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Re: Public Comment On U.S. Department of Housing and Urban Development Proposed Rule FR-6152-P-01 - Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs (Docket No. HUD-2020-0047)

The Transgender Legal Defense & Education Fund ("TLDEF"), Metro Trans Umbrella Group ("MTUG"), Marsha's House, Arianna's Center, Princess Janae's Place, GMHC, and Translatinx Network (collectively, the "Commenters") appreciate the opportunity to timely comment on the July 24, 2020 Notice of Proposed Rulemaking "Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs" issued by the United States Department of Housing and Urban Development ("HUD") published at 85 Fed. Reg. 44,811 (the "Proposed Rule").

In 2012, HUD implemented a policy to ensure that its core programs were open to all eligible individuals and families regardless of sexual orientation, gender identity, or marital status. 77 Fed. Reg. 5661. Titled "Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity," it was developed to ensure

that HUD's housing programs were available and accessible to all eligible individuals and families regardless of sexual orientation, gender identity, or marital status. However, absent from the 2012 rule was an explanation as to how transgender, intersex, or gender nonconforming ("TGNCI") people "should be accommodated in temporary, emergency shelters, and other buildings and facilities used for shelter, that have physical limitations or configurations that require and that are permitted to have shared sleeping quarters or shared bathing facilities." "Equal Access in Accordance With an Individual's Gender Identity in Community Planning and Development Programs" 81 Fed. Reg. 64,763. In 2016, HUD therefore amended the rule "to ensure that recipients and subrecipients of CPD [HUD's Office of Community Planning and Development] funding—as well as owners, operators, and managers of shelters and other buildings and facilities and providers of services funded by CPD—grant equal access to such facilities and services to individuals in accordance with an individual's gender identity". 81 Fed. Reg. 64,764. The 2016 Rule amended HUD's definition of "gender identity" to more clearly reflect the difference between actual and perceived gender identity, ensure that TGNCI people are afforded equal access to shelter accommodations based on their gender identity, and prohibited intrusive and discriminatory questions or requirements to provide anatomical information or documentary, physical, or medical evidence of the individual's gender identity in order to receive access to CPD programs. See generally id. Building upon these federal policies, countless state and local laws and ordinances have been crafted over the course of the past eight years to protect the rights afforded to the highly marginalized class of at-risk TGNCI individuals. Like the people they were created to protect, all of those protections are now needlessly at risk.

The Commenters strongly oppose the Proposed Rule and urge HUD to protect vulnerable individuals seeking basic services from discrimination based on their TGNCI status. The Proposed Rule codifies discrimination against TGNCI individuals and encourages illegal harassment by shelter providers. The Proposed Rule's discriminatory "good faith belief" provision serves to weaken protections for TGNCI individuals experiencing homelessness and seeking emergency shelter by allowing shelter providers to make placement determinations based solely on so-called "biological sex"

rather than "gender identity." It also encourages discrimination based on outmoded sex stereotypes (such as height, facial hair, and an Adam's apple), that will undoubtedly hurt anyone that does not fit neatly within the stereotypical gender binary. This is discrimination that will most assuredly lead to widespread harassment of vulnerable TGNCI individuals.

As such, and as explained in further detail below, the Proposed Rule violates multiple federal laws and policies, is internally inconsistent, creates unnecessary conflicts with state and municipal laws, promotes and advocates for further discrimination and marginalization of TGNCI people, and should be withdrawn.

Specifically, the Proposed Rule (1) violates the Fair Housing Act, the Americans with Disabilities Act, and the Administrative Procedure Act; (2) ignores the United States Supreme Court's recent Bostock decision clarifying that unlawful sex discrimination encompasses discrimination on the basis of both sexual orientation and transgender status, (3) promotes discrimination by allowing shelters to deny access based on sex stereotypes and transphobia and (4) conflicts with numerous state laws and local regulations. At bottom, the Proposed Rule serves no legitimate governmental purpose and manifests an ideologically-driven attempt to foster discrimination against TGNCI people. It should be withdrawn in its entirety.

1. THE COMMENTERS HAVE DEEP EXPERIENCE WORKING WITH TRANSGENDER PEOPLE, INCLUDING THOSE IN OR SEEKING SHELTER

Commenters are organizations that primarily work with TGNCI individuals to either directly provide shelter or provide information and referrals for shelter to transgender people facing homelessness or other emergencies throughout the country.

The Transgender Legal Defense & Education Fund (TLDEF) is a 501(c)(3) nonprofit whose mission is to end discrimination and achieve equality for transgender and nonbinary people, particularly those in our most vulnerable communities. TLDEF provides legal representation to transgender individuals who have been subject to discrimination, focusing on the critical issues of employment, education, public accommodations, and healthcare. TLDEF also provides public education on transgender rights. TLDEF's Name

Change Project at TLDEF provides pro bono legal name change services to hundreds of low-income transgender, gender nonconforming and nonbinary people annually through partnerships with dozens of the nation's most prestigious law firms and corporate law departments. Many of TLDEF's clients live in emergency shelters or have done so in the past.

The Metro Trans Umbrella Group is a grassroots non-profit that is diligently working to create a more inclusive and supportive community in St. Louis. MTUG helps the community lift each other up and empowers the community, as we work towards equality. Our mission is to bring together the community of transgender, non-binary, genderqueer, androgynous, intersex and allies in the St. Louis metro area through community, visibility, advocacy, and education. MTUG assists members of the St. Louis community in seeking shelter and provide lockers for them to store their belongings. MTUG Is currently building up its capacity to directly provide shelter as the current shelters in St. Louis are inadequate and outright discriminate against the St. Louis community.

Marsha's House opened in February 2017 to provide a wide array of programs to help LGBTQI+ homeless young adults in New York City, who had never had housing resources tailored to their needs, overcome the unique vulnerabilities and discrimination that homeless LGBTQ individuals face. Marsha's House operates an 81-bed shelter for LGBTQI+ individuals between the ages of 18-30 years with services that include referrals to supportive legal services, education, healthcare, and employment programs. LGBTQI+ also provides on-site mental health and nursing services, accompanied by mobile healthcare. While at Marsha's House, clients have access to Case Management and Housing teams to assist with securing suitable permanent housing.

Arianna's Center, founded in 2015 by transgender activist Arianna Lint, is a direct service and advocacy organization based in South Florida with a mission to uplift and support transgender women of color in Florida, Puerto Rico and beyond. Arianna's Center provides free mobile HIV testing and matches clients to care and prevention, case management to help with name changes, referrals for legal support and provides overall linkage to medical and mental health care. Arianna's Center also provides emergency safe housing for transgender women in distress and those released from

incarceration and ICE detention. Arianna's Center provides scholarships for GED and technical school as well as coaching to help transgender women enter the workforce. On the advocacy front, Arianna's Center trains transgender women of color to become activists and help educate elected leaders at all levels of government on issues and policy that are vital to the lives of people of transgender experience. All services provided by Arianna's Center are offered in both English and Spanish.

Princess Janae Place Inc. is a shelter in The Bronx, NY, that seeks to help people of transgender experience maximize their full potential as they transition from homelessness to independent living. Princess Janae Place fulfills Its mission by offering a safe space for people of transgender experience to connect with community, access gender affirming support, as well as engage in educational and recreational activities. Princess Janae Place serves as a critical referral source for its members.

GMHC is the world's first and leading provider of HIV/AIDS prevention, care, and advocacy. Building on decades of dedication and expertise, GMHC understands the reality of HIV/AIDS and empowers a healthy life for all. GMHC's mission is to fight to end the AIDS epidemic and uplift the lives of all affected. Potential clients are also assessed for other needs such as housing, connection to medical care, and mental health, and are connected to care.

Translatinx Network increases the capacity of all New York City transgender community members through advocacy, education, and social support. Translatinx Network has both a local and national focus, with a mission to promote the healthy development of transgender people through the delivery of a wide range of information. Through promotion, outreach in education, and capacity building, Translatinx Network encourages and strengthens the creation of safe and productive environments for transgender women. Translatinx Network has also operated a Community Clothing Closet for over two years that has provided clothing, hygiene kits, and other essential needs to individuals in need.

2. THE REALITY OF SHELTER HOUSING FOR TGNCI PEOPLE

The reality of shelter housing for many transgender, gender non-conforming, and non-binary people is dire. Around 30% of TGNCI

people reported having experienced homelessness at some point in their lives--an order of magnitude higher than the general population.[1] Nearly 26% of those who had experienced homelessness over the past year reported avoiding shelter "because they feared being mistreated as a transgender person."[2] Even in the best of circumstances with adequate funding and right to shelter laws, shelter access is often unstable and difficult for residents such as former TLDEF Name Change Project client Yessica Navarro. Despite strong anti-discrimination protections in NYC, Yessica has experienced mistreatment by fellow shelter residents. Even when shelter housing is available, it is often offered by religious shelters that implement strict rules on who may be served, which leaves many TGNCI people without any accessible shelters, as demonstrated by the experiences of MTUG and Jack Sage.

2.1 Arianna's Center

Arianna's Center works with clients who are amongst the most vulnerable in the South Florida community, transgender women of color. These women experience discrimination in housing, employment, and public accommodations at disproportionate levels to others in the community.

In 2018, the Transgender Law Center, with assistance from Arianna's Center, conducted a survey of TGNCI people in South Florida, and the results confirm the crisis facing many in this community. 80% of respondents reported being kicked out of home before they turned 18; additionally, 71% of respondents who identify as Black and 58% of respondents who identify as Hispanic reported facing housing discrimination. Issues such as difficulties in obtaining name and gender marker changes (57% of Black women and 67% of Hispanic women) as well as employment discrimination (71% of Black women and 92% of Hispanic women) also exacerbate these challenges for people experiencing homelessness and housing insecurity. Of all

[1] National Center for Transgender Equality, 2015 National Transgender Survey p. 13. Available at https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf

[2] *Id.*

respondents, 13% reported being turned away from a shelter because of their gender identity.

For many of Arianna's Center's clients, particularly transgender women, there is a very real fear of being allocated to shelters that do not reflect their gender identity. Fear of physical violence, harassment and bullying prevents some individuals from accessing what should be a safe, secure place to find refuge and keeps them in vulnerable situations. Arianna's Center has clients living in their cars, living under bridges and in parks, exposed and vulnerable partly due to unwelcoming atmospheres for transgender individuals in many shelters and the fear of being told they need to go to a place that doesn't reflect their gender identity. For a number of clients this fear is based on experiences with incarceration and the consequences of being housed in populations that don't reflect their gender identity, which serves as an additional barrier to accessing certain social services, such as emergency housing in single-sex facilities.

Arianna's Center formerly had four beds available for emergency accommodation for up to two weeks; however, the COVID-19 pandemic and social distancing guidelines has meant this number has had to be reduced to two beds at any given time.

Homelessness is a very real issue for transgender individuals living in the local community served by Arianna's Center; any rulings and policies which allow this at-risk community to be further discriminated against and treated without the respect and dignity they deserve can only serve to do further damage. Backward and insulting policies like HUD's Proposed Rule that suggest ways to determine an individual's gender identity by searching for certain characteristics to ultimately deny a person shelter are humiliating, harmful and unjust. It is the fear of Arianna's Center and that of the community it serves that these types of policies will exacerbate what is already a housing crisis for those in the transgender and gender non-conforming community.

