



666 Broadway, 7th Floor  
New York, New York 10012  
212-614-6464  
ccrjustice.org

September 22, 2020

Submitted via [www.regulations.gov](http://www.regulations.gov)

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

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

Dear Office of General Counsel:

The Center for Constitutional Rights (“CCR”) is a national, not-for-profit legal, educational, and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution, federal statutes, and local and international law. Since our founding in 1966, we have litigated landmark civil rights and human rights cases before the Supreme Court and other tribunals concerning government overreach and discriminatory state policies, including policies that disproportionately impact lesbian, gay, bisexual, transgender, queer, and intersex communities.

CCR writes today in our capacity as civil rights leaders to express our grave concern and opposition to the Department of Housing and Urban Development’s (“HUD”) Proposed Rule entitled *Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs*; RIN 2506-AC53 / Docket No. FR-6152-P-01, published in the Federal Register on July 24, 2020 (hereinafter the “Proposed Rule”).

The Proposed Rule authorizes shelter providers to invidiously discriminate against our nation’s 1.4 million adults (0.6% of the adult population) and 150,000 youth who identify as transgender.<sup>1</sup> The Rule seeks to redefine “gender identity” as a subjective measure of “actual or perceived gender-related characteristics,” rather than the gender an individual identifies with

---

<sup>1</sup> Andrew R. Flores, et al., *How Many Adults Identify as Transgender in the United States?*, THE WILLIAMS INST., at 2–3 (June 2016), <https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states>; Andrew R. Flores, et al., *Age of Individuals Who Identify as Transgender in the United States*, THE WILLIAMS INST., at 2–3 (Jan. 2017), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/TransAgeReport.pdf>. This figure includes transgender men and women, as well as non-binary individuals.

“regardless of the sex assigned to that person at birth.”<sup>2</sup> In doing so, the Proposed Rule empowers shelter providers to turn individuals away based on violent gender stereotypes, personal bias, and a mischaracterization of the relationship between biological sex and gender. This is certain to place transgender people in the untenable position of choosing between going unsheltered in the midst of a global pandemic or accepting placement in facilities that do not correspond to their gender identities—facilities where they face a known risk of serious harm. This can only be understood as part of the Trump Administration’s relentless and virulent assault on LGBTQIA+ people, and must be rejected.

Given the tremendous and unjustified costs the Proposed Rule will have on already vulnerable communities, and because the Proposed Rule violates federal statutes and the U.S. Constitution, and fails to comply with numerous regulatory and procedural requirements, we respectfully ask that you give due consideration to the comments and objections summarized below and withdraw the Proposed Rule in its entirety.

## **COMMENTS AND OBJECTIONS TO RIN 2506-AC53 BY THE CENTER FOR CONSTITUTIONAL RIGHTS**

### **I. The Proposed Rule Exceeds the Rulemaking Authority of HUD and Lacks a Valid Justification**

The Proposed Rule overturns HUD’s 2016 final rule, *Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs* (hereinafter the “Existing Rule”), which built upon the foundation of its 2012 predecessor rule<sup>3</sup> to better ensure HUD’s housing programs are “open to all eligible individuals and families” regardless of, among other things, *gender identity*.<sup>4</sup> To achieve this end, HUD amended the definition of “gender identity” to define both gender identity and perceived gender identity, and to differentiate them from each other. Under the Existing Rule, gender identity is defined as “the gender with which a person identifies, regardless of the sex assigned to that person at birth.”<sup>5</sup>

The Proposed Rule seeks to amend the definition of “gender identity” back to the 2012 definition: “actual or perceived gender-related characteristics.”<sup>6</sup> In doing so, HUD seeks to needlessly overturn the Existing Rule and far exceeds its rulemaking authority under federal law.

---

<sup>2</sup> *Equal Access to Housing in HUD’s Native American and Native Hawaiian Programs-Regardless of Sexual Orientation or Gender Identity*, 81 Fed. Reg. 80989 (final rule, Nov. 17, 2016).

<sup>3</sup> *Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity*, 77 Fed. Reg. 5661 (final rule, Feb. 3, 2012).

<sup>4</sup> *Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs*, 81 Fed. Reg. 64763 (final rule Sept. 21, 2016).

