they likely are covered by the FHA, which prohibits discrimination on the basis of sex.⁵⁰

(applying the FHA to a homeless shelter); *Woods v. Foster*, 884 F.Supp. 1169, 1173–74 (N.D.Ill.1995) (holding a homeless shelter was a dwelling because those who stayed there had no other place to return to); *Defiore v. City Rescue Mission of New Castle*, 995 F. Supp. 2d 413, 418–19 (W.D. Pa. 2013) (finding homeless shelter was a dwelling based on the expected extended length of stay of residents and facts that they receive mail, get medications, and return nightly to their sleeping areas); *Step By Step, Inc. v. City of Ogdensburg*, 176 F.Supp. 3d 112, 126 (N.D.N.Y. 2016) (finding shelters are dwellings under the FHA based on the need to provide housing to divert people from hospitals or homelessness; residents are not transients and view shelters as places to which they return).

⁴⁷ See *Lakeside Resort Enters., LP v. Bd. of Supervisors of Palmyra Twp.*, 455 F.3d 154, 159 (3d Cir.2006) (holding a shelter was a dwelling because it was intended that occupants would remain for more than one night and it would be a place to which they would return).

⁴⁸ *Woods v. Foster*, 884 F.Supp. 1169 (N.D. Ill. 1995) (explaining that “Although the Shelter is not designed to be a place of permanent residence, it cannot be said that the people who live there do not intend to return—they have nowhere else to go”).

⁴⁹ See U.S. Department of Housing and Urban Development Memo, *Assessing a Person’s Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act*, at p. 3, fn. 5 (Jan. 28, 2020) (“[f]or purposes of this guidance, the term ‘housing’ refers to all housing covered by the Fair Housing Act, including apartments, condominiums, cooperatives, single family homes, nursing homes, assisted living facilities, group homes, domestic violence shelters, *emergency shelters*, *homeless shelters*, dormitories, and other types of housing covered by the FHA”) (emphasis added), available at https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf?utm_medium=email&utm_source=govdelivery.

⁵⁰ 42 U.S.C. § 3604.

b. The NPRM contradicts existing nondiscrimination laws.

The overwhelming weight of legal authority has clarified that transgender people are protected under various federal laws—including the Fair Housing Act—on the basis of sex.⁵¹ The U.S. Supreme Court spotlighted and further solidified those protections when, by a 6-3 majority, the Court held in *Bostock* that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”⁵²

Following the ruling, members of Congress sent a letter to Secretary Carson asking him to reconsider publishing the regulation before conducting additional legal analysis “given the potential contradictions between the language in the *Bostock* decision and the language in the regulation submitted.”⁵³ Secretary Carson responded with the astonishing assertion that “[t]he Supreme Court’s ruling in *Bostock* has no impact on the Department’s proposed rule.”⁵⁴ But this is simply not the case. Federal nondiscrimination laws, especially civil rights statutes, usually are interpreted consistently.⁵⁵ In addition, the Supreme Court has just reconfirmed that the “but for” analysis relied upon in *Bostock* serves as a “default” or “background” rule that is presumed for federal nondiscrimination provisions.⁵⁶

It also should be noted, as the NPRM recognized, that twenty-two states expressly prohibit discrimination in housing against transgender people.⁵⁷ In addition, many local nondiscrimination ordinances also prohibit discrimination against transgender people in housing.⁵⁸ Even more states prohibit discrimination in housing on the basis of sex, and there is no reason to believe the Supreme Court’s forceful reasoning in *Bostock* would not apply similarly under those measures. Those sex-segregated shelters that would take up HUD’s invitation to discriminate against transgender people would be at great risk of liability under these state and local laws prohibiting such discrimination, as well as under the FHA.

2. The 2016 Final Rule’s admission and accommodation standard is consistent with federal law and provides clarity to shelters and beneficiaries.

⁵¹ See, e.g., *Bostock*, 140 S. Ct. at 1731; *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286 (11th Cir. 2020) (Title IX); *Boyden v. Conlin*, No. 17-cv-264-WMC, 2018 (W.D. Wis. Sept. 18, 2018) (Section 1557 of the ACA); *Smith v. Avanti*, 249 F.Supp. 3d 1194 (D. Colo. 2017) (Title VIII).

⁵² *Bostock*, 140 S. Ct. at 1741, 207 L. Ed. 2d 218 (2020).

⁵³ Letter from Representative Wexton and Representative Waters to Secretary Carson (June 29, 2020).