2.2 Metro Trans Umbrella Group

The quantitative data painting a desperate picture is borne out by the firsthand experiences of MTUG. MTUG currently works to provide those without shelter sleeping bags, tents, hot plates, pans, and bowls. The current shelter situation in St. Louis leaves many TGNCI without any meaningful access to shelters.

2.2.1 The Current Situation in St. Louis for Transgender People Seeking Shelter

In St. Louis, most of the shelters are run by church groups and religiously affiliated groups. Because they receive no federal funds, and St. Louis does not have an applicable local non-discrimination ordinance, these shelters are allowed to openly discriminate against transgender people seeking shelter. In particular, transgender women don't have any meaningful access to shelters. Even when allowed into a shelter that will accept them, they are placed with men rather than with women, where they are at high risk for abuse and harassment. Transgender men are often placed with cisgender men against their wishes and are also at high risk for abuse and harassment. MTUG's community members have reported high levels of verbal abuse from other shelter residents and staff members on account of their gender identity. The staff are never held accountable for their open discrimination against transgender people. Inconsistent staff and turnover make referrals to reliable shelters difficult to make.

One of the few shelters that serves LGBTQ people in St. Louis is Covenant House, which serves young adults and some minors. They are LGBTQ friendly and affirming; however, they only have five beds at their transgender community flat which means they are almost always full. This means that LGBTQ people often have nowhere else to go and end up couch surfing until they've exhausted all other options and end up on the street. COVID-19 has only made the situation worse by increasing housing instability through increased unemployment and inadequate unemployment benefits.

The homelessness crisis is particularly acute among homeless youth. MTUG estimates that in the St. Louis area, about 40% of homeless youth are LGBTQ. This is a vulnerable population as LGBTQ youth in their twenties are at the most risk for violence, harassment, and abuse. Covenant house has an age limit of 25. Gateway 180, another shelter that accepts LGBTQ people, has an age limit of 30. Those who age out of the system are left without many options. Roughly two thirds of those seeking shelter are in their twenties.

As part of an effort to increase access to transgender friendly shelters, MTUG has acquired brick and mortar housing to provide

direct shelter. MTUG plans on continuing this effort in community mutual aid to support and provide for its community in the absence of government and broader community support.

2.3 The Experiences of Jack Sage

Jack Sage is a transgender man who came out as transgender when he was 16. Jack is originally from Washington State but currently resides in Little Rock, Arkansas. When Jack first came out, his dad was ambivalent but wasn't interested in supporting him. Shortly after, Jack talked to his mom and she told him that she would help him get started on hormones and change his legal name. Jack then moved in with his mom. However, he quickly found out that she had lied about her support of his transition. Jack's mother only cared about having him in the household for the additional benefits she would receive. It turned out that Jack's mother's support was a lie. Jack's mother kept deadnaming him and misgendering him constantly. It became intolerable and Jack gave his mother an ultimatum to accept him as he was. However, Jack was kicked out of the house and left without a home.

In the immediate days after being kicked out, Jack couch surfed for nearly a year and half but eventually ran out of places to stay. Jack then moved to Virginia with a family that was willing to take him in that he was connected to through social media. However, it did not work out as well as Jack had hoped. Jack was deprived of his autonomy as he was not allowed to shower with the door closed or cook his own food or eat what he wanted. As a result of being deprived of his autonomy, Jack left in the middle of the night and stayed with a coworker for a few weeks. However, this was a temporary arrangement and Jack had to leave and as a result, ended up sleeping in a park for a short period of time. Jack met other trans people in the park and they invited him to stay at Casa Ruby, which is a shelter dedicated to trans people. However, one of the black trans women Jack knew at Casa Ruby, a woman named Zoe, was shot and killed.[1] In addition, Casa Ruby was a frequent target of hate crimes where people threw bricks through the door. Because of the

[1] https://www.nbcwashington.com/news/local/announcement-on-killing-of-transgender-woman-zoe-spears/135752/

murder of Zoe and frequent hate crimes in the area, Jack feared for his safety and didn't believe it would be safe to stay at Casa Ruby.

After leaving Washington DC, Jack ended up going to a shelter in Little Rock called Lucy's Place. Even though this was a LGBTQ friendly shelter, the woman who ran it was very transphobic. The shelter was a typical house that acted as a shelter. The neighbors knew that the house was a shelter but did not particularly approve of the residents staying there. After some time, Jack became aware that one of the older volunteers was engaging in some inappropriate behavior. Jack reported the behavior to the executive director and as a result, the volunteer was suspended. However, this volunteer came in and broke through the door and attacked Jack in the middle of the night. The very next day, a neighbor living next to the shelter pulled a gun out on Jack and fellow residents. As a result of these incidents, Jack was told that the shelter was closed for a weekend. However, the shelter had a policy that caused residents to lose their place in the shelter if they were gone for more than 72 hours. As a result, Jack and other residents could not return and had to figure something out in terms of finding a place to stay.

Throughout his time being homeless, Jack didn't have many options in terms of shelters. In particular, Jack spoke of his stay at a religious run shelter that openly discriminated against transgender residents. In order to stay there, Jack was forced to stay on the women's side and go by his birth name and go to church in order to stay as a resident. Another shelter openly discriminated against trans women who stayed there. In particular, a trans woman who was a resident of this shelter was kicked out for wearing a wig and makeup to dinner, as trans women were not allowed to wear wigs or makeup. Another trans woman was kicked out due to hugging her boyfriend, an act viewed as homosexuality and explicitly prohibited by the shelter. This type of open discrimination is extremely common for TGNCI shelter residents.

Fortunately, Jack was able to get his own place and find stable housing after all of these experiences. However, many transgender people are not so lucky and do not end up in stable housing after experiencing homelessness.

2.4 The Experiences of Yessica Navarro

Yessica Navarro is a 20 year old transgender woman in New York City who is a former Name Change Project client. Yessica has been in shelters since she was kicked out by her family at the age of 18. Like many transgender youth, she was disowned and kicked out by her father after she came out as transgender. Since then, Yessica has been residing at the Covenant House. While the shelter itself hasn't openly discriminated against her, she has been called "trannie" and has been given dirty looks by other residents. In particular, Yessica has experienced being avoided by other shelter residents and staff was very standoffish and cold towards her. Yessica has told supervisors at the Covenant House about the treatment she has received but is unsure if any corrective action has been taken to remedy the situation. Yessica has nearly been physically assaulted by other residents on account of her gender identity. Just recently, Yessica was forced to leave her job and has not returned as a result of the severe discrimination she has received.

3. SHELTERS ARE SUBJECT TO THE FAIR HOUSING ACT

The Fair Housing Act, 42 U.S.C. §§ 3601-19, expresses the policy of the United States to provide for fair housing throughout the United States. 42 U.S.C. §§ 3601. As part of that policy, the Fair Housing Act (FHA) provides that it "shall be unlawful . . . [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b). HUD's Proposed Rule clearly violates this nondiscrimination mandate in the FHA, and is thus contrary to law.[3]

The Proposed Rule attempts to revoke the protections afforded by the FHA, as clarified by the 2016 Rule, by relying on the erroneous theory that "an agency should not go beyond the scope of the power granted them by duly enacted legislation." 85 Fed. Reg. 44,813. However, the FHA clearly grants HUD the power to enact antidiscrimination policies, such as those reflected in the 2016 Rule. HUD's attempt now to avoid the scope of its authority and limit the reach of the FHA is patently contrary to Congress' intent that the FHA

[3] See also Section V, *infra.*

be broadly construed, inclusive, and given generous construction. *See, e.g., Samaritan Inns, Inc. v. D.C.*, 114 F.3d 1227, 1234 (D.C. Cir. 1997), *citing Trafficante v. Metro. Life Ins. Co*., 409 U.S. 205, 209, 211-212 (1972) (regarding charges of discrimination, the act showed "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution"); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1359 (6th Cir. 1995) ("The language of the Act is broad and inclusive."); (internal citation omitted). *Ohana v. 180 Prospect Place Realty Corp*., 996 F. Supp. 238, 240 (E.D.N.Y. 1998) ("In order to achieve its purpose, the provisions of the FHA are to be construed broadly."). HUD's Proposed Rule is simply an attempt to narrow the scope of the FHA in a harmful manner that Congress did not intend.

3.1 The Word "Dwelling" in the FHA Applies to Shelters and Extends Sex Nondiscrimination Protection to Them.

In the first instance, HUD misconstrues the FHA in an attempt to promote sex discrimination by excluding temporary and emergency shelters from the definition of "dwellings" under the FHA. This is an incorrect interpretation that contradicts HUD's previous public statements and the FHA itself, where the word "dwelling" clearly includes shelters.

A "dwelling" is defined by the FHA 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[.]" 42 U.S.C. § 3602(b). The term is used throughout HUD's regulations, and in some instances, these explicitly define shelters as a type of "dwelling." For example, in implementing the disability discrimination provision of the FHA, HUD avers that the FHA's prohibition on discrimination in the provision of a "dwelling" does apply to homeless shelters:

> Dwelling unit means a single unit of residence for a family or one or more persons. Examples of dwelling units include: a single family home; an apartment unit within an apartment building; and in other types of dwellings in which sleeping accommodations are provided but

> toileting or cooking facilities are shared by occupants of more than one room or portion of the dwelling, rooms in which people sleep. Examples of the latter include dormitory rooms and sleeping ***accommodations in shelters intended for occupancy as a residence for homeless persons.***

24 C.F.R. § 100.201(emphasis added).[4]

HUD also publicly states the definition of "dwelling" includes shelters on its Fair Housing Accessibility FIRST website. In response to the "FAQ Category" for Multi-Family Housing, the website's definition of housing covered by FHA's access requirements reads:

> This includes condominiums, apartment buildings, vacation or other time share units, assisted living projects, public housing authorities, HOPE VI projects, projects funded with HOME or other federal funds, transitional housing, and SROs (single room occupancy units) designed for more than overnight stays, dormitory rooms, ***homeless shelters used as a residence, cooperatives, hospices, and more*.**

Fair Housing Accessibility FIRST, Frequently Asked Questions (FAQ), https://www.fairhousingfirst.org/faq/mfhousing.html (last accessed September 20, 2020).