<sup>5</sup> *Id.*

<sup>6</sup> *Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs*, 85 Fed. Reg. 44818 (proposed rule, July 24, 2020) (to be codified at 24 C.F.R. § 5 and 24 C.F.R. § 576).

### A. The Proposed Rule Lacks a Valid Justification and Needlessly Overturns the 2016 Rule that Was Implemented After Careful Consideration by HUD

The Existing Rule adopted its definition of gender identity following a significant period of deliberation that was grounded in both the policy of other Federal agencies on the issue, as well as data reflecting the extent to which transgender people face discrimination in the shelter system. For example, the Existing Rule took into account a 2016 study from the Center for American Progress which found that of 100 shelters studied at the intake phase, only 30% were willing to accommodate transgender women in accordance with their gender identity, while 21% outright refused transgender women shelter. The Existing Rule also reflected the policies and regulations of other agencies, including the DOJ, DOE, and HHS, which specified that recipients and subrecipients were required to make placement decisions consistent with an individual's gender identity. Moreover, in February 2015, HUD's Office of Community Planning and Development (CPD) released Notice CPD-015-02, which clarified that eligibility for placement into single-sex facilities must be determined by “the gender with which the person identifies,” with serious consideration given to their “own views with respect to personal health and safety.”<sup>7</sup> Thus, prior to promulgating the Existing Rule, HUD was able to draw directly from a year of experience implementing such policy. Through rigorous examination of all relevant data, HUD determined that the Existing Rule was necessary for ensuring equal access to housing in HUD programs.

### B. The Proposed Rule Exceeds HUD's Rulemaking Authority

HUD lacks the authority to authorize federal contractors to discriminate against individuals on the basis of a protected characteristic, such as sex. HUD is charged with administering and enforcing the Fair Housing Act, which prohibits discrimination on the basis of protected characteristics, including sex.<sup>8</sup> The Supreme Court has decisively stated that discrimination against an individual because of their transgender status is sex discrimination.<sup>9</sup> The Proposed Rule affords shelter workers the individual discretion to deny someone shelter based on subjective visual cues about their biological sex, opening the door for vital emergency placement decisions to be governed by unchecked personal biases—the very type of sex discrimination the Constitution prohibits. As such, CCR further objects to the Proposed Rule on the grounds that it is far beyond the scope of HUD's rulemaking authority.

---

<sup>7</sup> *Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs*, 80 Fed. Reg. 72645 (proposed rule, Nov. 20, 2015).

<sup>8</sup> See the Fair Housing Act, 42 U.S.C. § 3604 et seq.

<sup>9</sup> See *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020) (affirming that discrimination against LGBTQIA+ persons is an actionable form of sex discrimination).

## **II. The Proposed Rule Violates the Equal Protection Clause of the Constitution and Is Unsupported By Law**

The Proposed Rule also violates transgender people’s right to equal protection under the law, as guaranteed by the Fourteenth Amendment, and is wholly unsupported by existing law or relevant data.

### **A. The Proposed Rule Violates the Equal Protection Clause by Authorizing Invidious Discrimination on the Basis of Sex**

The Proposed Rule also violates the Equal Protection Clause of the U.S. Constitution, which prohibits the federal government from denying LGBTQIA+ persons equal protection under the law.<sup>10</sup> In *Bostock*, the Supreme Court decisively concluded that discrimination against individuals based on their status as transgender is sex discrimination; as the Court succinctly reasoned, discrimination based on transgender status inherently requires a decisionmaker to treat individuals differently *because of* their sex.<sup>11</sup> While *Bostock* dealt with discrimination under Title VII, the Court’s rationale logically extends to claims under the Fourteenth Amendment. Because the Proposed Rule relies on transgender status as a basis for the disparate treatment of individuals within the shelter system, it will be subject to heightened scrutiny<sup>12</sup> and can only be justified if it serves a genuine, important, and exceedingly persuasive interest which is not based on broad generalizations of sex or gender.<sup>13</sup>

Here, HUD justifies opening the door to invidious discrimination against transgender people by claiming that it will alleviate the “burden” faith-based recipients face when seeking waivers for religious exemptions, and protect the privacy of women in sex-segregated shelters who have survived various forms of gender-based violence. Void of any evidentiary support, neither reason is “exceedingly persuasive,” nor can they be viewed as “genuine” given the Trump administration’s history of attacking the LGBTQIA+ community through similar rules.<sup>14</sup>

---

<sup>10</sup> See, e.g., *Bolling v. Sharpe*, 347 U.S. 497 (1954) (explaining that the Fourteenth Amendment’s guarantee of equal protection applies to the federal government via the Due Process Clause of the Fifth Amendment); see also *Romer v. Evans*, 517 U.S. 620 (1996) (one of a series of cases confirming that LGBTQIA+ people enjoy protection under the Equal Protection Clause).

