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Regulations Division
Office of General Counsel
United States Department of Housing and Urban Development
451 7th Street SW
Room 10276
Washington, DC 20410-0500

Re: Comments to the U.S. Department of Housing and Urban Development’s proposed rule “Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs” (July 24, 2020) (HUD Docket No. FR-6152-P-01, RIN 2506-AC53)

The National LGBT Bar Association and Foundation (“National LGBT Bar”) hereby submits comments on behalf of itself, its board of directors, its members, its affiliate state and local bar associations, and lesbian, gay, bisexual, transgender, and queer (“LGBTQ+”) attorneys, law students, and legal professionals nationwide concerning the Department of Housing and Urban Development’s proposed rule entitled “Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs,” HUD Docket No. FR-6152-P-01, RIN 2506-AC53 (the “Proposed Rule”), which was published in the Federal Register on July 24, 2020. If implemented, the Proposed Rule would impose significant harms on transgender individuals—that is, persons whose gender identity differs from the sex they were assigned at birth—who experience homelessness. It would also grant taxpayer-funded homeless shelters license to discriminate against transgender individuals. We therefore request that the Proposed Rule be withdrawn.

The Proposed Rule would effectively repeal HUD’s Equal Access Rule, which ensures that federally-funded housing is available to all individuals regardless of their gender identity and requires that individuals seeking access to single-sex facilities be placed and accommodated in accordance with their gender identity. The Equal Access Rule was promulgated because transgender individuals, who comprise 0.6% of the nation’s adult population,¹ disproportionately suffer from homelessness and experience high rates of violence, harassment, and discrimination

¹ Andrew R. Flores et al., Williams Inst., *How Many Adults Identify as Transgender in the United States?* 3 (June 2016).

in shelters. Nearly one-third of transgender individuals experience homelessness at some point in their lives, and 70% of those who have stayed in a shelter have reported some form of mistreatment, including harassment and refusal of service, due to their gender identity.² The Equal Access Rule provides crucial protections for transgender individuals seeking access to shelters consistent with their gender identity.

The Proposed Rule would eliminate those protections and would open the door to the same discriminatory treatment that necessitated the Equal Access Rule. Under the Proposed Rule, the operator of a single-sex shelter could turn away anyone whom the shelter operator determines is not of the same “biological sex” as other shelter residents. While the transgender community is the most visible target of the Proposed Rule, intersex individuals—who are born with variations in their physical sex characteristics such as chromosomes, genitals, internal reproductive organs, or hormone function that may cause their bodies to differ from expectations of what “male” or “female” bodies typically look like—and other individuals who are or are perceived to be gender nonconforming could also be denied shelter under this approach. Simply stated, if the Proposed Rule is adopted, many transgender, intersex, and other individuals in need of shelter would be forced to live on the street.

HUD’s justifications for the Proposed Rule are rooted not in fact, but in fear and stereotyping. For instance, HUD asserts that the Equal Access Rule “burdened those shelters with deeply held religious convictions.”³ However, HUD provides no evidence that the Equal Access Rule places any burden on faith-based shelter operators. In fact, shelters are permitted to apply for an exemption from the Equal Access Rule if they so choose. HUD’s putative concern for the safety of cisgender (that is, non-transgender)⁴ shelter residents is likewise baseless. HUD provides no evidence that allowing transgender persons access to homeless shelters in accordance with their gender identity puts anyone at risk.

The National LGBT Bar strongly objects to the changes proposed by HUD. The Proposed Rule would needlessly inflict harm on transgender individuals suffering from homelessness, who are among the nation’s most vulnerable populations. We therefore request that HUD withdraw the Proposed Rule and avoid creating unnecessary barriers for transgender individuals who are seeking a safe shelter.

² Sandy E. James et al., Nat’l Ctr. for Transgender Equal., *Report of the 2015 U.S. Transgender Survey* 5, 13 (Dec. 2016).

³ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs (hereinafter, the “Proposed Rule”), Docket No. FR-6152-P-01, 85 Fed. Reg. 44,811, 44,814 (Dep’t of Hous. & Urb. Dev. July 24, 2020).

⁴ See *Grimm v. Gloucester Cty. Sch. Bd.*, No. 19-1952, 2020 WL 5034430, at *1 (4th Cir. Aug. 26, 2020) (“[M]ost people are cisgender, meaning that their gender identity—or their deeply felt, inherent sense of their gender—aligns with their sex-assigned-at-birth.” (quotation marks omitted)).

I. TRANSGENDER INDIVIDUALS ARE AT HIGH RISK OF EXPERIENCING HOMELESSNESS AND VIOLENCE AND ARE THUS UNIQUELY IN NEED OF SHELTERING SERVICES.

Transgender individuals are overrepresented in homeless populations and are thus uniquely in need of the sheltering services that the Proposed Rule would deny them. Transgender individuals are significantly more likely to end up homeless than the general population because they face higher rates of discrimination in employment and housing and are frequently rejected by their families.

Studies have shown that transgender individuals experience higher levels of poverty than the general population, making them vulnerable to housing insecurity. For example, a 2015 survey of nearly 28,000 transgender individuals in the United States (the “USTS”) found that 29% were living in poverty, as compared to 12% of the general population.⁵ At the time of the survey, 9% of respondents were temporarily living with a friend or family member because they were unable to afford their own housing.⁶ A similar 2011 survey (the “NTDS”) found that transgender and gender nonconforming individuals were four times more likely than the general population to report household income of \$10,000 a year or less.⁷

Those income disparities are largely due to employment discrimination. Forty-seven percent of transgender individuals report that they have experienced an adverse job outcome—such as being fired, not hired, or denied a promotion—because of their status as transgender or gender nonconforming.⁸ The NTDS concluded that transgender individuals experience, on average, double the rates of unemployment compared to the general population; with transgender people of color, that multiple jumps to four times that of the general population.⁹ Just over a quarter of those surveyed reported losing a job due to being transgender or gender nonconforming.¹⁰ Many remained unemployed for months following their termination, and many of those individuals became homeless.¹¹

Transgender individuals also experience high levels of housing discrimination, which can likewise lead to homelessness. Twenty-three percent of transgender individuals reported experiencing housing discrimination of some kind as a result of being transgender.¹² Six percent

⁵ James et al., *supra* note 2, at 5.

⁶ *Id.* at 177.

⁷ Jaime M. Grant et al., Nat’l Ctr. for Transgender Equal., Nat’l Gay & Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 2* (2011).