Moreover, the overwhelming majority of courts unhesitatingly apply the FHA to a variety of temporary, emergency, or other short-term

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[4] HUD states the purpose of this rule is "effectuate sections 6 (a) and (b) and 15 of the Fair Housing Amendments Act of 1988." 24 C.F.R. § 100.200. Those sections added additional protections against disability discrimination in the provision of a "dwelling." PL 100–430 (HR 1158), PL 100–430, September 13, 1988, 102 Stat 1619.

shelters, either accepting or explicitly affirming the shelters' status as dwellings under the FHA. *See, e.g., Turning Point Inc. v. City of Caldwell,* 74 F.3d 941 (9th Cir.1996) (applying FHA analysis to 24–hour emergency shelters); *Woods v. Foster*, 884 F.Supp. 1169 (N.D.Ill.1995) (holding that a shelter for homeless and battered women and their families is a dwelling for purposes of the FHA); *City of Edmonds v. Oxford House, Inc*., 514 U.S. 725, 115 S.Ct. 1776, 131 L.Ed.2d 801 (1995) (analyzing group homes for recovering drug addicts and alcoholics as dwellings); *United States v. Columbus Country Clu*b, 915 F.2d 877 (3rd Cir. 1990), cert. denied, 501 U.S. 1205 (1991) (holding that seasonal homes were "dwellings" for purposes of the FHA); *Baxter v. City of Belleville*, 720 F.Supp. 720, 731 (S.D.Ill.1989) (determining that hospice facilities for AIDS patients were dwellings within the meaning of the FHA where, "[a]lthough the length of the residence may vary, the persons who will reside [at the dwelling] will not be living there as mere transients). In one recent case in the United States District Court for the District of Columbia, the court determined that a homeless shelter constituted a "dwelling" and was thus subject to the FHA's prohibitions on discrimination. *Hunter on behalf of A.H. v. D.C*., 64 F. Supp. 3d 158, 175 (D.D.C. 2014) (holding that complaint filed by homeless father and his disabled child against the District of Columbia and its subcontractor hired to operate the District's homeless shelters sufficiently alleged defendants' failure to make reasonable accommodations to a "dwelling," as required to state claim for discrimination, in violation of FHA); *see also Woods*, 884 F. Supp. at 1173 (homeless shelter qualified as a "dwelling," within meaning of Fair Housing Act section prohibiting discrimination in the sale or rental of a dwelling, where homeless person intended to stay at the shelter as long as he could, and he had no other home to go to).[5]

[5] Any effort by HUD to exclude shelters from the definition of "dwellings" would also contradict the FHA's definition of dwellings as "designed or intended for occupancy as, a residence." 42 U.S.C. § 3602(b). Notably, while the term "residence" is not defined in the FHA, courts have routinely found that the term encompasses shelters, further underscoring the protection from sex discrimination in such places. *See, e.g.*, *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1215–16 (11th Cir.2008); *Cohen v. Township of Cheltenham*, 174 F.Supp.2d 307, 323 (E.D. Pa. 2001). In reaching their conclusions, courts examine two main elements to determining a "residence" under the FHA: (1) "whether the facility is intended or designed for occupants who

4. THE PROPOSED RULE VIOLATES THE FHA

Having established that temporary and emergency shelters are "dwellings" (and/or "residences") within the purview of the FHA, such shelters are thus prohibited from discriminating on the basis of sex. The FHA provides: "As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, "[i]t shall be unlawful-- To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, ***sex***, familial status, or national origin." 42 U.S.C.A. § 3604(b)(emphasis added). As such, the Proposed Rule must be evaluated to determine whether it promotes impermissible sex discrimination in violation of the FHA. As the recent Supreme Court decision in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020) (holding that Title VII of the Civil Rights Act of 1964 protects employees against discrimination because of their sexual orientation or transgender status) makes perfectly clear, the "Good Faith" assessment championed in HUD's Proposed Rule targets the provision of fair housing by impermissibly discriminating on the basis of sex in clear violation of the FHA and should be withdrawn.

4.1 The FHA Is Broadly Applicable

Courts have repeatedly invoked the FHA's stated purpose of providing for fair housing throughout the United States to justify a broad application of the statute. *Trafficante v. Metropolitan Life Ins. Co*., 409 U.S. 205, 209, 212 (1972) (observing that "[t]he language of the [FHA] is broad and inclusive," that the [FHA] carries out a "policy

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'intend to re-main in the [facility] for any significant period of time' "; and (2) "whether those occupants would 'view [the facility] as a place to return to' during that period." *Lakeside Resort Enterps. v. Bd. of Supervisors of Palmyra Township*, 455 F.3d 154, 158 (3d Cir.2006). Homeless shelters are generally intended and designed for residents to remain for longer than a single night. There is no exact definition of "significant period of time" but cases have found that stays of days or weeks are sufficient to constitute a "significant period of time". *Defiore v. City Rescue Mission of New Castle*, 995 F. Supp. 2d 413, 419 (W.D. Pa. 2013) (expected stays of "1-90 days" constitute a "significant period of time"); *Woods v. Foster*, 884 F. Supp. 1169, 1173 (N.D. Ill. 1995) (average stay in shelter was two weeks and thus the shelter constituted a "dwelling" for the purposes of the FHA).

that Congress considered to be of the highest priority," and that vitality can be given to this policy "only by a *generous construction*…of the statute.") (emphasis added). Other decisions evincing a broad application of the FHA and its anti-discrimination focus include *City of Edmonds v. Oxford House, Inc*., 514 U.S. 725, 731 (1995); *Revock v. Cowpet Bay West Condo. Assoc*., 853 F.3d 96, 104–05 (3d Cir. 2017); *Hunt v. Aimco Props., L.P*., 814 F.3d 1213, 1223 (11th Cir. 2016); *Connecticut Fair Hous. Center v. Corelogic Rental Prop. Sol., LLC*, 369 F. Supp. 3d 362, 370 (D. Conn. 2019).

This broad application has allowed for judicial extensions of the FHA's protections to classes of persons protected under the plain text of the statute even though they may not have been specifically identified as the intended beneficiaries of the statute. *See, e.g., Trafficante*, 409 U.S. at 205 (holding that the FHA protected a Caucasian tenant's challenge to the racially-discriminatory policies of his housing complex).

Similarly, in *Bostock*, the Supreme Court held that Title VII of the Civil Rights Act of 1964 (Title VII) – to which courts routinely look to interpret Title VIII of the Civil Rights Act of 1968 (the FHA) – protects employees against discrimination because of their sexual orientation or transgender status. The *Bostock* Court explicitly acknowledged the propriety of such broad application in its interpretation of Title VII:

> Title VII's prohibition of sex discrimination in employment is a major piece of federal civil rights legislation. It is written in starkly broad terms. It has repeatedly produced unexpected applications, at least in the view of those on the receiving end of them. Congress's key drafting choices—to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff's injuries virtually guaranteed that unexpected applications would emerge over time.

Bostock, 140 S.Ct. at 1753. Moreover, *Bostock*, applying the same "broad" canon of construction as in *Trafficante*, *see Bostock*, 140 S.Ct. at 1747 ("when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule"), rejected the view that Title VII does not protect LGBT people because they were not intended by Congress to be protected in 1964, *id.* at 1749-1753. Title VII and the FHA's prohibition of discrimination on the basis of sex were both intended to and do in practice prohibit all forms of sex discrimination which they encompass.

4.2 Discrimination on the Basis of Transgender Status Is Unlawful Under Both the FHA and Title VII

Courts have typically looked to Title VII sex discrimination protection precedents to inform FHA sex discrimination claims. Because many Title VII cases occur in the context of workplace harassment or discrimination based on sex, courts have also applied workplace discrimination claim evidentiary tests to allegations of housing discrimination under the FHA. *See, e.g., Honce v. Vigil*, 1 F.3d 1085, 1090 (10th Cir. 1993) (adopting elements of a Title VII hostile-workplace claim for the FHA), *citing Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65, (1986) (comparing Title VII hostile work environment precedent to the Fair Housing Act); *Mencer v. Princeton Square Apartments*, 228 F.3d 631, 634 (6th Cir. 2000) (applying the three-part test for employment discrimination developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) to housing discrimination cases); *Wetzel v. St. Andrew Living Cmty*., LLC, 901 F.3d 856 (7th Cir. 2018) (applying "hostile environment test" under Title VII to a FHA claim); *DiCenso v. Cisneros*, 96 F.3d 1004, 1007 (7th Cir. 1996)("A determination of what constitutes a hostile environment [sex discrimination] in the housing context requires the same analysis courts have undertaken in the Title VII context."); *Cavalieri-Conway v. L. Butterman & Assocs.*, 992 F. Supp. 995, 1002-5 (N.D. Ill. 1998)("As with sexual discrimination claims, courts rely on a Title VII analysis in reviewing "hostile environment" claims of sexual harassment under the FHA."), *aff'd sub nom Cavalieri v. L. Butteman & Assoc*s., 172 F.3d 52 (7th Cir. 1999).[6]

[6] Courts also look to Title VII to inform discrimination claims under the FHA brought on other grounds. *See, e.g., Gamble v. City of Escondido*, 104 F.3d 300, 304 (9th Cir.1997) (applying Title VII analysis to housing discrimination based on

This long-standing cross-application makes sense, as both statutes are remedial civil rights legislation similar in structure and nomenclature, each passed around the same time. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtyes. Project, Inc*., 135 S.Ct. 2507, 2516-20 (2015) (comparing section 3604(a) of the FHA to Title VII); *Bloch v. Frischholz*, 587 F.3d 771, 779 (7th Cir. 2009) (noting that section 3604(b) of the FHA mirrors Title VII); *Kyles v. J.K. Guardian Sec. Servs., Inc*., 222 F.3d 289, 295 (7th Cir. 2000) (describing Title VII and the FHA as "functional equivalent[s]" to be "given like construction and application."). The language of the FHA and Title VII similarly use "because of… sex" language in their statutes, and both statutes were enacted to eradicate sex-based discrimination from a sector of society. *Inclusive Communities*, 135 S.Ct. at 2521 ("The FHA, like Title VII…was enacted to eradicate discriminatory practices within a sector of our Nation's economy.") *See also* 42 U.S.C. § 3601 ('It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States'); H.R. Rep., at 15 (explaining the FHA 'provides a clear national policy against discrimination in housing')."); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2nd Cir. 1988) (the FHA and Title VII "are part of a coordinated scheme of federal civil rights laws enacted to end discrimination."). In addition, both statutes, Title VII then Title VIII, were enacted shortly after one another. *Inclusive Communities* at 2519 (finding that the similarity in text and structure of the FHA and Title VII is all the more compelling given that Congress passed the FHA in 1968—only four years after passing Title VII); *Smith v. City of Jackson Miss.*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.")(citation omitted).

The similarities in the language, structure, purpose, and timing of Title VII and the FHA support the application of *Bostock*'s reasoning to the housing context. Thus, *Bostock*'s affirmation that workplace

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disability); *Kormoczy v. Secretary, U.S. Dept. of HUD*, 53 F.3d 821, 823–24 (7th Cir.1995) (applying Title VII analysis to housing discrimination claim based on familial status).

sex discrimination claims on the basis of transgender status are actionable under Title VII also applies to sex discrimination claims actionable under all federal civil rights statutes, [7] specifically including the FHA.

4.3 The Proposed Rule, Including the "Good Faith" Assessment of Sex Proposed by HUD, Constitutes and Promotes Illegal Sex Stereotyping

Bostock explicitly affirms that federal civil rights statutes' prohibition of sex discrimination extends to discrimination on the basis of transgender status: "An employer who fires an individual merely for being gay or transgender defies the law." *Bostock*, 140 S. Ct. at 1754. Likewise, it is longstanding Supreme Court precedent that discrimination for failure to conform to stereotypes regarding behavior or appearance considered appropriate for one's sex violates federal civil rights law. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-251 (1989) (same under Title VII of the Civil Rights Act of 1964); *id.* at 256 ("It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.' Nor . . . does it require expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills, that has drawn the criticism."). *See also U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (sex stereotypes are an impermissible basis for classification under Equal Protection Clause).