⁵⁴ Letter from Secretary Carson to Representative Waters & Representative Wexton (July 13, 2020).

⁵⁵ See e.g., *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1023 (7th Cir. 1997) (clarifying that “it is helpful to look to Title VII to determine whether the alleged sexual harassment is severe and pervasive enough to constitute illegal discrimination on the basis of sex for purposes of Title IX.”).

⁵⁶ See *Comcast Corp. v. Nat’l Ass’n of African Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020).

⁵⁷ Movement Advancement Project, Nondiscrimination in Housing, available at https://www.lgbtmap.org/equality-maps/non_discrimination_laws.

⁵⁸ Movement Advancement Project, Nondiscrimination Ordinances, available at https://www.lgbtmap.org/equality-maps/non_discrimination_ordinances.

HUD is critical of the 2016 Final Rule for allowing homeless transgender people to self-attest their gender identity for purposes of determining placement within sex-segregated facilities. HUD argues that because some states don't have explicit nondiscrimination provisions prohibiting discrimination on the basis of gender identity in housing, and because there are variations in the ways some jurisdictions have defined "gender identity," the best approach is to eliminate those protections altogether. Although express state and local nondiscrimination protections certainly prohibit the kind of discrimination this NPRM urges, those variations do not warrant elimination of federal clarification. The Proposed Rule would result in profound confusion and would reduce, not increase, predictability and stability for shelter providers. In creating ambiguity, however, HUD has signaled an unwillingness to protect the recipients of federally funded services, which will cause serious harm to both organizations and beneficiaries.

Moreover, in addition to state and local nondiscrimination protections, transgender people have multiple federal protections against discrimination on the basis of sex, such as the Violence Against Women Act as well as the Fair Housing Act. Although the NPRM cites constitutional principles of democracy and federalism as support,⁵⁹ transgender Americans also have relevant protection under the constitutional guarantees of equal protection and due process.

3. HUD improperly asserts that the 2016 Rule burdened shelters that operate based on certain religious beliefs.

HUD asserts that the prescriptive approach of the 2016 Final Rule regarding admission and accommodation of transgender people in accordance with their gender identity improperly burdens providers who hold religious beliefs that sex is immutably assigned at birth and that gender transition is religiously forbidden.

HUD's stated concern is misplaced because, whether religiously affiliated or secular, all shelters that make the choice to seek federal funding and to act for the federal government in providing services to the public can be expected to abide by generally applicable nondiscrimination laws. Furthermore, the NPRM produces no evidence for its conclusion that the 2016 Rule "discourages some religious providers from accepting HUD funding." In addition, HUD fails to recognize the large and growing number of religiously affiliated providers who do not discriminate against transgender people and who willingly comply with nondiscrimination laws. HUD also ignores that other entities have not filled in the gaps created by religious entities who turn away homeless transgender people on religious grounds. Inviting into this service area still more providers who wish to discriminate against transgender people – and specifically those who heretofore have avoided HUD funding because of the nondiscrimination requirements – would increase the discrimination marginalized, vulnerable transgender people already experience. By no reasoning with such a result comport with the mission Congress has set for HUD.

⁵⁹ 85 FR 44813.

4. The justification that the 2016 Rule failed to adequately consider privacy issues is without merit.

The NPRM justifies the Proposed Rule in part by asserting that transgender women should be excluded from sex-segregated facilities because their presence poses a safety risk to other women.⁶⁰ The NPRM freely concedes that “HUD is not aware of data suggesting that transgender individuals pose an inherent risk to biological women” but then asserts that there is “anecdotal evidence that non-transgender biological men may exploit the process of self-identification under the current rule to gain access to women’s shelters.”⁶¹

This data-free assertion improperly validates recent fearmongering while ignoring the fact that transgender people have been housed in shelters in accordance with their gender identity in many parts of the country for years without an increase in safety incidents.⁶² Similar arguments have been raised in support of legislation seeking to prohibit transgender people from using single-sex facilities.⁶³ Research has shown, however, that fears of increased safety and privacy violations are not empirically grounded and that there is no relationship between the existence of nondiscrimination laws and the frequency of criminal incidents in single-sex facilities.⁶⁴ Accordingly, over 300 domestic violence and sexual violence prevention groups issued a National Consensus Statement opposing measures like the NPRM that “utilize and perpetuate the myth that protecting transgender people’s access to restrooms and locker rooms endangers the safety or privacy of others.”⁶⁵ For precisely this reason, the National Task Force to End Sexual and Domestic Violence has urged HUD to withdraw the Proposed Rule.