⁸ *Id.* at 3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 53, 67.

¹² *Id.*

of transgender individuals reported being denied a home or apartment in the past year because they were transgender.¹³ Those numbers are even higher for transgender women of color, with Black, Latina, and multiracial women being particularly affected.¹⁴ Five percent of transgender individuals reported being evicted from their home or apartment within the previous year because of anti-transgender bias.¹⁵

The resulting homelessness rate for the transgender population is alarmingly high. About one-third of transgender individuals reported having experienced homelessness at some point in their lifetime—staying with family or friends temporarily, living on the street, sleeping in a car, or staying in a shelter.¹⁶ Over one half of one percent of transgender individuals in the United States were homeless at the time they responded to the 2015 USTS survey.¹⁷ That number was three times higher than the homelessness rate for all adults (0.18%).¹⁸ Discrimination in employment or housing played a role in many transgender individuals becoming homeless.¹⁹

During the current pandemic, this vulnerable population is expected to experience even higher rates of unemployment, poverty, and homelessness.²⁰ That is because, to prevent the spread of COVID-19, LGBTQ+ organizations that provide crucial resources for homeless transgender individuals are being forced to reduce or eliminate services.²¹

Transgender youth are particularly susceptible to homelessness. As HUD noted in 2016, “[w]hile research suggests that transgender youth represent less than one percent of the youth in the United States, a disproportionately high 6.8% of youth living on the streets identify as transgender.” Transgender youth often end up homeless as a result of being kicked out of their homes for being transgender. Seventy-five percent of transgender youths who reported being thrown out of their homes by their immediate families also reported experiencing homelessness.²² The National Coalition for Homelessness found that “26% of homeless LGBTQ

¹³ *Id.* at 179.

¹⁴ *Id.*

¹⁵ *Id.* at 180.

¹⁶ James et al., *supra* note 2, at 178.

¹⁷ *Id.* at 177.

¹⁸ *Id.*

¹⁹ *Id.* at 178.

²⁰ Jody L. Herman et al., Williams Inst., *Vulnerabilities to COVID-19 Among Transgender Adults in the US 3* (Apr. 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-COVID19-Apr-2020.pdf>.

²¹ Elizabeth Kuhr, *Coronavirus Pandemic a Perfect Storm for LGBTQ Homeless Youth*, NBC News (Apr. 5, 2020), <https://www.nbcnews.com/feature/nbc-out/coronavirus-pandemic-perfect-storm-lgbtq-homeless-youth-n1176206>.

²² James et al., *supra* note 2, at 178.

youth report being forced out of their homes solely because of their sexual orientation or gender identity.”²³ The NTDS found that family discrimination or rejection based on transgender status led to homelessness in 19% of respondents.²⁴

II. THE PROPOSED RULE WOULD HAVE DISASTROUS EFFECTS ON THE HEALTH AND SAFETY OF TRANSGENDER INDIVIDUALS.

If enacted, the Proposed Rule would have a disastrous effect on the health and safety of transgender individuals, who already represent a uniquely vulnerable population. The Proposed Rule presents transgender individuals with the untenable choice of either being placed at a facility inconsistent with their gender identity or going unsheltered.²⁵ Many transgender individuals will go unsheltered under the Proposed Rule and, without shelter, will experience physical violence. Those who opt for shelter at a facility inconsistent with their gender identity will be subject to psychological trauma and a high risk of physical violence.

a. The Proposed Rule Would Significantly Increase the Number of Transgender Individuals Who Are Without Shelter.

By depriving transgender individuals of the ability to access a facility consistent with their gender identity, the Proposed Rule would dramatically increase the number of homeless transgender individuals who are without shelter. Even with the protections afforded by the Equal Access Rule—which requires that transgender people have access to a shelter in accordance with their gender identity—homeless transgender individuals are significantly more likely to be unsheltered than their cisgender counterparts. For instance, a recent study found that 56% of transgender individuals experiencing homelessness were without shelter, as compared to 35% of the homeless population as a whole.²⁶ The Proposed Rule, which permits shelter operators to make arbitrary determinations regarding an individual’s “biological sex” and thereby deprive

²³ Nat’l Coalition for the Homeless, *LGBTQ Homelessness 1* (June 2017), <http://nationalhomeless.org/wp-content/uploads/2017/06/LGBTQ-Homelessness.pdf>.

²⁴ Grant et al., *supra* note 7, at 112.

²⁵ Cf. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch-22: out of a job if they behave aggressively and out of a job if they do not.”); *Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011) (applying *Price Waterhouse*’s holding in case involving discrimination against a transgender employee).

²⁶ Compare Jackie Janosko, Nat’l All. to End Homelessness, *Demographic Data Project Part I: Gender Minorities*, <https://endhomelessness.org/demographic-data-project-gender-minorities> (last visited Sept. 21, 2020) with Council of Econ. Advisors, *The State of Homelessness in America 1* (Sept. 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/09/The-State-of-Homelessness-in-America.pdf>.

transgender individuals of access to a facility consistent with their gender identity, would only exacerbate that discrepancy.

As HUD was told at a 2012 conference, “homeless service providers reported that, if given the choice between a shelter designated for their assigned birth sex or sleeping on the streets, many transgender shelter seekers would choose the streets.”²⁷ HUD has attributed that fact to the dangerous conditions that transgender people face at shelters that correspond to their sex assigned at birth.²⁸ Because the Proposed Rule in many circumstances would require transgender individuals to seek housing at facilities that do not conform to their gender identity, many would likely opt to live on the streets rather than in a shelter.

Notably, the Proposed Rule allows shelters to request documentation (such as a birth certificate, identification, or medical record) from shelter-seekers to verify that they are members of “the sex that is served by the shelter.”²⁹ The federal government and many states, recognizing the importance in having identification that reflects one’s gender identity, allow transgender people to update their identification documents.³⁰ However, due to myriad factors, including cost, lack of information, or a fear of being outed, many transgender people may have contradictory gender markers listed on their documents (i.e., some documents may say “male” and others “female”).³¹ If a shelter-seeker is unable to verify their sex because of inconsistent gender markers on their documents, the shelter might deny access and instead provide a referral to a different shelter, which could then deny service for the same reason.³²

b. Without Shelter, Transgender Individuals Experience Disproportionately High Levels of Violence from the General Population and Law Enforcement.