HUD's Proposed Rule is the embodiment of the stereotypes the Supreme Court has held to be unlawful. Although HUD concedes it "is not aware of data suggesting that transgender individuals pose an inherent risk to biological women," it nevertheless relies as justification for the Proposed Rule on the stereotype of transgender women as threatening sexual violence and psychological trauma

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[7] Indeed, *Bostock* has already been applied to federal civil rights statutes other than Title VII. *See, e.g., Grimm v. Gloucester County Sch. Bd.*, 19-1952, 2020 WL 5034430, 4th Cir. August 26, 2020), as amended (August 28, 2020) (Title IX of the Civil Rights Act); A*dams by and through Kasper v. Sch. Bd. of St. Johns County*, 968 F.3d 1286, 1291 (11th Cir. 2020) (same). This underscores its applicability to the FHA as well.

against cisgender women. 85 Fed. Reg. 44815. This furthers the negative and baseless stereotypes of transgender women as frightening and as violent sexual predators.[8] In reality, the reverse is true—transgender people are much more likely to become victims of gender-based violence, and therefore to need protections from it of the type that emergency shelters are designed to provide. *See* Walter O. Bockting et al., *Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population*, 103 Am. J. Pub. Health 943 (2013); Lauren Mizock & Kim T. Mueser, *Employment, Mental Health, Internalized Stigma, and Coping With Transphobia Among Transgender Individuals*, 1 Psychol. of Sexual Orientation & Gender Diversity 146, 146 (2014) ("Transgender individuals face significant stigma or transphobia—prejudice, discrimination, and gender related violence due to negative beliefs, attitudes, irrational fear, and aversion to transgender people."); USTS at 5 ("The findings paint a troubling picture of the impact of stigma and discrimination on the health of many transgender people"); *see also Whitaker ex rel. Whitaker* v. *Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1051 (7th Cir. 2017) ("There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity."); *Grimm v. Gloucester County Sch. Bd*., 19-1952, 2020 WL 5034430, at *17 (4th Cir. Aug. 26, 2020), as amended (Aug. 28, 2020 citing *Grimm v. Gloucester County Sch. Bd*., 302 F. Supp. 3d 730, 749 (E.D. Va. 2018) ("[T]here is no doubt that transgender individuals historically have been subjected to discrimination on the basis of their gender identity, including high rates of violence and discrimination in education, employment, housing, and healthcare access); Michelle M. Johns et al., Ctrs. for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students—19 States and Large Urban School Districts, 2017*, 68 Morbidity & Mortality Wkly. Rep. 67 (2019), https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6803-H.pdf.

Likewise, the Proposed Rule's sanction of emergency shelters' classification of residents based on their "good faith" assessment of

[8] https://www.glaad.org/publications/victims-or-villains-examining-ten-years-transgender-images-television

their appearance—focusing on such factors as height and "the presence of an Adam's apple," or "the presence (but not the absence) of facial hair" —is an open-ended invitation to indulge in stereotyping on the basis of appearance. 85 Fed. Reg. 143, 44816. This is especially notable because the Proposed Rule allows shelters to deny accommodation based on this assessment without regard to a person's self-reported sex or the sex that appears on their identity documentation, which the Proposed Rule states may be "request[ed]" but need not be respected. 85 Fed. Reg. 143, 44815. In other words, the policy permits shelters to deny accommodation based solely on whether a person's appearance conforms to sex-based expectations about how they should look—in direct violation of *Price Waterhouse*.

Finally, HUD's determination that shelters may house individuals on the basis of "biological sex"—which it does not define—ignores *Bostock*'s admonition that "discriminat[ing] against persons with one sex identified at birth and another today" is illegal discrimination "on the basis of sex." 140 S.Ct. at 1746. *See also id.* ("Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals' sex"). *Bostock* assumed *arguendo* that "sex" means "the biological distinctions between male and female," *id*. at 1739, and yet it rejected the argument that such distinctions permit differential classification on the basis that a person is transgender, *id*. at 1749-1750. Where a person is discriminated against because they fail to identify with their sex assigned at birth, "it is really the [person's] bucking of 1950s gender roles, not her sex, doing the work." *Id*.

Thus, a single-sex shelter may not turn away transgender men or women because they are transgender, for the same reason that an employer may not turn away a job applicant because they are transgender. And yet by encouraging shelters to rely solely on the undefined term "biological sex," the Proposed Rule would permit that. But a reliance on "biological sex" does not permit discrimination under *Bostock*. 140 S.Ct. at 1739. The Federal Courts of Appeal are unanimous in holding that transgender individuals may not be assigned to the wrong single-sex facility on the basis of others' perception of their "biological sex," under either the Fourteenth Amendment or statute—and nor are there any countervailing "privacy" interests by non-transgender people that would require such incorrect placements. *Grimm v. Gloucester County Sch. Bd*., 19-

1952, 2020 WL 5034430 (4th Cir. Aug. 26, 2020), as amended (Aug. 28, 2020); Adams by and through Kasper v. Sch. Bd. of St. Johns County, 968 F.3d 1286 (11th Cir. 2020); Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1038 (7th Cir. 2017); *Doe by and through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018), cert. denied sub nom. *Doe v. Boyertown Area Sch. Dist*., 139 S. Ct. 2636 (2019); *Parents for Priv. v. Barr*, 949 F.3d 1210 (9th Cir. 2020). HUD's Proposed Rule thus ignores decades of Supreme Court precedent interpreting sex discrimination, and encourages shelters to violate federal law.

4.4 The FHA Imposes the Responsibility to Affirmatively Promote Fair Housing and Nondiscrimination

Finally, by promoting discrimination and encouraging harassment, HUD's Proposed Rule violates the Fair Housing Act by abdicating then actively countering the FHA's explicit requirement that HUD affirmatively promote fair housing and non-discrimination. Section 808(d) of the Fair Housing Act requires all executive branch departments and agencies administering housing and urban development programs and activities to administer these programs in a manner that affirmatively furthers fair housing. *See* 42 U.S.C. 3608. Section 808(e)(5) of the Fair Housing Act (42 U.S.C. 3608(e)(5)) requires that HUD programs and activities be administered in a manner affirmatively furthering the policies of the Fair Housing Act. Indeed, HUD's own public website affirms this obligation:

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

> activities to provide equal housing opportunities.

https://www.hud.gov/program_offices/fair_housing_equal_opp/non_discrimination_housing_and_community_development_0.

HUD's clear abdication of its statutorily mandated duty to affirmatively promote fair housing is yet another reason why the Proposed Rule is unlawful and should be withdrawn.

5. THE PROPOSED RULE VIOLATES THE AMERICANS WITH DISABILITIES ACT

Title III of the Americans With Disabilities Act ("ADA") prohibits discrimination against individuals "on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). That is, Title III prohibits discrimination on the basis of disability in places of public accommodations (*e.g.*, businesses that are generally open to the public, such as restaurants, movie theaters, schools, day care facilities, recreation facilities, and doctors' offices), including shelters for the homeless. *Id*. at § 12181(7)(K) ("The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce . . . a day care center, senior citizen center, ***homeless shelter***, food bank, adoption agency, or other social service center establishment.") (emphasis added). By promoting discrimination against transgender individuals at shelters, the Proposed Rule targets disabled individuals suffering from gender dysphoria and excludes them from the full and equal enjoyment of public accommodations on the basis of their disability in violation of the ADA.

5.1 Gender Dysphoria Is A Recognized Disability Under Title III of the ADA

The ADA defines "disability" broadly as "a physical or mental impairment that substantially limits one or more major life activities of such individual," "a record of such an impairment," or "being regarded as having such an impairment." 42 U.S.C. § 12102(1); 42 U.S.C. § 12102(4)(A); 29 C.F.R. § 1630.2(k)(1) (a "record of such an impairment" means that such a person "has a history of, or has been misclassified as having, a mental or physical impairment that

substantially limits one or more major life activities"). Gender dysphoria meets each of these definitions:

- *First*, gender dysphoria is a legally recognized "physical or mental impairment" because it is a "disorder or condition" "affecting one or more body systems." 29 C.F.R. § 1630.2(h). Gender dysphoria derives from an atypical interaction of sex hormones (endocrine system) and the developing brain (neurological system), which results in a person being born with circulating hormones inconsistent with the person's self-perception of their gender. *See, e.g., Doe v. Mass. Dep't of Correction*, No. 1:17-cv-12255-RGS, 2018 WL 2994403, at *6 (D. Mass. June 14, 2018) (noting "recent studies demonstrating that GD diagnoses have a physical etiology, namely hormonal and genetic drivers contributing to the in utero development of dysphoria") (not reported).[9]

- *Second*, it is also a "mental impairment," as its definition in the DSM-5 includes significant psychological distress. *See* Diagnostic & Statistical Manual of Mental Disorders (5th Ed. 2013) ("DSM-5") ("Gender dysphoria refers to the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender.").

- *Third*, gender dysphoria substantially limits one or more major life activities, including thinking, concentrating, and

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[9] Gender dysphoria should not be confused with any "gender identity disorders not resulting from physical impairments" not encompassed by the ADA--such as simply one's transgender identity (*i.e.*, "the condition of identifying with a different gender"). Gender dysphoria is a medical condition that transgender people may have. *Blatt v. Cabela's Retail, Inc.*, No. 5:14-CV-04822, 2017 WL 2178123, at *4 (E.D. Pa. May 18, 2017). *See also Doe* at *7–*8 (holding that gender dysphoria "is not merely another term for 'gender identity disorder'" or, alternatively, it "result[s] from [a] physical impairment[]," and that to hold otherwise would impermissibly bring the ADA into conflict with the Equal Protection Clause). This has also been the consistent position of the United States. Stat. of Int. of U.S. at 2–3, *Doe v. Dzurenda*, No. 3:16-CV-1934 (D. Conn. Oct. 27, 2017), ECF No. 57; Stat. of Int. of U.S. at 2–3, *Doe v. Arrisi*, No. 3:16-cv-08640 (D.N.J. July 17, 2017), ECF No. 49; Stat. of Int. of U.S. at 5, *Blatt v. Cabela's Retail, Inc.*, No. 5:14-cv-4822-JFL, 2015 WL 9872493 (E.D. Pa. Nov. 16, 2015).

> interacting with others, and also substantially limits the operation of major bodily functions, including neurological, brain, and reproductive functions. *See id*. ("Gender dysphoria, along with atypical gender expression, is associated with high levels of stigmatization, discrimination, and victimization, leading to negative self-concept, increased rates of mental disorder comorbidity, school dropout, and economic marginalization, including unemployment, with attendant social and mental health risks, especially in individuals from resource-poor family backgrounds. In addition, these individuals' access to health services and mental health services may be impeded by structural barriers, such as institutional discomfort or inexperience in working with this patient population.").

5.2 Shelters That Deny Access To Transgender Individuals With Gender Dysphoria Violate Title III of the ADA

Title III of the ADA provides that entities that provide public accommodations may not, among other unlawful actions, impose "eligibility criteria" that tend to screen out disabled individuals. 42 U.S.C. § 12182(b)(2)(A)(i) ("For purposes [of Title III], discrimination includes . . . the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered[.]"); *Spector v. Norwegian Cruise Line Ltd*., 545 U.S. 119, 128 (2005) (same).