<sup>11</sup> *Bostock*, 140 S. Ct. at 1742.

<sup>12</sup> *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>13</sup> *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>14</sup> See, e.g., DHS/USCIS and DOJ/EOIR Joint Notice of Proposed Rulemaking, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*; RIN 1615-AC42 / 1125-AA94 / EOIR Docket No. 18-0002 / A.G. Order No. 4714-2020; U.S. Dep’t of Health & Human Servs., *Nondiscrimination in Health and Health Education Programs or Activities*, Section 1557 NPRM, RIN 0945-AA11; U.S. Dep’t of Labor, *Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption*, RIN 1250-AA09/Docket ID OFCCP-2019-0003, 41 CFR Part 60-1; *Equal Participation of Faith-Based Organizations in the Department of Labor’s Programs and Activities: Implementation of Executive Order 13831*, RIN 1291-AA41; U.S. Dep’t of Health & Human Servs., *Ensuring Equal Treatment of Faith-Based Organizations*, RIN 0991 AC13; *Equal Participation of Faith-Based Organizations in DHS’s Programs and Activities: Implementation of Executive Order 13831*, RIN 1601-AA93; U.S. Dep’t of Educ., *Uniform Administrative Requirements, Cost Principles, and Audit*

Further, HUD’s claim that transgender women pose a danger to survivors of domestic or sexual violence relies on violent stereotypes of LGBTQIA+ people as sexual predators. This claim also ignores substantial evidence that nondiscrimination policies that include protections for transgender people, such as the Existing Rule, are both consistent with and essential for prevention of sexual violence against all people.<sup>15</sup> As such, the Proposed Rule is “inexplicable by anything but animus” towards transgender people.<sup>16</sup> HUD’s attempt to justify the Rule under Federalism grounds also fails, as states and municipalities do not have a right to engage in invidious discrimination.<sup>17</sup>

Administrative convenience is not a legitimate justification for discrimination;<sup>18</sup> nor is animus.<sup>19</sup> Relying entirely on both, the Proposed Rule privileges the exaggerated administrative needs of a minority of faith-based funding recipients, which already benefit from a clear and transparent process for obtaining religious waivers, over the basic survival needs of poor transgender individuals.<sup>20</sup> In doing so, the Proposed Rule violates transgender people’s right to equal protection under the law and must be withdrawn

#### B. The Proposed Rule Encourages Unlawful Profiling and Gender-Based Harassment and Intrudes on Privacy of Shelter Dwellers

The Proposed Rule also exceeds HUD’s rulemaking authority and lacks a valid basis because it encourages shelter providers to engage in unlawful profiling and gender-based harassment of shelter residents. By its plain language, the Proposed Rule instructs shelter providers to make intrusive, snap assessments about the gender of shelter residents, using gender stereotypes. For instance, the Rule encourages shelter operators to assess “factors such as [an individual’s] height, the presence (but not the absence) of facial hair, the presence of an Adam’s apple, and other physical characteristics.”<sup>21</sup> The Rule also empowers shelter operators to conduct gender checks, and to demand “documentary evidence of the person’s sex,” including a shelter dweller’s medical

---

*Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program, RIN 1840-AD45; Equal Participation of Faith-Based Organizations in Department of Justice’s Programs and Activities: Implementation of Executive Order 13831, RIN 1105-AB58; Equal Participation of Faith-Based Organizations in USAID’s Programs and Activities: Implementation of Executive Order 13831, RIN 0412-AA99; Equal Opportunity for Religious Organizations in U.S. Department of Agriculture Programs: Implementation Of Executive Order 13831, RIN 0510-AA08; AQ75-Joint Proposed Rule-Equal Participation of Faith-Based Organizations in Veterans Affairs Programs: Implementation of Executive Order 13831, RIN 2900-AQ75.*

<sup>15</sup> See the 2016 National Consensus Statement on this point, signed by over 300 organizations across the country that support victims of domestic and sexual violence.