Because the Proposed Rule would increase the number of transgender individuals going without shelter, it would also exacerbate the violence experienced by this already-vulnerable population. While a staggering 47% of transgender people report being sexually assaulted during their lifetime, the number climbs to 65% among transgender individuals who have

²⁷ Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs, 80 Fed. Reg. 72,644 (proposed Nov. 20, 2015).

²⁸ *See id.*

²⁹ Proposed Rule, 85 Fed. Reg. at 44,815.

³⁰ *See generally* Nat’l Ctr. for Transgender Equal., *ID Documents Center*, <https://transequality.org/documents> (last visited Sept. 21, 2020).

³¹ James et al., *supra* note 2, at 87, 89.

³² Proposed Rule, 85 Fed. Reg. at 44,815 (“[I]f the shelter resident is unable to verify their sex, the shelter would work through the centralized or coordinated assessment system to provide a transfer recommendation for another shelter.”).

experienced homelessness.³³ Other studies confirm the high rate of violence experienced by homeless transgender individuals.³⁴

Those grim statistics are symptomatic of a larger rise in violence against transgender individuals, which has been described by the American Medical Association as an “epidemic.”³⁵ In 2018, nearly one out of five hate crimes was motivated by anti-LGBTQ+ bias, with transgender people representing a significant proportion of that group.³⁶ It is estimated that one in four transgender individuals will experience a hate crime in their lifetime.³⁷

Homeless transgender individuals are also frequently harassed by law enforcement officers. According to one study, 20% of transgender individuals who interacted with police reported being verbally harassed by officers, 4% were physically attacked, and 3% were sexually assaulted.³⁸ Transgender individuals who had been homeless during the prior year were twice as

³³ James et al., *supra* note 2, at 205.

³⁴ For example, 66% of homeless transgender individuals have experienced a physical assault, and 33% have experienced sexual violence. Grant et al., *supra* note 7, at 202.

³⁵ Am. Med. Ass’n, *AMA Adopts New Policies on First Day of Voting at 2019 Annual Meeting* (June 10, 2019), <https://www.ama-assn.org/press-center/press-releases/ama-adopts-new-policies-first-day-voting-2019-annual-meeting> (describing the American Medical Association’s response to the rise in fatal attacks against transgender people, especially those against transgender people of color).

³⁶ See Fed. Bureau of Investigation, *2018 Hate Crime Statistics*, <https://ucr.fbi.gov/hate-crime/2018/tables/table-1.xls> (last visited Sept. 21, 2020). Of the 7,120 hate crime incidents reported in 2018, 1,364 stemmed from anti-LGBTQ+ bias. Specifically, 186 stemmed from bias related to the victim’s gender identity (including transgender status) and an additional 303 resulted from a mix of anti-lesbian, gay, bisexual or transgender bias.

³⁷ Alexandra Holden, Am. Bar Ass’n, *The Gay/Trans Panic Defense: What It Is, and How to End It* (Apr. 1, 2020), <https://www.americanbar.org/groups/crsj/publications/member-features/gay-trans-panic-defense>. In addition, “[t]hose individuals at the intersection of homophobia, transphobia, and racism, face worse statistics. Between 2013 and 2017, of the 102 known transgender people killed in hate crimes in the United States, 75 were black or African-American.” *Id.*

³⁸ James et al., *supra* note 2, at 186.

likely to be verbally harassed and nearly three times as likely to be sexually or physically assaulted by an officer.³⁹ Other studies of transgender populations have found similar results.⁴⁰

The epidemic of violence against transgender people shows no signs of abating. As of August 7, at least twenty-eight transgender individuals had been murdered during 2020, which already surpasses the total number of murders of transgender people in 2019.⁴¹ In light of the epidemic of violence against the transgender community, it makes little sense for HUD to promulgate a rule that would deny shelter to members of this vulnerable population.

c. Transgender Individuals Housed at a Facility Inconsistent with Their Gender Identity Would Be Subject to Psychological Trauma and an Increased Risk of Physical Violence.

The Proposed Rule would also inflict significant physical and psychological harm on members of the transgender community who opt for shelter at a facility inconsistent with their gender identity rather than sleeping on the streets. Physical violence against transgender individuals increases when they are forced into facilities inconsistent with their gender identity. For example, nearly 35% of all transgender inmates in state and federal prisons reported sexual victimization involving another inmate or facility staff during the previous twelve months,⁴²

³⁹ *Id.* at 187. Forty percent of transgender individuals who had been homeless in the past year reported being verbally harassed by an officer, compared to 20% of all transgender people. *Id.* An additional 17% of those who were homeless in the past year reported being physically or sexually assaulted. *Id.*

⁴⁰ For example, a 2011 study conducted by the National Center for Transgender Equality and National Gay and Lesbian Task Force found that 46% of transgender people reported being uncomfortable seeking police assistance. Grant et al., *supra* note 7, at 6. According to the same study, 22% of respondents who have interacted with the police also reported harassment, 6% reported physical assault, and 2% reported sexual assault. *See id.* at 6, 160.

⁴¹ Nat'l Ctr. for Transgender Equal., *Murders of Transgender People in 2020 Surpasses Total for Last Year In Just Seven Months* (Aug. 7, 2020), <https://transequality.org/blog/murders-of-transgender-people-in-2020-surpasses-total-for-last-year-in-just-seven-months>.

⁴² Allen J. Beck, U.S. Dep't of Just., Bureau of Just. Stat., *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12, Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates 1* (Dec. 2014), https://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf.

compared to 4% of all prison inmates.⁴³ When transgender individuals are forced into facilities inconsistent with their gender identities, that number rises to as high as 59%.⁴⁴

In addition to physical violence, being forced to use a facility inconsistent with one's gender identity can lead to psychological harm. According to the American Medical Association, policies that exclude transgender individuals from facilities consistent with their gender identity have a detrimental effect on mental health.⁴⁵ A 2016 study found that denying a transgender student access to gender-appropriate campus housing increased the likelihood that the student would attempt suicide at some point in their life.⁴⁶ According to another study, transgender individuals who are forced to “de-transition” and go back to living according to their sex assigned at birth—as the Proposed Rule would require transgender individuals seeking shelter to do—also experience a higher rate of suicidal thoughts.⁴⁷

Numerous courts have recognized the psychological harm inflicted upon transgender individuals when they are denied access to facilities consistent with their gender identity. For example, in a recent Seventh Circuit case involving a school district's refusal to allow a transgender student to use the restroom corresponding with his gender identity, the court noted that the district's treatment of the student “directly caus[ed] significant psychological distress and place[d] [the student] at risk for experiencing life-long diminished well-being and life-

⁴³ Allen J. Beck et al., U.S. Dep't of Just., Bureau of Just. Stat., *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12-Update* (Dec. 9, 2014), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4654>.