The "Good Faith" criteria established by the Proposed Rule personifies the exact type of eligibility criteria explicitly prohibited under the ADA. *See* 85 Fed. Reg. at 44,818 ("A recipient, subrecipient, owner, operator, manager, or provider may deny admission or accommodation in temporary, emergency shelters and other buildings and facilities . . . based on a ***good faith*** belief that an individual seeking accommodation or access . . . is not of the sex which the shelter's policy accommodates. If a temporary, emergency shelter has a ***good faith*** belief that a person seeking access to the shelter is not of the sex which the shelter accommodates, the shelter may request information or documentary evidence of the person's

sex, except that the shelter may not request evidence which is unduly intrusive of privacy.") (emphases added). In essence, the Proposed Rule's "Good Faith" standard imposes a "passing test" that "screens out" individuals who are suffering from gender dysphoria and unable to hide it. This "passing test" permits a shelter to make snap judgments as to whether to turn away individuals with gender dysphoria based on the presence of any combination of physical characteristics. *See id*. at 44,816 ("HUD believes [that] reasonable considerations [to determine an individual's "biological sex"] may include, but are not limited to a combination of factors such as height, the presence (but not the absence) of facial hair, the presence of an Adam's apple, and other physical characteristics which, when considered together, are indicative of a person's biological sex."). This encourages shelters to discriminate against people suffering from gender dysphoria, as such individuals may outwardly retain physical and secondary-sex characteristics of one gender, but identify as another gender. Based solely on having the "physical characteristics" of a certain gender, this "passing test" impermissibly permits a shelter to find a transgender person ineligible for shelter based on their gender dysphoria, and therefore violates Article III of the ADA. *See, e.g., U.S. v. Asare,* 2020 WL 4496319 (S.D.N.Y. August 5, 2020) (finding that Defendants' policy of screening out individuals living with HIV through preoperative testing constituted the prohibited application of eligibility criteria under Title III of the ADA).

6. THE PROPOSED RULE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act (APA), 5 U.S.C. § 500 et seq., governs the process by which federal agencies develop and issue regulations. It includes requirements for publishing notices of proposed and final rulemaking in the Federal Register, provides opportunities for the public to comment on notices of proposed rulemaking, and generally governs internal procedures of administrative agencies, including how they interact with the public. Accordingly, final agency decisions and rules are subject to judicial review. Such rules may be set aside as unlawful if found to be arbitrary, capricious, an abuse of discretion, not otherwise in accordance with the law, or contrary to constitutional right, power, privilege, or immunity. A rule is arbitrary and capricious, and in

violation of the APA, where the proposing agency does not provide a reasonable explanation for the rule. 5 U.S.C. § 706(2)(A). As described below, the Proposed Rule drafted by HUD is arbitrary and capricious and, if finalized, violates the APA in that it 1) fails to perform a reasoned analysis or demonstrate any rational explanation for its changes to the 2016 Rule; 2) provides no rational basis for the Proposed Rule, which demonstrates that the Proposed Rule is impermissibly arbitrary and capricious; and 3) is contrary to law (*i.e.*, the FHA and ADA).

6.1 HUD Has Failed to Provide An Analysis That Supports the Changes To The Regulations, Demonstrating That The Rule Is Arbitrary and Capricious

HUD has failed to perform even a cursory analysis that would demonstrate a legitimate reason for its departure from the 2016 Rule. "When an agency changes or reverses a prior policy, it must first 'display awareness that it is changing position'." *Whitman-Walker Clinic, Inc. v. U.S. Dept. of Health and Human Services*, CV 20-1630 (JEB), 2020 WL 5232076, at *23 (D.D.C. Sept. 2, 2020), citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009). It may not, for example, "depart from a prior policy sub silentio." *Id.* The agency also "must show that there are good reasons for the new policy," *id*., and must "supply a reasoned analysis for the change." *Ark Initiative v. Tidwell*, 816 F.3d 119, 127 (D.C. Cir. 2016) (*quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)); *see also State Farm*, 463 U.S. at 43, 103 S.Ct. 2856 ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' ") (*quoting Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962)). An agency action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem." *Id.*

When promulgating regulations, an agency must, among other things:

1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs;

2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations;
3) Select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);
4) To the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and
5) Identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

See Exec. Order No. 13563 § 1(b), 76 Fed. Reg. 3,821 (January 18, 2011).

In this regard, when addressing the Proposed Rule HUD has failed to perform a cost-benefit or any other analysis that could present any legitimate legal policy reasons to support its proposed changes to the 2016 Rule. As such, the Proposed Rule provides no legitimate support for the change in regulation and is therefore in violation of the APA and must be discarded.

6.1.1 HUD Has Failed to Comply With APA Procedural Requirements In Proposing Revisions To The Regulations

Agency rulemaking without an adequate "reasoned explanation" violates the APA. *Dept. of Homeland Sec. v. Regents of the U. of Californi*a, 140 S. Ct. 1891, 1916 (2020); *accord id*. at 1907-1910 (under the APA, where an agency offers an inadequate explanation of its reasons for rulemaking, it must offer additional explanation or restart the rulemaking process); *see also Azar v. Allina Health Servs.*, 139 S.Ct. 1804 (2019) (rejecting the Department of Health and Human Services' attempt to bypass notice-and-comment rulemaking before changing the formula for calculating Medicare hospital

payments paid to hospitals for treating low-income Medicare patients).

Similarly to *Regents of the University of California*, HUD's instant effort in promulgating the Proposed Rule is accompanied by nothing in terms of reason or support. Blatantly absent from the Proposed Rule is any consideration by HUD of the *Bostock* ruling or how the Proposed Rule does not violate the non-discrimination provision of the FHA. This has already proven fatal to other rules seeking to roll back civil rights protections for transgender people. In *Whitman-Walker Clinic, Inc. v. U.S. Dept. of Health and Human Services*, CV 20-1630 (JEB), 2020 WL 5232076 at 26* (D.D.C. September 2, 2020), the court considered an attempt by the Department of Health and Human Services attempted to pass a series of revisions to Section 1557 of the Affordable Care Act that would remove protections put in place to prevent discrimination against individuals identifying as transgender. The Court found that, by adopting these proposed changes, "HHS acted arbitrarily and capriciously, in excess of its statutory authority, and not in accordance with the law in violation of the Administrative Procedure Act ("APA")." *Whitman-Walker*, 2020 WL 3444030 at *254. In part, the Court's ruling was based on HHS's failure to address issues raised in the thousands of comments submitted and refusing to wait for the Supreme Court to issue its ruling in *Bostock*. The Court found that HHS "should have at least considered the import of *Bostock* for the reasons underlying its regulatory action…before it eliminated regulatory language providing for precisely what *Bostock* seemed to guarantee. The agency's failure to take that obvious deliberative step prevents the Court from finding that its policy change was supported by "reasoned analysis" and compels the conclusion that its action was arbitrary and capricious." *Whitman-Walker*, 2020 WL 5232076 at *25 (emphasis in original).

Similar to the rule at issue in *Whitman-Walker*, HUD's Proposed Rule fails to take into account the *Bostock* ruling that discrimination on the basis of a person's sexual orientation *or transgender status* is discrimination on the basis of sex. The Proposed Rule fails to address how or why transgender status should be exempt from the prohibition of discrimination "on the basis of sex" under FHA, which is co-extensive with how that term is used in Title VII, *see* Section 4.2, *supra*.

Moreover, the Proposed Rule inappropriately lacks a cost-benefit or other analysis to support its proposed changes, thus violating the APA and exposing the rule as an arbitrary and capricious act. *See Casa De Maryland v. U.S. Department of Homeland Security*, 924 F.3d 684 (4th Cir. May 17, 2019) (finding that the Department of Homeland Security failed to provide a reasoned explanation for the proposed change in policy and the proposed rule was therefore arbitrary and capricious). Instead, HUD chose to rely on unfounded assumptions that the Proposed Rule would somehow reduce costs and increase availability to shelters. *See* 85 Fed. Reg. 44,814, 44,816. When an agency action, including a proposed rule change, is "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court," a court may reject a proposed agency action as unlawful. *See*, 5 U.S.C. § 706(2)(f). Accordingly, the Proposed Rule wrongly states that Congress did *not* prohibit discrimination in temporary and emergency shelters and thereby impermissibly "rests upon factual findings that contradict those which underlay [the] prior policy," *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515–516 (2009); *see also*, *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (finding that a policy change complies with the APA if It provides "good reasons" for the new policy, which, if the "new policy rests upon factual findings that contradict those which underlay its prior policy," must include "a reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy."). In so doing, HUD blatantly ignores the pre-existing rights and laws already in place prohibiting discrimination.[10]

6.1.2 HUD Ignores The Costs Of The Proposed Rule

In its haste to propose and enact the Proposed Rule, HUD has failed to address the reliance interest of those dependent on the regulations in their current state. As stated *supra,* the APA requires that proposed changes be supported by a cost-benefit analysis or legal or policy reasoning. *See* Exec. Order No. 13563 § 1(b), 76 Fed. Reg. 3,821 (January 18, 2011), 5 U.S.C. § 706(2)(A). The Proposed Rule would impose significant individual and federal costs by denying transgender individuals access to the resources and programming on

[10] See Section 6, *supra*.

which they may be dependent on for safety, shelter, healthcare, and numerous other resources. The Proposed Rule presents no analysis or policy as to why transgender individuals relying on these resources should now be denied access, or how this denial will impact them.

The Proposed Rule's encouragement of shelters to develop their own policies regarding sex is likely to lead to stereotyping and to violations of Federal, state, and local laws by shelters. It thus will create an unworkable standard whereby shelter employees discriminate on sex stereotypes and unlawfully turn away shelter seekers. Further, individuals living in rural areas have access to fewer total shelters, such that restriction of access would entirely isolate or cut-off the individuals in need of help. These costs are nowhere addressed in the Proposed Rule.

The Proposed Rule suggests the use of medical records or identification documents to confirm an individual's gender identity, *see* 85 Fed. Reg. 44,815 (although as noted *supra* it does not require a shelter to respect a person's ID documents). However, the Proposed Rule overlooks the numerous barriers that transgender individuals, undocumented immigrants, and people of color face in obtaining these documents. *See,* National Center for Transgender Equality, *U.S. 2015 Transgender Survey*, https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf (last accessed Sept. 22, 2020).

The Proposed Rule's acknowledgment that shelters must take "special care to address the mental health and safety needs of transgender individuals," 85 Fed. Reg. 44,815, is internally inconsistent with the remainder of a rule that patently promotes discrimination against such individuals. Specifically, the rule acknowledges the low resources and overburdened nature of shelters, but fails to anticipate that those same shelters may not be capable of facilitating a transfer recommendation. *See id*. This is particularly the case with rural shelters where another shelter is not a viable option. This will result in the loss of shelter, safety, and security for transgender individuals who are denied housing.

HUD bluntly admits in its Proposed Rule that it has *not* conducted the necessary analysis as to how the Proposed Rule may impact

shelters, stating that "(…) HUD does not know how many of those would issue a new policy. Nor does HUD know how many of those are small entities." 85 Fed. Reg. 44,817. In addition, HUD does not know how many entities would be affected or impacted by the Proposed Rule. *See id*. HUD's failure to address or recognize the resources that each shelter would need to invest to comply with the Proposed Rule, or even know how many shelters this would impact, highlights HUD's abject failure in following the APA requirements before promulgating the Proposed Rule. Thus, the Proposed Rule is unlawful, and should be withdrawn.

6.2 There Is No Rational Basis For HUD's Proposed Rule, And It Is Therefore Arbitrary And Capricious [11][12]

> The APA provides that agency actions, findings, and conclusions must not be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed

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[11] HUD's argument that the 2016 Rule "imposed restrictions not supported by Congressional enactment (*i.e.*, the Fair Housing Act)," 85 FED. REG. 44,812, is not a rational explanation for the Proposed Rule as the protections for TGNCI individuals in the 2016 Rule are appropriately within the purview of the Fair Housing Act. *See* Section 4, *supra*.