<sup>16</sup> *Romer v. Evans*, 517 U.S. 620, 632 (1996).

<sup>17</sup> *Id.*

<sup>18</sup> *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>19</sup> *Dep’t of Agriculture v. Moreno*, 413 U.S. 528 (1973).

<sup>20</sup> 85 Fed. Reg. 44814 (acknowledging the current availability of waivers under the Religious Freedom Restoration Act (“RFRA”).

<sup>21</sup> 85 Fed. Reg. 44816.

records—reserving the right to exclude anyone who, for privacy reasons or otherwise, fails to comply.<sup>22</sup>

Finally, the Rule provides that anyone deemed transgender following a visual or medical inspection can be lawfully excluded from sex-segregated shelters pursuant to the Rule. Not only are such inquiries humiliating and demeaning to shelter residents writ large, but it authorizes invidious discrimination “because of sex,” in violation of federal statutes and the Constitution.

These intrusions are not justified by HUD’s own admission. Indeed, as it acknowledges, there is absolutely no “data suggesting that transgender individuals pose an inherent risk to ‘biological women.’”<sup>23</sup>

### C. HUD’s Assertion that the 2016 Rule Has “Manifest Privacy Issues” Is Wholly Unsupported By Law or Fact

HUD seeks to overturn the Existing Rule, in part, based on the claim that doing so is necessary to protect the privacy and safety of women who are survivors of “domestic violence . . . dating violence, sexual assault, and stalking” (hereinafter “sexual violence”).<sup>24</sup> This argument is not only completely unsubstantiated by relevant facts or law, but it is clearly motivated by animus towards transgender people, specifically transgender women.

HUD concedes that this assertion is not based on any “data suggesting that transgender individuals pose an inherent risk to ‘biological women.’”<sup>25</sup> Rather, HUD cites to what it calls “anecdotal evidence” supporting the claim, which consists of: one case involving a procedural dispute between a private faith-based shelter (not funded by HUD) and the Anchorage Equal Rights Commission which contains no material facts relevant to the experiences of survivors of sexual violence;<sup>26</sup> one statement of hearsay from an Alliance Defending Freedom lawyer in regards to the previous case;<sup>27</sup> and a single complaint filed by nine women, which has not yet been heard on its merits.<sup>28</sup> Thus, after five years of operating under rules and guidance that required placement decisions be made based on an individual’s own gender identity, HUD cannot point to any substantial or persuasive evidence that the existing placement procedure poses a risk to survivors of sexual violence. To the contrary, in proffering this argument HUD ignores the

---

<sup>22</sup> 85 Fed. Reg. 44815; 85 Fed. Reg. 44818.

<sup>23</sup> 85 Fed. Reg. 44815 (quotation marks added).

<sup>24</sup> 85 Fed. Reg. 44814.

<sup>25</sup> 85 Fed. Reg. 44815 (quotation marks added).

<sup>26</sup> See *Downtown Soup Kitchen v. Municipality of Anchorage*, 406 F. Supp. 3d 776 (D. Alaska 2019).

<sup>27</sup> See Rachel D’Oro, *Faith-based shelter fights to keep out transgender women*, AP NEWS (Jan. 12, 2019), <https://apnews.com/85494d367c2d4a38b1749f76a89f49c3>. The Alliance Defending Freedom has been classified as a hate group by the Southern Poverty Law Center. *Why is Alliance Defending Freedom a Hate Group?*, S. POVERTY LAW CTR. (Apr. 10, 2020), <https://www.splcenter.org/news/2020/04/10/why-alliance-defending-freedom-hate-group>.

<sup>28</sup> See *McGee v. Poverello House*, No. 118CV00768LJOSAB, 2019 WL 5596875 (E.D. Cal. Oct. 30, 2019).

guidance of over 300 organizations serving victims of sexual violence across the country who firmly believe that anti-discrimination protections like those offered by the Existing Rule actually make shelters safer for *all* people.<sup>29</sup>

By mischaracterizing the relationship between biological sex and gender, HUD attempts to conceal the fact that transgender women living in the shelter system face disproportionately high rates of sexual violence – especially transgender women who are Black, Brown, or Disabled.<sup>30</sup> Rather than maintaining placement requirements that reflect the realities of violence faced by women, including transgender women, living in the shelter system, HUD chooses to elevate the opinions of a small minority of individuals who believe that all transgender people are acting against the will of God.<sup>31</sup> This is clearly animus and cannot be a legitimate justification for any rule.