⁴⁴ Just Detention Int'l, *Targets for Abuse: Transgender Inmates and Prisoner Rape 1* (Mar. 2013), <https://justdetention.org/wp-content/uploads/2015/10/FS-Targets-For-Abuse-Transgender-Inmates-And-Prisoner-Rape.pdf> (“One study of California prisoners found that 59 percent of transgender women housed in men's prisons had been sexually abused while incarcerated, as compared to 4 percent of non-transgender inmates in men's prisons.”).

⁴⁵ Am. Med. Ass'n, *Transgender Individuals' Access to Public Facilities* (2018), <https://www.ama-assn.org/system/files/2019-03/transgender-public-facilities-issue-brief.pdf>.

⁴⁶ Kristie L. Steelman, *Transgender Adults' Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 J. of Homosexuality 1378 (2016).

⁴⁷ Jody L. Herman et al., Williams Inst., *Suicide Thoughts and Attempts Among Transgender Adults: Findings from the 2015 U.S. Transgender Survey 17* (Sept. 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Suicidality-Transgender-Sep-2019.pdf>. Specifically, 57.3% of respondents in the U.S. Transgender Survey who have ever “de-transitioned” reported suicidal thoughts in the past year, compared to 44.2% who have not. *Id.*

functioning.”⁴⁸ The court therefore concluded that the student would suffer irreparable harm without an injunction granting him access to the boy’s bathroom.⁴⁹

A recent decision by the Fourth Circuit similarly noted the harms imposed upon transgender students when they are not permitted to use facilities that correspond with their gender identity.⁵⁰ Specifically, the “stigma of being forced to use a separate restroom . . . invite[s] more scrutiny and attention from other students, very publicly brand[ing] all transgender students with the letter T.”⁵¹ Instead, “students have better mental health outcomes when their gender identity is affirmed . . . [and] [u]sing the school restrooms matching their gender identity is one way that transgender students can affirm their gender and socially transition.”⁵² The court ultimately held that the school board’s policy of prohibiting the student from using the facility that corresponded with his gender identity violated the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments of 1972.⁵³

By permitting shelter operators to deny transgender individuals housing at a facility that corresponds with their gender identity, the Proposed Rule would inflict precisely the harms that have been recognized in numerous studies and the case law. Transgender individuals experiencing homelessness would be given the “choice” of either sleeping on the streets or facing the psychological and physical trauma associated with being housed in a single-sex facility that does not correspond with their gender identity. HUD has provided no valid justification for the harms imposed by the Proposed Rule. *See* Point IV, *infra*. The Proposed Rule should be withdrawn accordingly.

d. Providing a Referral to Another Shelter Is Not an Adequate Solution.

Under the Proposed Rule, a shelter that denies access to an individual based on a good-faith belief that the individual is not of the “biological sex” that the shelter accommodates is

⁴⁸ *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045 (7th Cir. 2017).

⁴⁹ *See id.*

⁵⁰ *See Grimm*, 2020 WL 5034430, at *15–*16.

⁵¹ *Id.* at *22 (internal quotes omitted); *see also Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3d Cir. 2018) (“[A] school district’s policy that required a transgender student to use single-user facilities . . . would very publicly brand all transgender students with a scarlet ‘T,’ and they should not have to endure that as the price of attending their public school.”).

⁵² *Grimm*, 2020 WL 5034430, at *4.

⁵³ *Id.* at *25.

required to recommend an alternative facility.⁵⁴ That referral requirement is insufficient to alleviate the harms caused by the Proposed Rule for several reasons.

First, the Proposed Rule does not require a shelter to recommend an alternate facility that would house the individual in accordance with their gender identity.⁵⁵ Accordingly, a referral would in most instances merely present the individual with the same untenable decision of sheltering in a facility that does not correspond with their gender identity or remaining on the streets.

Second, some transgender or intersex shelter-seekers may be excluded from *all* shelters under the referral policy. The Proposed Rule permits shelters to make admissions decisions based on their perception of an individual's "biological sex," or, alternatively, based on transition status, active hormone therapy, or state-recognized gender status.⁵⁶ However, the Proposed Rule does not require a referral to be made to a facility that uses the same criteria. As a result, transgender or intersex individuals could find themselves excluded from every available shelter. For example, a women's shelter may turn away a transgender woman under the Proposed Rule because she is perceived to be too tall or has an Adam's apple.⁵⁷ That shelter could then provide a referral to a men's shelter that makes admissions decisions based on medical transition status. That men's shelter could then refuse this individual because she has been deemed to have transitioned "too far."⁵⁸ Similarly, a men's shelter could turn away a transgender man under the Proposed Rule because he lacks identification listing his gender as male and refer him to a women's shelter that turns him away because he has facial hair. An intersex person could

⁵⁴ Proposed Rule, 85 Fed. Reg. at 44,818 ("If a temporary, emergency shelter denies admission or accommodations based on a good faith belief that a person seeking access to the shelter is not of the sex which the shelter accommodates as determined under its policy, the shelter must use the centralized or coordinated assessment system, as defined in § 578.3 of this title, to provide a transfer recommendation to an alternative shelter."); *see also id.* at 44,815 ("Shelters may also choose to admit individuals on criteria other than biological sex. For example, under the proposed rule, a single-sex facility could continue to operate under the policy set forth in the 2016 Rule.").

⁵⁵ *See id.*

⁵⁶ *See id.* at 44,815 ("Shelters could also have policies that follow state or local law, such as perceived gender identity, that varies from the HUD definition of self-identified gender identity. Other possible policies could be based on medical transition status, active hormone therapy or state recognized gender status.").

⁵⁷ *See id.* at 44,816 ("HUD believes that reasonable considerations 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. A good faith determination could also be made if a person voluntarily self identifies as the biological sex that is opposite that served by the single sex facility if that is a part of its policy.").