[12] HUD's argument that that the 2016 Rule "imposed regulatory burdens," 85 FED. REG. 44,816, is not a rational explanation for the Proposed Rule as it is not supported by any analysis to demonstrate how the Proposed Rule actually impacts the resources and access to resources HUD purports to be protecting. *See* Section 6.1, *supra*.

> on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706(2). The Supreme Court has expanded on the basis by which an agency's actions should be analyzed under the APA, holding that "[t]he question in each case is whether the agency's reasons for the change, when viewed in light of the data available to it, and when informed by the experience and expertise of the agency, suffice to demonstrate that the new policy rests upon principles that are rational, neutral, and in accord with the agency's proper understanding of its authority." *F.C.C. v. Fox* at 536. In other words, an agency must "examine the relevant data and articulate a satisfactory explanation for its action." *Id.* at 513, *citing Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). As further demonstrated herein, the does not articulate any satisfactory explanation for the Proposed Rule. Thus, the Proposed Rule is arbitrary and capricious in violation of the APA, and is therefore unlawful.

6.2.1 HUD's Supposed Concern For Local Control and Federalism Is Not A Satisfactory Explanation For the Proposed Rule

HUD's attempts to justify its Proposed Rule by arguing that the 2016 Rule impermissibly minimized local control and thus violated the principles of Federalism are simply incorrect, and as such it is not a reasonable explanation for the Proposed Rule. HUD argues that the 2016 Rule ignored "significant variation in State and local law" and argues that "the best way to fulfill this federalism mandate — particularly in a difficult issue like this with a lack of clear national consensus—is to refrain from enforcing a national solution." 85 FED. REG. 44,813-4. However, as Executive Order 13,132, "Federalism," points out, only those "issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people[.]" HUD's invocation of federalism as a justification for the Proposed Rule fails for several reasons. In the first instance, as demonstrated in Section 4 *supra*, and as made irrefutably clear by the recent holding in *Bostock* (which

set a clear standard that discrimination on the basis of transgender status is unlawful), the Proposed Rule violates the FHA, a national statute that intentionally supplants state and local law. As noted above, in *Bostock*, the Supreme Court held that that Title VII of the Civil Rights Act of 1964 protects employees against discrimination because of their sexual orientation or gender identity. After *Bostock,* it is clear that Federal law contemplates the protection from discrimination on the basis of TGNCI status, thus rendering HUD's concerns regarding "local control" moot.

Moreover, as demonstrated in Section 6, *supra*, HUD's Proposed Rule violates the ADA—another national civil rights statute that is intended to supplants state and local law— by encouraging discrimination on the basis of an individual's status as a person with a disability (*i.e.*, gender dysphoria). Thus, this compound discrimination on the basis of TGNCI status is a national issue in multiple respects and is not an issue to be regulated at the state or local level as expressly contemplated by the Proposed Rule. It follows, then, that the 2016 Rule did not violate the principles of Federalism, and therefore, HUD's empty "Federalism" justification is facially insufficient and unable to stand as a rational explanation for the Proposed Rule in a manner demanded by the rulemaking requirements of the APA.

6.2.2 HUD's Argument That The 2016 Rule "Burdened Those Shelters With Deeply Held Religious Convictions" Is Not A Satisfactory Explanation For The Proposed Rule

HUD's attempt at providing a policy basis or justification for the Proposed Rule, namely that the 2016 Rule "burdened those shelters with deeply held religious convictions," yet again lacks merit and does not provide an APA-compliant explanation for the Proposed Rule. In comparison to legal challenges that have been brought relating to healthcare and insurance plans, and discussed within this comment, it is notable that no shelters, including those "with deeply held religious convictions," have brought a legal challenge to the 2016 Rule. 85 Fed. Reg. 44,814. The case cited by the Proposed Rule, *The Downtown Soup Kitchen v. Municipality of Anchorage*, only determined that the shelter was not subject to the municipality's public accommodations law, not that the religious convictions of the facility's operators were in conflict with prohibiting transgender

status discrimination. *See The Downtown Soup Kitchen v. Municipality of Anchorage*, No. 3:18-cv-00190-SLG, Dkt. No. 1.

Equally absent is any explanation regarding the number of religious shelters that have religious objections, along with any evidence to indicate that religious shelters believe they are burdened by the rule--which undermines the assertion that allowing discrimination will increase the number of providers. *See* 85 Fed. Reg. 44,814. The Proposed Rule also fails to address that the vast majority of religious shelters are still covered by local and state public accommodations laws, such that the Proposed Rule would both fail to change the regulatory framework actually faced by shelters, and put shelters at risk of violating local and state public laws in order to undertake the policies promoted through the Proposed Rule.

6.2.3 HUD's Claims That The 2016 Rule Led to Privacy Issues Are Not A Satisfactory Explanation For The Proposed Rule

The closest HUD comes to articulating a satisfactory explanation for the proposed change is its alleged concern for personal privacy issues and concerns specific to individuals at shelters – but even this falls far short of what is required. 85 Fed. Reg. 44,814. Under 5 U.S.C. § 706(2)(A), a court reviewing an agency action under the APA shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Here, HUD's meager attempts to provide "policy" reasons for the Proposed Rule based on "safety" or "privacy" concerns fail, and expose HUD's Proposed Rule for the arbitrary and capricious action that it is.

HUD provides no evidence to support the safety complaints it claims are behind the new revisions. Instead, furthering the capricious nature of the rule and its lack of actual policy, HUD literally concedes that these fears are baseless, admitting that it "***is not aware of data suggesting that transgender individuals pose an inherent risk***" to non-TGNCI women, and instead attempts to rely on "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." 85 Fed. Reg. 44,815 (emphasis added).

HUD cites to the complaint in a lawsuit filed in Fresno, California, in which one transgender individual in a shelter engaged in alleged misconduct, to try and justify its proposed allowance for widespread discrimination. Bad acts by individual members of minority groups have long been used to justify discrimination against them. Devah Pager and Hana Sheperd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 Ann. Rev. Sociol. 181, 193 (2008). But reliance on negative stereotypes about transgender people--as with any group--is an unconstitutional basis for policymaking is unconstitutional. *See Virginia*, 518 U.S. at 533; *Romer v. Evans*, 517 U.S. 620, 632-35 (1996); *Dep't of Agriculture v. Moreno*, 413 U.S. 528, 533-37 (1973). HUD cites no evidence that allowing transgender people into a shelter that matches their gender identity is more likely to result in the kind of misconduct at issue in that case, let alone that misconduct by one single person (which, even if true, would already be illegal and justify removing the alleged wrongdoer from a shelter under existing law, no matter the sex of that person), is sufficient reason to justify stripping thousands of at-risk individuals of non-discrimination protections and access to critical services. *See Grimm*, 2020 WL 5034430, at *19 (striking down a schoolboard policy prohibiting transgender students from using the correct school bathroom where "[t]he Board does not present any evidence that a transgender student . . . is likely to be a peeping tom"). This absence is all the more notable considering that the 2016 Rule has been the law of the land for four years--giving HUD ample opportunity to find examples of how it has in practice given rise to the concerns HUD alleges. *See Adams by and through Kasper v. Sch. Bd. of St. Johns County, 968 F.3d 1286, 1299 (11th Cir. 2020)* (holding that the absence of actual privacy breaches during a six-week period in which a school district allowed transgender students to use the correct bathroom undermined its argument that allowing such bathroom usage created privacy concerns).

HUD's proposed solution to this alleged incident is grossly disproportionate and is not well-reasoned or supported by any evidence. HUD presents no evidence that this is a common pattern of behavior or source of fear to residents of shelters. It presents no other anecdotal evidence and admits that it has no other factual

evidence, data, or studies supporting its proposed rule change. 85 Fed. Reg. 44,815. Rather, the Proposed Rule's conclusions rest solely on tropes that transgender people inherently cause privacy issues, create hazards to their cisgender counterparts, and completely ignores that transgender individuals should also be given due consideration for their privacy, mental health, and safety concerns.

Nowhere is the Proposed Rule's marginalization of transgender people more flagrant then when it cites — as justification for the discrimination it encourages — the need to give more consideration to "at-risk clients, particularly 'the special needs of program residents that are victims of domestic violence' along with 'dating violence, sexual assault, and stalking.'" 85 Fed. Reg. 44,814. Not surprisingly, notably absent from this consideration is the extraordinary levels of physical and sexual violence faced by transgender individuals. Evidence collected by the National Center for Transgender Equality and others shows that more than one in four transgender people has faced a bias-driven assault, with rates higher for transgender women and transgender people of color. *See*, https://transequality.org/issues/anti-violence. This well-recognized and documented history of harm and abuse faced by transgender individuals serves to demonstrate that many transgender individuals share at least the same at-risk needs as their cisgender counterparts at shelters.

Indeed, transgender individuals are particularly at risk and are disproportionately the victims of domestic violence, sexual assault, stalking, and all factors listed by HUD as "special needs of program residents." By proposing to lessen protection or accessibility to transgender individuals, despite their risk level, the Proposed Rule engages in the very discrimination prohibited by *Bostock* by labeling transgender women as "men," and referring to them as such throughout the Proposed Rule. *See* Human Rights Campaign, HRC's Brief Guide to Getting Transgender Coverage Right, https://www.hrc.org/resources/reporting-about-transgender-people-read-this (last accessed September 19, 2020). In addition, the Proposed Rule relies on transphobic tropes by associating transgender people with sexual violence, citing unfounded fears that "biological men may exploit the process of self-identification under

the current rule in order to gain access to women's shelters." 85 Fed. Reg. 44,815. Using a non-existent hypothetical based in transphobic bigotry is the antithesis of reasoned rulemaking, and thus the Proposed Rule should be withdrawn.

6.2.4 The Proposed Rule Is in Conflict With Itself

Finally, the arbitrary and capricious nature of the Proposed Rule is reflected by the fact that it is internally inconsistent. The stated language in the Preamble explicitly states that the 2016 prior rule "Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity" is still maintained under the Proposed Rule. Explicitly encouraging and allowing for discrimination based on transgender status and sex stereotypes is paradoxical to maintain a rule that promotes equal access "regardless of . . . gender identity." *Id.* at 44,811. This internal conflict makes clear that, on top of the Proposed Rule's clear violations of federal law and policy, the Proposed Rule is not only arbitrary and capricious, but nonsensical. As such, it should be withdrawn in its entirety.

6.3 The Proposed Rule Is Contrary to Law and Therefore Violates the APA

Under 5 U.S.C. § 706(2)(A), an agency action that is found to be contrary to law is unlawful and will be set aside. In addition to violating the FHA and the ADA, discussed *infra*, the Proposed Rule is also contrary to law as it violates the Fifth Amendment's Equal Protection Clause by engaging in unlawful animus against transgender individuals. *See*, *e.g.*, *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that the Due Process Clause of the Fifth Amendment nonetheless imposes various equal protection requirements on the federal government via reverse incorporation). The Supreme Court has identified three factors that serve to demonstrate animus in rulemaking:

(1) disparate impact,

(2) "[t]he historical background of the decision[,] . . . particularly if it reveals a series of official actions taken for invidious purposes," and

(3) "contemporary statements by members of the decision-making body."

Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977). All three are present here.

The Proposed Rule will undoubtedly have a disparate impact against transgender and gender nonconforming people as they are singled out for disparate treatment under the rule. As described throughout these Comments, the Proposed Rule creates an impermissible "good faith" test that allows subjective and stereotypical physical characteristics to be used in determining the so called "biological sex" of a shelter resident. This is an arbitrary and capricious standard that is ripe for abuse and inconsistent application. In addition, the historical background of this decision is littered with public animus by HUD and especially HUD Secretary Ben Carson, as shown by the excerpts of public statements and policy changes made over the past four years:

- In early 2017, the Department of Housing and Urban Development (HUD) removed "for review six resource documents aimed at helping emergency homeless shelters and other housing providers comply with HUD nondiscrimination policies regarding LGBT service recipients." Letter from Members of Congress to Ben Carson, Sec'y, U.S. Dep't of Housing and Urban Dev. 1 (January 31, 2019), https://bit.ly/3fljVFj. The "review" was never completed, despite its completion being directed by Congress. See *id*.

- On September 19, 2019, Housing and Urban Development (HUD) Secretary Ben Carson shocked his staff by referring to homeless transgender women seeking shelter as "big, hairy men" trying to infiltrate women's homeless shelters. Tracy Jan et al., HUD Secretary Ben Carson Makes Dismissive Comments About Transgender People, Angering Agency Staff, Wash. Post (September 19, 2019), https://wapo.st/2VUhLVk.

To "give rise to an inference of discriminatory motive," statements must be made by relevant actors and must not be "remote in time

[or] made in unrelated contexts." *Dept. of Homeland Sec. v. Regents of the U. of California*, 140 S. Ct. 1891, 1916 (2020) 48 (quoting *Batalla Vidal v. Nielson*, 291 F. Supp. 3d 260, 278 (E.D.N.Y. 2018)). This construction of "contemporary statements" revises the construction used by the lower court in *Batalla Vidal* by "discounting some allegations altogether and narrowly viewing the rest." *Id.* at 1917 (Sotomayor, J., dissenting). *Trump v. Hawaii,* 138 S. Ct. 2392, 2438-2440 (Sotomayor, J., dissenting) (referring to *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018)). The court has found "official expressions of hostility and the failure to disavow them to be constitutionally significant" when those statements occurred within the adjudicatory hearing itself. *Id.* The above-cited statements are contemporaneous as they are made within the rule itself and by the HUD Secretary himself while the rule was being written.

The Proposed Rule drafted by HUD repeatedly refers to transgender women as "men," evincing the lack of care being given to those that may be at highest risk of discrimination. Misgendering is itself a form of discrimination, and one that the Supreme Court in *Bostock* took pains to avoid by correctly referring to Ms. Stephens as a transgender woman.

By using disrespectful language that implies misgendering is acceptable and by ignoring the Supreme Court's recent ruling in *Bostock*, HUD is authorizing other agencies to refrain from improving or correcting their own use of improper language. As an example, HHS has engaged in routine and systematic misgendering and denial of basic dignity to transgender people. *See*, 85 Fed. Reg. 37,191. HHS referred to a hypothetical "transgender patient [who] self-identifies as male" as "her" 85 Fed. Reg. at 37,189. HHS referred to a pregnant transgender man as "her" and "in fact a . . . woman"); *id*. at 37,191. HHS referred to the decedent in *Prescott v. Rady Children's Hospital*, who died of suicide following severe mistreatment and harassment on account of his transgender status, as "her" (despite quoting, in a footnote, the court's opinion that correctly referred to him as a boy).

The Proposed Rule follows a pattern of official actions, and targeted rules and regulations to strip transgender people of legal protections and rights.

- **July 26, 2017** Tweet After consultation with my Generals and military experts, please be advised that the United State Government will not accept or allow……. Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming……victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you.

- **January 24, 2017**: On President Trump's inauguration day, the administration scrubbed all mentions of LGBTQ people from the websites of the White House, Department of State, and Department of Labor.[13]

- **February 22, 2017:** The Departments of Justice and Education withdrew landmark 2016 guidance explaining how schools must protect transgender students under the federal Title IX law.[14]

- **March 13, 2017:** The State Department announced the official U.S. delegation to the UN's 61st annual Commission on the Status of Women conference would include two outspoken anti-LGBT organizations, including a representative of the Center for Family and Human Rights (C-FAM): an organization designated as a hate group by the Southern Poverty Law Center.[15]

- **March 20, 2017:** Department of Health and Human Services (HHS) removed demographic questions about LGBT people

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[13] https://www.nbcnews.com/feature/nbc-out/trump-administration-removes-lgbtq-content-federal-websites-n711416

[14] https://www.npr.org/sections/ed/2018/02/12/585181704/the-education-department-says-it-wont-act-on-transgender-student-bathroom-access

[15] https://ru.usembassy.gov/u-s-delegation-61st-session-un-commission-status-women/; https://www.splcenter.org/hatewatch/2019/05/13/anti-lgbtq-hate-groups-sponsor-united-nations-event

that Centers for Independent Living must fill out each year in their Annual Program Performance Report.[16]

- **March 28, 2017:** The Census Bureau retracted a proposal to collect demographic information on LGBT people in the 2020 Census.[17]

- **April 14, 2017:** The Department of Justice abandoned its request for a preliminary injunction against North Carolina's anti-transgender House Bill 2, which prevented North Carolina from enforcing HB 2.[18]

- **June 14, 2017:** The Department of Education withdrew its finding that an Ohio school district discriminated against a transgender girl. The Department gave no explanation for withdrawing the finding, which a federal judge upheld.[19]

- **August 25, 2017:** President Trump released a memo directing Defense Department to move forward with developing a plan to discharge transgender military service members and to maintain a ban on recruitment.[20]

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16 https://www.americanprogress.org/issues/lgbtq-rights/news/2017/03/20/428623/trump-administration-rolling-back-data-collection-lgbt-older-adults/

17 https://apnews.com/619704d091da4b54968a23720aadee0f/Census-suggests-counting-LGBT,-then-%22corrects%22-and-deletes

18 https://www.nbcnews.com/feature/nbc-out/justice-department-withdraws-lawsuit-over-hb2-bathroom-bill-n746551

19 https://www.washingtonpost.com/local/education/education-dept-closes-transgender-student-cases-as-it-pushes-to-scale-back-civil-rights-investigations/2017/06/17/08e10de2-5367-11e7-91eb-9611861a988f_story.html

20 https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-defense-secretary-homeland-security/

- **December 14, 2017:** Staff at the Centers for Disease Control and Prevention were instructed not to use the words "transgender."[21]

- **February 18, 2018:** The Department of Education announced it will summarily dismiss complaints from transgender students involving exclusion from school facilities and other claims based solely on gender identity discrimination.[22]

- **March 20, 2018:** The Department of Education reiterated that the Trump administration would refuse to allow transgender students to use bathrooms and locker rooms based on their gender identity.[23]

- **March 23, 2018**: The Trump Administration announced an implementation plan for its discriminatory ban on transgender military service members.[24]

- **April 11, 2018:** The Department of Justice proposed to strip data collection on sexual orientation and gender identity of teens from the National Crime Victimization Survey.[25]

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[21] https://www.washingtonpost.com/national/health-science/cdc-gets-list-of-forbidden-words-fetus-transgender-diversity/2017/12/15/f503837a-e1cf-11e7-89e8-edec16379010_story.html

[22] https://www.npr.org/sections/ed/2018/02/12/585181704/the-education-department-says-it-wont-act-on-transgender-student-bathroom-access

[23] https://www.advocate.com/politics/2018/3/20/betsy-devos-reaffirms-no-protections-transgender-students

[24] https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF

[25] https://www.nbcnews.com/feature/nbc-out/justice-department-wants-remove-questions-lgbtq-teens-crime-survey-n865361

- **May 11, 2018:** Federal Prisons Roll Back Rules Protecting Transgender People.[26]

- **October 25, 2018:** U.S. representatives at the United Nations worked to remove references to transgender people in UN human rights documents.[27]

- **April 12, 2019:** The Department of Defense put President Trump's ban on transgender service members into effect, putting service members at risk of discharge if they come out or are found out to be transgender.[28]

- **May 15, 2020:** The Department of Education issued a letter declaring that the federal Title IX rule requires school to ban transgender students from participating in school sports, and threatening to withhold funding from Connecticut schools if they do not comply.[29]

- **June 19, 2020:** When discussing Aimee Stephens, a transgender woman and one of the plaintiffs who won *Bostock* (in which the Supreme Court consistently referred to her using the correct gender), HHS remarked that "Stephens 'quite obviously' is not 'a woman' because 'Stephens's sex' is male." 85 Fed. Reg. at 37,180 & n.90–91 (internal quotation marks omitted).

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[26] https://www.nytimes.com/2018/05/11/us/politics/justice-department-transgender-inmates-crime-victims.html

[27] https://www.theguardian.com/world/2018/oct/24/trump-administration-gender-transgender-united-nations

[28] https://www.nytimes.com/2019/03/13/us/transgender-troops-ban.html

[29] https://www.nytimes.com/2020/05/29/us/connecticut-transgender-student-athletes.html

7. HUD'S PROPOSED RULE CREATES SIGNIFICANT CONFLICTS WITH EXISTING FEDERAL AND STATE LAWS

7.1 The Proposed Rule Would Create a Clear Conflict Between Violence Against Women Act Funding and HUD Funding

The Violence Against Women Reauthorization Act of 2013 (VAWA 2013) made history by being the first federal funding statute to explicitly bar discrimination based on actual or perceived gender identity or sexual orientation - as well as race, color, religion, national origin, sex or disability, and expanding protections to cover those affiliated with victims.

This groundbreaking provision ensures that lesbian, gay, bisexual and transgender (LGBT) victims of domestic violence, sexual assault, dating violence and stalking are not denied, on the basis of sexual orientation or gender identity, access to the critical services that Office on Violence Against Women (OVW) supports. [30] Specifically, VAWA 2013 states:

> No person in the United States shall, on the basis of actual or perceived race, color, religion, national origin, sex, gender identity (as defined in paragraph 249(c)(4) of title 18, United States Code), sexual orientation, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under [VAWA], and any other program or activity funded in whole or in part with funds appropriated for grants, cooperative agreements, and other assistance administered by the Office on Violence Against Women.

As well as expanding the group of individuals who qualify for protection under VAWA 2013, VAWA 2013 also enhanced housing

[30] https://nnedv.org/wp-content/uploads/2020/01/Library_Policy_Approps-Chart-6.8.20.pdf

protections and expanded protection to additional housing programs, including Continuums of Care and Emergency Solutions Grants (ESG). Furthermore, the nondiscrimination condition applies not only to OVW-covered grants, but also specific grants administered by the Office of Justice Programs, and programs and activities funded in whole or in party with VAWA funds.[31] Under VAWA, programs can only segregate based on gender if necessary to effectively serve survivors.[32] Even in programs that are gender-segregated, equal services must be provided to people of all genders. This usually means that if there is a program designed just for women, similar services must also be given to any men who seek help. If a program appears only open to women, or divided by gender, without good reason or without equal services available to the opposite sex, an individual may choose to file a complaint.