### **III. The Proposed Rule Violates the Administrative Procedure Act and Federal Law Because It Imposes Costs on the American Public that HUD Failed to Properly Consider**

CCR further objects to the Proposed Rule because HUD failed to conduct a proper analysis of costs as mandated by federal law, including the Administrative Procedure Act, the Unfunded Mandates Reform Act of 1995, and various Executive Orders.<sup>32</sup> These rules collectively require agencies to adequately assess all the potential costs of a rule and adopt it only where it has been shown it will produce the least burden while maximizing the benefits to society.<sup>33</sup> The Supreme Court has repeatedly held that agencies “must examine the relevant data” in adopting a regulation, and emphasized that failing to “consider an important aspect of the problem” can render agency action arbitrary and capricious.<sup>34</sup> In promulgating the Proposed Rule, HUD fails to consider the significant costs it would produce in the form of disparate impacts on LGBTQIA+ people, Disabled people, and people of color, as well as significant financial costs to the general American public.

---

<sup>29</sup> See National Consensus Statement, *supra* note 15.

<sup>30</sup> JAIME M. GRANT, ET. AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NAT’L TRANSGENDER DISCRIMINATION SURVEY, THE NAT’L GAY & LESBIAN TASK FORCE, & THE NAT’L CTR. FOR TRANSGENDER EQUALITY, 4 (2011), [https://www.transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf)

<sup>31</sup> Complaint at 55-56, *Downtown Soup Kitchen v. Municipality of Anchorage*, 2018 WL 9815914 (D. Alaska Aug. 16, 2018) (No. 3:18CV00190).

<sup>32</sup> See, e.g., Exec. Order No. 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (Sept. 30, 1993); Exec. Order No. 13563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 18, 2011); Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4; approved March 22, 1995) (“UMRA”).

<sup>33</sup> See Exec. Order 12866, *supra* note 32 (requiring agencies to “assess *all* costs and benefits” and “select those approaches that maximize net benefits”) (emphasis added).

<sup>34</sup> *Motor Vehicles Mfrs. Ass’n v. State Farm Ins.*, 463 US. 29, 43 (1983).

## A. The Rule Imposes Tremendous Costs on Transgender People

The Proposed Rule imposes tremendous costs on transgender people, and especially transgender people of color, who already experience disproportionate levels of homelessness and economic insecurity because of the societal discrimination they face.<sup>35</sup>

Transgender people are more than twice as likely to be living in poverty as the general U.S. population and nearly twice as likely to experience homelessness.<sup>36</sup> One in three transgender adults have experienced homelessness at some point in their lives, and these numbers appear to be even higher among transgender youth.<sup>37</sup> Prior to the COVID-19 pandemic, transgender people experienced unemployment at approximately three times the rate of the general U.S. population.<sup>38</sup> Rates of homelessness are even higher among transgender people of color—especially transgender women of color—as a majority of Native American, Black, and multiracial women surveyed reportedly experienced homelessness.<sup>39</sup> Rates of homelessness among transgender people have also increased exponentially since 2016—rocketing up by nearly eighty-eight (88%) percent.<sup>40</sup> These disproportionate rates of homelessness and poverty are a product of the severe and pervasive discrimination transgender people face in employment, housing, and education.<sup>41</sup>

Making things all the more egregious, HUD acknowledges these facts—stating: “HUD is aware that transgender individuals experience poverty, housing instability . . . and homelessness at high rates.”<sup>42</sup> The preamble to the Proposed Rule also acknowledges that “Given the rates of

---

<sup>35</sup> SANDY E. JAMES, ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY, NAT’L CTR. FOR TRANSGENDER EQUALITY 144, 174 (Dec. 2016),

<https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pd> (hereinafter “2015 U.S. Transgender Survey”) (providing statistics on homelessness and noting that transgender people are also nearly four times more likely to have a household income under \$10,000 per year, the threshold for extreme poverty); *see also* CTR. FOR AM. PROGRESS, MOVEMENT ADVANCEMENT PROJECT, PAYING AN UNFAIR PRICE: THE FINANCIAL PENALTY FOR LGBT WOMEN IN AMERICA, 1 (2015), <http://www.lgbtmap.org/file/paying-an-unfair-price-lgbt-women.pdf> (discussing the ways that employment discrimination drives homelessness).