⁵⁸ *See id.* at 44,815.

likewise be turned away from multiple shelters that use different criteria to define “biological sex.” An individual with Congenital Adrenal Hyperplasia could be barred from one shelter due to their genital variation and referred to a second shelter that denies them due to the secondary sex characteristics caused by their hormonal variation. The upshot is that some transgender and intersex shelter-seekers would be forced to go without any shelter at all under the Proposed Rule’s referral system.

Third, the Proposed Rule does not explain how the referral system would be administered in rural areas, where there is a scarcity of temporary shelters.⁵⁹ Due in part to the lack of shelters, more than 75% of LGBTQ+ people who live in rural areas or small towns report that it would be at least somewhat difficult to find an alternative homeless shelter if turned away.⁶⁰ Thus, in many areas of the country, the referral system would be futile due to a lack of adequate alternatives.

Finally, substantial harm occurs at the moment that a transgender or intersex individual is denied access to a facility based on their failure to conform to physical sex stereotypes. A referral to another facility cannot address that harm.

III. THE PROPOSED RULE’S CHARACTERIZATION OF “BIOLOGICAL SEX” RELIES ON OUTDATED SEX STEREOTYPES AND WILL RESULT IN THE PRECISE FORMS OF DISCRIMINATION PROHIBITED BY HUD RULES.

The Proposed Rule is premised on the medically and legally indefensible presumption that an individual’s sex can be determined solely on the basis of their external physical characteristics.⁶¹ The Proposed Rule’s reduction of “biological sex” to physical sex stereotypes such as “height, the presence (but not the absence) of facial hair, the presence of an Adam’s apple, and other physical characteristics” would grant shelters *carte blanche* to arbitrarily admit or deny shelter based solely on an assessment of whether an individual appears sufficiently “male” or “female.” That would result in discrimination on the basis of gender identity and transgender status, which is prohibited by HUD’s Equal Access Rule, while also ignoring the existence of intersex variations that can cause an individual’s physical characteristics not to conform to typical notions of male or female. Those variations are present from birth (although

⁵⁹ Patricia A. Post, Nat’l Health Care for the Homeless Council, *Hard to Reach: Rural Homelessness & Health Care* (Jan. 2002), <https://nhchc.org/wp-content/uploads/2019/08/Rural-Homelessness.pdf>.

⁶⁰ Sarah Kellman et al., Ctr. for Am. Progress, *The Dire Consequences of the Trump Administration’s Attack on Transgender People’s Access to Shelters* (July 31, 2019), <https://www.americanprogress.org/issues/lgbtq-rights/news/2019/07/31/472988/dire-consequences-trump-administrations-attack-transgender-peoples-access-shelters>.

⁶¹ Proposed Rule, 85 Fed. Reg. at 44,815. The proposal goes so far as to claim it permits shelter providers to “*determine* an individual’s sex based on a good faith belief that an individual seeking access to the temporary emergency shelters is not of the sex . . . which the facility accommodates.” *Id.* at 44,816.

they may not be discovered until later in an individual's life) and occur in about 1.7% of the population.⁶²

Medical science recognizes that an individual's biological sex is comprised of a variety of elements, including one's gender identity (sometimes referred to as an individual's "brain sex").⁶³ For many individuals, all of those components of sex are aligned and point toward one binary sex.⁶⁴ However, for transgender, non-binary, and intersex individuals, at least one of those elements is incongruent with the rest.⁶⁵

For example, in the intersex variation called Androgen Insensitivity Syndrome, an individual may be born with XY chromosomes, internal testes, and a vulva and vagina. Intersex children are usually "assigned" male or female.⁶⁶ That initial assignment is largely subjective, and experts may disagree on the "correct" sex to assign to an intersex child.⁶⁷ Many intersex individuals will continue to identify with their assigned sex throughout their lives, but many

⁶² Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* 51 (2000); Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 *Am. J. Hum. Biol.* 151, 161 (2000).

⁶³ Sharon M. McGowan, *Working with Clients to Develop Compatible Visions of What It Means to "Win" a Case: Reflections on Schroer v. Billington*, *Harv. C.R.-C.L. L. Rev.* 205, 234 (2011) (identifying nine distinct elements comprising sex, including "chromosomal sex, gonadal sex, fetal hormonal sex (prenatal hormones produced by the gonads), internal morphologic sex (internal genitalia, i.e., ovaries, uterus, testes), external morphological sex (external genitalia, i.e., penis, clitoris, vulva), hypothalamic sex (i.e., sexual differentiations in brain development and structure), sex of assignment and rearing, pubertal hormonal sex, and gender identity and role"); see also *In re Heilig*, 816 A.2d 68, 73 (Md. Ct. App. 2003) (acknowledging the "recognized medical viewpoint that gender is not determined by any single criterion" and listing seven components of sex, including "[p]ersonal sexual identity"). Notably, the majority of these elements cannot be visually determined.

⁶⁴ McGowan, *supra* note 63, at 234.

⁶⁵ *Id.*

⁶⁶ Peter A. Lee et al., *Consensus Statement on Management of Intersex Disorders*, 118 *Pediatrics* 488, 491 (2006); see generally Elizabeth Reis, *Bodies in Doubt: An American History of Intersex* (2009).

⁶⁷ See, e.g., Anne Tamar-Mattis, *Advocs. for Informed Choice, Report to the Inter-American Commission on Human Rights: Medical Treatment of People with Intersex Conditions as a Human Rights Violation* 5 (Mar. 2013), <https://goo.gl/Nf7Xt7> ("There is still controversy and uncertainty about gender assignment in [cases of partial Androgen Insensitivity Syndrome], and it can go either way, depending largely on the doctor's judgment."); David A. Diamond et al., *Gender Assignment for Newborns with 46xy Cloacal Exstrophy: a 6-year Follow-up Survey of Pediatric Urologists*, 186 *J. Urology* 1642, 1643 (2011) (reporting that only 79 percent of surveyed clinicians agreed on a male gender assignment in 46XY cloacal exstrophy).

others do not.⁶⁸ When elements of an individual’s sex are not fully aligned, gender identity is the primary determinant of that individual’s sex.⁶⁹ No one physical trait or aspect of appearance can reliably indicate how individuals navigate sex designations in their lives; gender identity does.