HUD implemented VAWA 2013 in November 2016, the effect being that housing programs administered by HUD are required to be compliant with VAWA 2013.[33] As a recipient of VAWA funding, and provider of resources to those intended to be protected and assisted by VAWA 2013, HUD acknowledged its responsibility to comply with VAWA 2013 and subsequently expanded protections for survivors of violence and issued its own guidance. Comments issued in its 2016

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[31] Frequently Asked Questions, U.S. Department of Justice, April 9, 2014, *available at* https://www.justice.gov/sites/default/files/ovw/legacy/2014/06/20/faqs-ngc-vawa.pdf.

[32] *See*, 2018 Biennial Report , Office on Violence Against Women, https://www.justice.gov/ovw/page/file/1292636/download; *see also* Gender Integrated Shelters: Experience and Advice, FORGE, Spring 2016, available at: http://forge-forward.org/wp-content/docs/gender-integrated-shelter-interivews-FINAL.pdf (discussing the benefits of integrated shelters and estimated population demographics of individuals served at the interviewed shelters).

[33] *See*, https://www.hud.gov/program_offices/housing/mfh/violence_against_women_act#:~:text=On%20March%207%2C%202013%2C%20the,core%20housing%20and%20homelessness%20programs.

Implementation included statements such as the below to confirm its dedication to protecting all LGBT victims and HUD's obligations:

> HUD emphasizes that housing providers must provide LGBT victims of domestic violence, dating violence, sexual assault, and stalking, with the protections and remedies that VAWA 2013 directs be provided to all tenants and applicants. Failure to do so not only violates VAWA 2013 and HUD's regulations, but also may violate HUD's 2012 Equal Access Rule, which requires that HUD-assisted and HUD insured housing are made available without regard to actual or perceived sexual orientation, gender identity, or marital status.[34]

As made clear by HUD's own publications, HUD already has a pre-existing responsibility to provide equal protections to transgender individuals and the Proposed Rule would directly contradict these obligations.

7.2 The Proposed Rule Would Create a Conflict Between USDA Rural Housing Funding and HUD Funding

Rural Housing Funding is a part of Rural Development in the U.S. Department of Agriculture. It provides and funds a variety of programs to build or improve housing and community facilities in rural areas. Although both programs aim to provide loans, housing, and other resources to people of all income levels, the USDA's housing program is focused on individuals and communities living in rural areas. Accordingly, the USDA passed its own civil rights statement to ensure that all individuals, regardless of sex, gender identity, or sexual orientation, have equal access to the programs, funding, and activities offered by the USDA: "Doing right means treating all people equally, regardless of an individual's race, color, national origin, religion, sex (including pregnancy, gender identity and sexual orientation), disability, age, genetic information, marital

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[34] Department of Housing and Urban Development, Violence Against Women Reauthorization Act of 2013: Implementation in HUD Housing Programs, *available at*: https://www.govinfo.gov/content/pkg/FR-2016-11-16/pdf/2016-25888.pdf

status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs)."2020 USDA Civil Rights Statement.

However, because rural populations may be served by USDA or HUD programs, conflicts between these two regulations are assured.[35] For example, individuals who wish to file fair housing complaints are directed to HUD. *See*, https://www.rd.usda.gov/about-rd/offices/civil-rights. If HUD does not provide the same protections as the USDA, individuals who are subjected to illegal discrimination will face conflicting regulatory regimes.

7.3 The Proposed Rule Would Create a Conflict Between HHS (ACF) Funding and HUD Funding

The Administration for Children and Families (ACF), part of the U.S. Department of Health and Human Services, offers a variety of grant programs to serve children, families, and communities to promote economic and social well-being. HHS and ACF receive funding from HUD that aim to provide services to assist children and families that are homeless. These services include State Medicaid-Housing Agency Partnerships, Healthcare for the Homeless, and Projects for Assistance in Transition from Homelessness (PATH), among others.[36] Recipients of federal financial assistance (FFA) from HHS must administer their programs in compliance with federal civil rights laws that prohibit discrimination on the basis of race, color, national origin, disability, age and, in some circumstances, religion, conscience, and sex. The Proposed Rule, to the extent it already conflicts with federal law and statutes, would similarly force the HHS to conflict with either the Proposed Rule or existing federal laws.

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[35] For a full list of resources available to residents in rural areas, *see* A Guide to Federal Housing and Community Development Programs, *available at* http://ruralhome.org/storage/documents/fedprogguide.pdf.

[36] https://www.hhs.gov/programs/social-services/homelessness/grants/index.html

7.4 The Proposed Rule Conflicts with the Referral Services Required by The HEARTH Act Reauthorizing the McKinney Vento Homeless Assistance Act

The Homeless Emergency Assistance and Rapid Transition to Housing Act (the "HEARTH Act") of 2009 reauthorized the McKinney Vento Homeless Assistance Act to expand the definition of homelessness and expand access to resources available, such that the only individuals excluded under the HEARTH Act are defined as "any individual imprisoned or otherwise detained pursuant to an Act of Congress or a State Law." *See* 42 USC 11302 (d). The Act makes no additional exclusions on the basis of sex, gender identity, or sexual orientation, instead stating that the Act may cover any individual "fleeing, or is attempting to flee, domestic violence, dating violence, sexual assault, stalking, or other dangerous or life-threatening conditions in the individual's or family's current housing situation, including where the health and safety of children are jeopardized, and who have no other residence and lack the resources or support networks to obtain other permanent housing." To read in additional exclusions or restrictions as to who may be covered would be an unauthorized restriction of the scope of the HEARTH Act.

Funding for Homeless Assistance Grants, which originate from HUD, was also modified by the HEARTH Act in 2009. The modification expanded the way funds can be used, including homelessness prevention, rapid rehousing, and broadening the definition of homelessness. The HEARTH Act further revised the McKinney Vento Homeless Assistance Act by modifying the grant structure: now, grants are offered under Continuum of Care programs (CoC), the Emergency Solutions Grant, and Rural Housing Stability Assistance Programs (RHS). Recipients of federal assistance, *i.e.* through these grants, are obligated to comply with federal laws prohibiting discrimination, including the Fair Housing Act. According to the HUD website, "[t]hese obligations extend to recipients of HUD financial assistance, including subrecipients, as well as the operations of state and local governments and their agencies, and certain private organizations operating housing and community development services, programs, or activities." *See*,

https://www.hud.gov/program_offices/fair_housing_equal_opp/non_discrimination_housing_and_community_development_0#_Civil_Rights_Obligations. Because Homelessness Assistance Grants are funded by HUD, the Proposed Rule would jeopardize who has access to these funds and provide contradictory definitions as to who may apply for or receive funding and resources under the Act. That conflict puts recipients and subrecipients of Homeless Assistance Grants at clear risk of violating the HEARTH Act.

Recipients or subrecipients who run shelters that receive funding through a Homeless Assistance Grant are currently required under the 2016 Rule, § 5.106(c), to provide individuals seeking access to single-sex facilities placement and accommodations in accordance with their self-identified gender identity and requires recipients to take nondiscriminatory steps as necessary to address privacy concerns of residents and occupants. Thus, the Proposed Rule would clearly put recipients and subrecipients who receive HUD funding at risk of violating compliance with nondiscrimination policies.

7.5 The Proposed Rule Conflicts with State and Municipal Laws

The Proposed Rule will create conflict and disparity between in-place state and municipal laws, forcing administrations, nonprofit organizations, and agencies to choose between complying with state and municipal laws or violating federal policy.

Twenty two states explicitly prohibit discrimination based on sexual orientation and gender identity.[37] For example, New York law bans discrimination on the basis of gender identity in housing. 9 NYCRR §466.13. The law provides that discrimination on the basis of gender identity is sex discrimination and that discrimination on the basis of gender dysphoria is disability discrimination. Thus, by changing the definition of sex discrimination, the Proposed Rule would be directly in conflict with existing New York law.[38]

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[37] See Movement Advanced Project, available at https://www.lgbtmap.org/equality-maps.

[38] For a full list of state and municipal laws, *see* Movement Advancement Project.

Moreover, the number of states is growing: last month, an Administrative Law Judge with the Montana Department of Labor and Industry held that gender identity is protected under the Montana Human Rights Act. *In re Office of Administrative Hearings,* Case Nos. 1570-2019 AND 1572-2019. The Department cited *Bostock* as being "highly relevant" to the case, as both dealt with employees who were diagnosed with gender dysphoria, and ultimately agreed with *Bostock*'s holding that discrimination based on transgender status falls under the Act's prohibition on sex discrimination.

Similarly, municipalities have passed their own equality laws outlawing discrimination on gender identity. *See, e.g.*, the City of Juneau's antidiscrimination ordinance, CBJ 41.05.005:

> It is the policy of the City and Borough of Juneau to eliminate unlawful discrimination based on race, color, age, religion, sex, familial status, disability, sexual orientation, gender identity, gender expression, or national origin. Such discrimination poses a threat to the health, safety and general welfare of the citizens of the City and Borough.

The Proposed Rule would unduly burden shelters with the task of attempting to follow conflicting state and federal and local laws. It would also burden state and local regulatory authorities' efforts to enforce their laws in an environment where a federal agency is encouraging shelters to discriminate--in violation of both federal law and state law which is held to the same standard by courts and administrative bodies.

7.6 HUD's Proposal Misstates Massachusetts Nondiscrimination Law by Defining Gender Identity as "Perceived," Rather Than Actual

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"Equality Maps: State Nondiscrimination Laws." https://www.lgbtmap.org/equality-maps/non_discrimination_laws. Accessed [September 12, 2020].

The Proposed Rule attempts to use Massachusetts law as an example of state laws in conflict with HUD's current rule, to which the Proposed Rule would allegedly defer. However, this purported conflict is based on a misquotation of Massachusetts law. HUD views the 2016 Rule as deferring to an individual's self-identified gender; in conflict with what it views to be Massachusetts's reliance on purportedly "objective" factors rather than self-identification. 85 Fed. Reg. 44,813. However, while quoting the beginning and end of the Massachusetts statute, the Proposed Rule omits the middle portion, which states in relevant part, "Gender-related identity may be shown by . . . **consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held as part of a person's core identity** . . . " Mass. Gen. L. Ch. 4 § 7 (emphasis added). HUD also mis-cites the statute at one point as Mass. Gen. L. Ch. 22C § 32, which is a different statute entirely. Perhaps HUD's omission was caused by its confusion. In any event, Massachusetts has long recognized a person's self-affirmed gender identity as a component of sex under the state's anti-discrimination laws, before the cited statute was even adopted, *see e.g., Doe ex rel. Doe v. Yunits*, 001060A, 2000 WL 33162199, at *6 (Mass. Super. Oct. 11, 2000), aff'd sub nom. *Doe v. Brockton Sch. Comm.*, 2000-J-638, 2000 WL 33342399 (Mass. App. Nov. 30, 2000). The Proposed Rule simply ignores the case law. Thus, contrary to the Proposed Rule's assertion, Massachusetts law is consistent with HUD's current definition of "gender identity." It is also consistent, unlike HUD's proposed rule, with the Supreme Court's decision In *Bostock*.

8. CONCLUSION

Based on the preceding, the Commenters strongly oppose the Proposed Rule and urge HUD to withdraw the Proposed Rule in its entirety, as it is not only inconsistent with federal law and policy, but fosters discrimination against and encourages harassment of transgender individuals seeking shelter.

Sincerely,

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