In addition, unlawful behavior that puts the rights or safety of others at risk, regardless of the gender identity or other characteristics of the perpetrator, can and should be addressed by law enforcement. But, any such behavior by miscreants does not justify the removal of life-saving legal protections from desperate transgender people seeking safe shelters.

⁶⁰ 85 FR 44815.

⁶¹ *Id.*

⁶² https://www.lgbtmap.org/equality-maps/non_discrimination_laws/public-accommodations. See, e.g., Lou Chibbaro Jr., *Predictions of trans bathroom harassment unfounded*, Washington Blade (Mar. 31, 2016), available at <https://www.washingtonblade.com/2016/03/31/predictions-of-trans-bathroom-harassment-unfounded/> (spokespeople from the Des Moines, IA, Albuquerque, NM, Baltimore, MD, San Francisco, CA, Los Angeles, and New York City Police Departments statements clarifying no issues in sex-segregated facilities where there are nondiscrimination protections in place.).

⁶³ See Tal Kopan & Eugene Scott, *North Carolina Governor Signs Controversial Transgender Bill*, CNN (Mar. 24, 2016), available at <https://www.cnn.com/2016/03/23/politics/north-carolina-gender-bathrooms-bill/index.html>.

⁶⁴ See Amira Hasenbush et al, *Gender Identity Nondiscrimination Laws in Public Accommodations: a Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 Sex. Res. Soc. Policy 70-83 (July 23, 2018), available at <https://link.springer.com/article/10.1007/s13178-018-0335-z>.

⁶⁵ 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), available at <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>.

In reality, it is homeless transgender people who experience high rates of assault and harassment in shelters. The National Center for Transgender Equality found that 70% of transgender people who have had to seek shelter reported having been assaulted, harassed or excluded from a homeless shelter.⁶⁶ Similarly, Los Angeles’s 2020 Homeless Count documented that transgender people experience the highest rates of violence among the homeless population in Los Angeles.⁶⁷ Denying transgender people emergency shelter or forcing them to be housed inconsistently with their gender identity will aggravate the harassment and violence they already experience both in shelters and when trying to survive on the streets. It will likely cost lives.

Indeed, crimes against transgender people continue to rise. There were an estimated 27 murders of transgender people in 2019 and 26 transgender people already have been lost in 2020 to violence, almost all of whom were transgender women of color.⁶⁸

The NPRM goes further by inviting those shelters who wish to exclude transgender people to establish a gender stereotyping protocol to establish the “good faith basis” by which it will determine that a beneficiary should be deemed a different sex than the sex served by the shelter.⁶⁹ HUD recommends that providers be guided by a series of stereotypes such as “height, the presence (but not the absence) of an Adam’s apple, and other physical characteristics to determine the sex of the person seeking shelter. When shelters are unable to ascertain a person’s sex visually, they are invited to demand verification of sex via a government identification.”⁷⁰

Such stereotyping will harm transgender people and anyone who is seen as not conforming with gender stereotypes. The potential for intrusive questions and requirements for documents they may not possess will have a chilling effect on many transgender people who need shelter, producing the opposite outcome of what the 2016 Final Rule sought to accomplish and what HUD is charged by statute to pursue. Without proper justification, the NPRM improperly elevates the hypothesized concerns of some federally funded shelters over the emergency housing and safety needs of vulnerable transgender people.

D. HUD failed to consider the full range of costs associated with the NPRM.

HUD fails to consider a wide array of costs associated with the Proposed Rule. The NPRM would inflict costs on shelter providers, shelter seekers, and the community as a whole. HUD suggests that entities that choose to take advantage of the freedom to discriminate would

⁶⁶ *Supra* note 5 at 181.

⁶⁷ Los Angeles Homeless Services Authority, *2020 Greater Los Angeles Homeless Count Results* (June 12, 2020), available at <https://www.lahsa.org/news?article=726-2020-greater-los-angeles-homeless-count-results>.

⁶⁸ Human Rights Campaign, *Violence Against the Transgender and Gender Non-Conformity Community in 2020*, available at <https://www.hrc.org/resources/violence-against-the-trans-and-gender-non-conforming-community-in-2020>.

⁶⁹ 85 FR 44815.

⁷⁰ 85 FR 44816.