Substantial scientific evidence shows that an individual’s gender identity (or “the internalized sense of a person’s gender as male or female”) is “either innate or fixed at an early age, and likely has a strong biological and genetic component.”⁷⁰ Research demonstrates that, unlike the secondary sex characteristics discussed in the Proposed Rule, an individual’s gender identity “cannot be altered voluntarily”⁷¹ and may be determined by biological forces.⁷² Many

⁶⁸ Lee et al., *supra* note 66, at 491; Paulo Sampaio Furtado et al., *Gender Dysphoria Associated with Disorders of Sex Development*, 9 *Nature Revs. Urology* 620, 621–22 (2012).

⁶⁹ William Reiner, *To Be Male or Female – That Is the Question*, 151 *Archives Pediatric & Adolescent Med.* 224, 225 (1997) (“[T]he organ that appears to be critical to psychosexual development and adaptation is not the external genitalia, but the brain.”); Brief for the Maine Chapter of the American Academy of Pediatrics et al. at 8, *Doe v. Reg’l Sch. Unit 26*, 2014 ME 11, 86 A.3d 600 (explaining that while “chromosomes, hormones, internal reproductive organs, external genitalia, and secondary sex characteristics” are “components of sex,” “the most important determinant of a person’s sex” is their gender identity); M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 *Vt. L. Rev.* 943, 947 (2015) (“Gender identity ‘has a strong biological and genetic component’ and ‘is the most important determinant of a person’s sex.’”).

⁷⁰ Brief for the Maine Chapter of the American Academy of Pediatrics et al. at 5, *Doe v. Reg’l Sch. Unit 26*, 2014 ME 11, 86 A.3d 600 (citing Peggy T. Cohen-Kettenis & Louis J. Gooren, *Transsexualism: A Review of Etiology, Diagnosis and Treatment*, 46 *J. Psychosomatic Res.* 315 (1999); Jiang-Ning Zhou et al., *A Sex Difference in the Human Brain and its Relation to Transsexuality*, 378 *Nature* 68 (1995); Louis Gooren *Gender Transitions: The Brain Has Not Followed Other Markers of Sexual Differentiation?*, 4 *Int’l J. of Transgenderism* (2000)).

⁷¹ Brief of Amici Curiae Medical, Nursing, Mental Health and Other Health Care Organizations in Support of Appellee at 6, *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286 (11th Cir. 2020) (explaining that gender identity “cannot be altered voluntarily or ascertained immediately after birth” and many develop a stable gender identity “between ages 3 and 4”).

⁷² *Id.* (“[R]esearch suggests there may be biological influences” including exposure to certain hormones in the womb, and “[b]rain scans and neuroanatomical studies of transgender individuals may also support these biological explanations.”); Reiner, *supra* note 69, at 225 (“[T]he organ that appears to be critical to psychosexual development and adaptation is not the external genitalia, but the brain.”); *see also* Frank P.M. Kruijver et al., *Male to Female Transsexuals Have Female Neuron Numbers in the Limbic Nucleus*, 85 *J. Clinical Endocrinology & Metabolism* 2034, 2041 (2000) (“[T]he present study . . . provides unequivocal new data . . . such that this limbic nucleus *itself* is structurally sexually differentiated opposite to the transsexual’s genetic and genital sex.”); Jiang-Ning Zhou et al., *A Sex Difference in the Human Brain and its Relation to Transsexuality*, 378 *Nature* 68, 68 (1995) (“Our study . . . show[s] a

federal courts have recognized the substantial body of medical research suggesting that gender identity is biologically determined and immutable.⁷³ Accordingly, the Proposed Rule’s suggestion that an individual can be accommodated “on the basis of their biological sex, *without regard to their gender identity*”⁷⁴ is oxymoronic because an individual’s sex is directly dependent on gender identity.

As acknowledged by HUD, the Equal Access Rule currently prohibits discrimination on the basis of gender identity and transgender status.⁷⁵ However, because the Proposed Rule permits, and, in fact, encourages “determinations” of sex based on physical stereotypes, it would permit shelters to turn away individuals based solely on their transgender status, because their gender identity differs from visible markers of certain physical sex traits, or because of intersex traits that may not fit easily into male or female stereotypes.

It is impossible for shelters to determine an individual’s “biological sex” based solely on external physical characteristics. Courts have recognized that treatment based on physical characteristics is discriminatory sexual stereotyping.⁷⁶ Every time a shelter turns away a

female brain structure in genetically male transsexuals and supports the hypothesis that gender identity develops as a result of an interaction between the developing brain and sex hormones.”).

⁷³ See, e.g., *Schroer v. Billington*, 424 F. Supp. 2d 203, 212–13, 213 n.5 (D.D.C. 2006) (acknowledging “the different components of biological sexuality—chromosomal, gonadal, hormonal, and neurological,” as well as the belief that “sexual identity is produced in significant part by hormonal influences on the developing brain *in utero*”); see also *Glenn*, 663 F.3d at 1320 (“[G]overnmental acts based upon gender stereotypes—which presume that men and women’s appearance and behavior will be determined by their sex—must be subjected to heightened scrutiny because they embody ‘the very stereotype the law condemns.’”); *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995) (opining that Ninth Circuit precedent finding that transsexuals are not a constitutionally suspect class because “the plaintiff did not establish that transsexuality is an immutable characteristic determined solely by the accident of birth,” may warrant reevaluation in light of “[r]ecent research concluding that sexual identity may be biological” (quotation marks omitted)).

⁷⁴ Proposed Rule, 85 Fed. Reg. at 44,812.

⁷⁵ *Id.* at 44,812, 44,815 (noting that “a shelter may place an individual based on his or her biological sex but may not discriminate against an individual because the person is or is perceived as transgender,” and further clarifying that “[d]enial of accommodation solely because of a person’s gender identity that differs from biological sex is not permitted”).

⁷⁶ *Glenn*, 663 F.3d at 1316–17, 1320 (“[G]overnmental acts based upon gender stereotypes—which presume that men and women’s appearance and behavior will be determined by their sex—must be subjected to heightened scrutiny because they embody the very stereotype the law condemns. . . . The Constitution does not tolerate any form of gender stereotyping on the basis of one’s birth sex and sexual organs.”); see also *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (finding that an employer “who fires a transgender person who was identified as a male at birth” based on their external physical features, “but who now identifies as a female,”

transgender, intersex, or gender nonconforming individual on the basis of physical stereotypes such as “height, the presence . . . of facial hair, [or] the presence of an Adam’s apple,” that shelter has discriminated against those populations because “[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.”⁷⁷

IV. HUD’S JUSTIFICATIONS FOR THE PROPOSED RULE ARE UNSUPPORTED AND PRETEXTUAL.

HUD presents little to no evidence to justify the Proposed Rule. Instead, it asserts without support that the Equal Access Rule raises privacy and safety concerns and burdens religious organizations. However, those purported concerns are mere pretense to justify discrimination against transgender individuals.

a. HUD Provides No Support for Its Assertion that the Proposed Rule Is Necessary to Protect Cisgender Shelter-Seekers.

In support of the Proposed Rule, HUD cites a need to protect the privacy and safety of cisgender shelter residents.⁷⁸ HUD presents no evidence that the current Equal Access Rule poses any threat to cisgender residents, however. At most, HUD asserts that “there is *anecdotal* evidence that some women may fear that non-transgender, biological men may exploit the process of self-identification under the current rule in order to obtain access to women’s shelters.”⁷⁹ HUD further claims that the Equal Access Rule “makes it impracticable for some shelters to, after admitting a biological male, adequately protect the privacy interests of their biological female clientele who do not want to shower, undress, and sleep in the same facilities as biological men.”⁸⁰ Those vague assertions about the supposed fears of some cisgender shelter residents are unsupported and insufficient to justify the burden that the Proposed Rule places on transgender individuals. Moreover, those assertions underscore that the Proposed Rule is based on the sexist and transphobic belief that transgender women are not truly women, but rather are

discriminates on the basis of sex stereotypes); *Adams*, 318 F. Supp. 3d at 1298 n.13 (noting that “[b]ecause the physical aspects of maleness and femaleness may not be in alignment (for example, a person with XY chromosomes [could also] have female-appearing genitalia), the Endocrine Society guidelines disfavor the term ‘biological sex’”); *In re Heilig*, 816 A.2d at 73 (acknowledging the “recognized medical viewpoint that gender is not determined by any single criterion”).

⁷⁷ *Whitaker*, 858 F.3d at 1048; *see also Glenn*, 663 F.3d at 1320 (“A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.” (quotations marks omitted)).

⁷⁸ Proposed Rule, 85 Fed. Reg. at 44,814–15.

⁷⁹ *Id.* at 44,815 (emphasis added).

⁸⁰ *Id.*

sexual predators. In reality, there is no evidence that transgender women are a threat to cisgender shelter residents, or that cisgender men will pretend to be transgender to commit crimes against shelter residents.

i. There Is No Evidence that Transgender Women Pose Any Threat to the Safety or Privacy Interests of Cisgender Women.

HUD fails to present any evidence that housing transgender women poses any threat to the safety or privacy interests of cisgender women. As even HUD acknowledges, it “is not aware of data suggesting that transgender individuals pose an inherent risk” to cisgender women.⁸¹

HUD supposedly worries that some cisgender women may not feel comfortable showering or changing around transgender women.⁸² As HUD acknowledges, that “privacy” justification is not rooted in any evidence regarding the behavior of transgender women but is based on their mere presence in a facility. Courts, however, have consistently rejected attempts to justify discriminatory rules on the ground that the presence of transgender individuals makes cisgender people feel uncomfortable. For example, the Seventh Circuit held that a transgender student would likely suffer irreparable harm from a school district’s unwritten bathroom policy, which was purportedly founded on concerns that the presence of transgender individuals in the bathroom would make cisgender students uncomfortable.⁸³ The bottom line is that any hypothetical discomfort experienced by cisgender shelter residents does not justify outright discrimination against transgender individuals.⁸⁴ That is particularly true when the “discomfort” is weighed against the pervasive violence and trauma visited upon transgender individuals who are unable to access shelters consistent with their gender identity.⁸⁵

ii. There Is No Evidence that Cisgender Men Are Taking Advantage of the Equal Access Rule to Surreptitiously Gain Access to Women’s Shelters.

HUD also presents no evidence that cisgender men are exploiting the Equal Access Rule to gain access to women’s shelters. Instead, HUD relies solely on “anecdotal evidence” of what

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Whitaker*, 858 F.3d at 1052 (“A transgender student’s presence in the restroom provides no more of a risk to other students’ privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions.”).

⁸⁴ *See Doe*, 897 F.3d at 529–30 (finding that “cisgender students who feel that they must try to limit trips to the restroom to avoid contact with transgender students can use the single-user bathrooms in the school,” given “the very drastic consequences that the transgender students must endure if the school were to ignore the latter’s needs and concerns”).

⁸⁵ *See Part III, supra.*

some shelter residents supposedly fear might happen.⁸⁶ As the Fourth Circuit explained, the hypothetical fear cited by HUD perpetuates “a harmful and false stereotype about transgender individuals; namely, the ‘transgender predator’ myth.”⁸⁷ The “transgender predator” myth purports that cisgender men “will pretend to be transgender in order to gain access to the bathrooms” and other facilities of women, thereby placing women’s safety in jeopardy.⁸⁸ HUD’s “transgender predator” justification has been repeatedly presented and refuted in litigation over transgender bathroom access.⁸⁹

HUD’s “hypothetical predator” argument has similarly been rejected by a national survey of police departments. In 2019, the National Center for Transgender Equality contacted police officials across the country to inquire whether recently-passed laws protecting the rights of transgender people to access public accommodations, such as restrooms, have resulted in increased reports of predators attempting to surreptitiously gain access to single-sex facilities.⁹⁰

⁸⁶ Proposed Rule, 85 Fed. Reg. at 44,815.

⁸⁷ *Grimm*, 2020 WL 5034430, at *30 (Wynn, J. concurring).

⁸⁸ *Id.*

⁸⁹ *See id.* (noting that “[t]he ‘transgender predator’ myth—although often couched in the language of ensuring student privacy and safety—is no less odious, no less unfounded, and no less harmful than [historical] race-based or sexual-orientation-based scare tactics”); *Adams*, 318 F. Supp. 3d at 1310 (finding no reports “of a transgender student (or adult) going into a restroom for the purpose of engaging in any inappropriate predatory behavior,” nor “a cisgender student pretending to be transgender to gain access to a bathroom opposite of their true gender identity”); *see also Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 n.11 (4th Cir. 2016) (“We note that the record is devoid of any evidence tending to show that G.G.’s use of the boys’ restroom creates a safety issue. We also note that the Board has been, perhaps deliberately, vague as to the nature of the safety concerns it has.”); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 291, 291 n.39 (W.D. Pa. 2017) (“[T]here is no record evidence of an actual or threatened outbreak of other students falsely or deceptively declaring themselves to be ‘transgender’ for the purpose of engaging in untoward and maliciously improper activities in the High School restrooms For an ‘imposter’ to take such steps would be an extensive social and medical undertaking. That would appear to the Court to be a really big price to pay in order to engage in intentionally wrongful conduct that is unlawful under state law and contrary to the District’s stated expectations as to student conduct.”); *Bd. of Educ. of Highland v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 876 (S.D. Ohio 2016) (finding that “no incidents of individuals using an inclusive policy to gain access to sex-segregated facilities for an improper purpose have ever occurred” and noting that “if anything, . . . administrators stressed that protection of the transgender students themselves is usually their most pressing concern”).