“generally face only a small burden” in establishing a gender-assessment policy.⁷¹ But HUD ignores that the NPRM creates confusion regarding the obligations of providers. After developing “gender assessment tools,” providers will need to wade through tricky questions concerning whether the gender stereotyping policy they have been invited to create complies with all relevant federal, state, and local laws and regulations. Then, some of those entities that have been induced to believe they are free to discriminate doubtless will be faced with litigation costs, state and local enforcement measures, and losses of funding. This situation is likely to be especially problematic and expensive for providers that operate in more than one jurisdiction and must invest even more resources in order to determine where the federal permission to discriminate is likely to create liability under other laws.

But more importantly, the NPRM abjectly fails to consider the costs associated with the serious harms to transgender people who will forego emergency housing altogether when mistreated by or turned away from a shelter. Transgender people experience disproportionate violence and harassment when housed inconsistently with their gender identity and when living on the street. They are vulnerable to high rates of diverse traumas, most of which entail economic costs in the form of physical and mental health needs, poverty, and increased work for law enforcement. In addition, HUD failed to consider the longer-term economic costs associated with discrimination. Research has demonstrated that pervasive discrimination adversely impacts the health and well-being of many transgender people, which in turn causes long-term negative health outcomes, which inflicts myriad economic costs.

HUD should withdraw the NPRM and fully consider all of the costs associated with its proposals. There are multiple sources of data from which estimates of these costs can be calculated, including data on the prevalence of discrimination against transgender people prior to the 2016 Final Rule, demographic information on the transgender population, and research documenting the negative health outcomes resulting from discrimination.⁷²

⁷¹ *Id.*

⁷² See, e.g., Jody L. Herman et al., *Age of Individuals who Identify as Transgender in the United States* (The Williams Institute Jan. 2017), available at <https://williamsinstitute.law.ucla.edu/publications/age-trans-individuals-us/>; Jaclyn M. White Hughto, Sari L. Reisner, & John E. Pachankis, *Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions*, 147 *Social Science & Medicine* 147, 222–231 (2015); Mark L. Hatzenbuehler et al., *Stigma as a Fundamental Cause of Population Health Inequalities*, 103 *Am. J. Pub. Health* 813, 816 (2013); Tohru Nemoto, Birte Bödeker, & Mariko Iwamoto, *Social Support, Exposure to Violence and Transphobia, and Correlates of Depression Among Male-To-Female Transgender Women with a History of Sex Work*, 101 *Am. J. Public Health* 1980 (2011); Kristen Clements-Nolle, Rani Marx, & Mitchell Katz, *Attempted Suicide Among Transgender Persons: The Influence of Gender-Based Discrimination and Victimization*, 51 *J. Homosexuality* 53 (2009); Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 *Psychol. Bulletin* 674, 679–85 (2003); Vickie M. Mays & Susan D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 *Am. J. Pub. Health* 1869, 1874 (2001).



E. Conclusion

The NPRM comes at particularly dangerous moment for transgender people who need shelter. This vulnerable population has been at heightened risk for homelessness⁷³ and the economic crisis will inevitably lead to more transgender people needing emergency shelter services, especially as eviction moratoriums begin to lift. Moreover, as confirmed by the Centers for Disease Control and Prevention, homeless people are at heightened risk for COVID-19.⁷⁴ Yet, because an estimated 300,000 of the nearly two million transgender people in the U.S. live with underlying health conditions such as diabetes, asthma, and heart disease, this population is even more vulnerable to the virus.⁷⁵ Given the responsibilities with which Congress has charged HUD by statute, nothing in the Proposed Rule justifies the ways in which it would exacerbate existing threats to the health and lives of transgender Americans if allowed to take effect.

For all the reasons stated above, we urge the Department not to finalize the NPRM and instead immediately to withdraw it. HUD should be striving to fulfill its mission to increase safe and affordable housing rather than inviting discrimination and other abuse of transgender people in need of shelter.

Thank you for the opportunity to submit this comment on the Proposed Rule. Please do not hesitate to contact Sasha Buchert at sbuchert@lambdalegal.org if further information would be of assistance.

Respectfully submitted,

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⁷³ U.S. Trans Survey, *supra* note 5, at p. 178.

⁷⁴ Centers for Disease Control and Prevention, *Interim Guidance on Unsheltered Homelessness and Coronavirus Disease 2019 (COVID-19) for Homeless Service Providers and Local Officials* (updated Aug. 6, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html>.

⁷⁵ Jody L. Herman & Kathryn O'Neill, *Vulnerabilities to COVID-19 Among Transgender Adults in the U.S.* (The Williams Institute April 2020), available at <https://williamsinstitute.law.ucla.edu/publications/transgender-covid-19-risk/>.