⁹⁰ What Experts Say, Nat’l Ctr. for Transgender Equal., *Police Departments Across the Country Agree: There’s Been No Increase in Public Safety Incidents in Cities and States with Nondiscrimination Laws*, <https://transequality.org/what-experts-say> (last visited Sept. 21, 2020).

The response was a resounding “no.”⁹¹ One police department—in a city that passed one of the nation’s first transgender-inclusive nondiscrimination laws over 40 years ago—responded that fears about sexual assaults are “not even remotely” a problem, and the notion of men posing as transgender women to enter women’s restrooms to commit sex crimes “sounds a little silly.”⁹²

HUD’s purported “predator” justification invokes the fear-mongering that has been used to slow the progress of transgender rights for decades. It is particularly incongruous for HUD to justify a rule that would discriminate against transgender individuals based on an unfounded fear of actions that cisgender men might take unless the rule were promulgated.

iii. *The Equal Access Rule Addresses Any Privacy Concerns at Issue in the Shelter Context.*

Under the Equal Access Rule, HUD already has measures in place to address privacy concerns in the shelter context. The Equal Access Rule currently provides that shelters receiving HUD funds “*must* take nondiscriminatory steps that may be necessary and appropriate to address privacy concerns raised by residents or occupants and, as needed, update its admissions, occupancy, and operating policies and procedures” to address those concerns.⁹³ Accordingly, to the extent that privacy issues might arise under the Equal Access Rule, the Rule provides a means for those issues to be addressed.

HUD summarily asserts that providing privacy accommodations “is not an option for many shelters, whose budgets, staff, and space are already limited,” and notes that “some individuals may hesitate to raise their concerns” or may “not know whether privacy accommodation is an available option.”⁹⁴ Again, HUD provides no evidence—not even anecdotal—to support its assertion. Reasonable measures such as amended shower schedules or other inexpensive options like curtains or room dividers are sufficient to address any privacy concerns that may arise. To the extent that shelter residents are unaware of their right to request privacy accommodations, HUD could amend the Equal Access Rule to require shelters to inform residents of that right.

b. The Proposed Rule Prioritizes Administrative Convenience for Religious Entities over the Safety of Homeless Transgender Individuals.

The Proposed Rule is also premised on HUD’s assertion that the Equal Access Rule imposes “burdens on faith-based shelter providers,” since “[i]n some faith traditions, sex is viewed as an immutable characteristic determined at birth.”⁹⁵ However, as HUD acknowledges,

⁹¹ *Id.*

⁹² *Id.*

⁹³ 24 C.F.R. § 5.106(c)(2) (emphasis added).

⁹⁴ Proposed Rule, 85 Fed. Reg. at 44,815.

⁹⁵ *Id.* at 44,814.

the Equal Access Rule permits religious organizations to seek a waiver based on religious objections.⁹⁶ There is thus no reason to overturn the Equal Access Rule based on concerns about religious objections because such objections are accommodated by the current rule.⁹⁷

Without citing any data, HUD asserts that seeking a waiver “can be both time consuming and burdensome.”⁹⁸ HUD further claims, again without any evidence, that “the 2016 Rule’s approach discourages some religious providers from accepting HUD funding at all, to avoid being forced to either comply with the rule or the need to request a waiver.”⁹⁹ Those arguments are baseless. HUD does not cite a single instance of a shelter turning down funding on account of the Equal Access Rule or being unable to request an exemption on religious grounds.

In any event, by amending the Equal Access Rule based on a theoretical concern that some faith-based shelter might find requesting a waiver to be burdensome, HUD is prioritizing the administrative convenience of religious entities over the lives of homeless transgender individuals. While HUD’s concern over the burden posed by the Equal Access Rule on religious organizations appears to be entirely hypothetical, the danger posed by the Proposed Rule on the homeless transgender population is all too real.

V. CONCLUSION

The National LGBT Bar strongly objects to the Proposed Rule. Transgender individuals are overrepresented in homeless populations due to the prevalence of poverty, employment discrimination, and housing discrimination that they experience. As a result, transgender individuals are particularly in need of access to emergency shelter. The Proposed Rule would needlessly inflict harm on these vulnerable individuals by permitting discrimination based on outdated sex stereotypes. The purported justifications for the Proposed Rule lack any foundation in logic or evidence and instead appear to be the result of fear and prejudice. We therefore request that HUD withdraw the Proposed Rule.

⁹⁶ *Id.*

⁹⁷ Organizations receiving federal funds are not entitled to an exemption of the Equal Access Rule; however, the Equal Access Rule does provide an exemption. In any event, the National LGBT Bar maintains that these religious accommodations, or “right to discriminate” waivers, create separate classes among citizens and undermine legal equality for LGBTQ+ people in a free society. *See* Brief for GLBTQ Legal Advocates & Defenders and 27 Other LGBTQ Advocacy Groups as Amici Curiae Supporting Respondents, *Fulton v. City of Philadelphia*, No. 19-123 (U.S. filed Aug. 20, 2020).

⁹⁸ Proposed Rule, 85 Fed. Reg. at 44,814.

⁹⁹ *Id.*

Sincerely,

A handwritten signature in black ink, appearing to read "D'Arcy Kemnitz". The signature is fluid and cursive, with a long, sweeping tail on the final letter.

D'Arcy Kemnitz
Executive Director
National LGBT Bar
Association and Foundation

The National LGBT Bar Association and Foundation wishes to acknowledge partner John E. Roberts; pro bono counsel Erin Meyer; associates Emily Cummins, Alex Downie, Lucas Kowalczyk, Ren Morris, and Eric Novak; and paralegal Sara Cody, of Proskauer Rose LLP for their assistance in drafting this letter.