<sup>36</sup> *See generally* JAMES, 2015 U.S. TRANSGENDER SURVEY, *supra* note 35.

<sup>37</sup> *Id.* at 178; *see also* HUMAN RIGHTS CAMPAIGN FOUND., THE LIVES AND LIVELIHOODS OF MANY IN THE LGBTQ COMMUNITY ARE AT RISK AMIDST COVID-19 CRISIS (2020), [https://assets2.hrc.org/files/assets/resources/COVID19-IssueBrief-032020-FINAL.pdf?\\_ga=2.221490655.630195376.1600283949-2017554150.1600283949](https://assets2.hrc.org/files/assets/resources/COVID19-IssueBrief-032020-FINAL.pdf?_ga=2.221490655.630195376.1600283949-2017554150.1600283949).

<sup>38</sup> Jody L. Herman & Kathryn O’Neill, *Vulnerabilities to COVID-19 Among Transgender Adults in the US*, THE WILLIAMS INST. (Apr. 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-COVID19-Apr-2020.pdf>.

<sup>39</sup> JAMES, 2015 U.S. TRANSGENDER SURVEY, *supra* note 35, at 178 (finding that 59% of Native American women, 51% of Black women, and 51% of multiracial women had experienced homelessness).

<sup>40</sup> *See, e.g.*, Jackie Janosko, *Changes to HUD’s Equal Access Rule Could Exclude More Transgender People From Shelter*, NAT’L ALLIANCE TO END HOMELESSNESS (July 29, 2020), [endhomelessness.org/changes-to-huds-equal-access-rule-could-exclude-more-transgender-people-from-shelter](http://endhomelessness.org/changes-to-huds-equal-access-rule-could-exclude-more-transgender-people-from-shelter).

<sup>41</sup> *See* GRANT, *supra* note 30; *see also* LOURDES ASHLEY HUNTER, ASHE MCGOVERN, & CARLA SUTHERLAND, INTERSECTING INJUSTICE: ADDRESSING LGBTQ POVERTY AND ECONOMIC JUSTICE FOR ALL: A NATIONAL CALL TO ACTION (Mar. 2018), *available at* <https://socialjusticesexuality.com/files/2018/04/Poverty-Reports-Exec-Summary.pdf>.

<sup>42</sup> 85 Fed. Reg. 44815.



violence and mistreatment that homeless transgender persons experience, . . . shelter access for transgender persons is critical.”<sup>43</sup> Yet, the Rule proceeds to strip transgender people of meaningful shelter access rights.

Further, data also shows that transgender people face serious harm when forced into sex-segregated congregate settings that are incongruent with their gender identities. For example, the 2015 Transgender Survey found that 50% of transgender people using the shelter system had been verbally harassed, physically attacked, or sexually assaulted by shelter staff or other residents.<sup>44</sup> These trends mirror those found in other institutions: the 2015 survey similarly found that transgender people held in jails, prisons, and juvenile detention centers were over *five times* more likely to be sexually assaulted by staff than non-transgender people, and over *nine times* more likely to be sexually assaulted by other inmates;<sup>45</sup> a 2018 study that found that transgender youth face a substantially greater risk of being sexually assaulted in schools where they are prohibited from using the bathrooms or locker rooms that correspond with their gender identities.<sup>46</sup>

Eliminating existing protections for transgender people in the shelter system will further cement their marginalization and expose them to serious harm. HUD has failed to meaningfully address these serious costs in its Proposed Rule.

By placing safe and accessible homeless shelters out of reach of a population that is already so vulnerable, HUD’s Proposed Rule knowingly plunges countless Americans into even greater misery and sparks an epidemic of street homelessness nationwide—forcing transgender individuals to sleep outdoors as winter looms and hurricanes and wildfires rage, where they may also be subject to criminalization under quality of life ordinances, and to “rely[] on sleeping arrangements that may be abusive or otherwise dangerous” in the middle of a global pandemic.<sup>47</sup> Nowhere are these costs meaningfully accounted for by HUD, in direct contravention of federal law.<sup>48</sup>

Accordingly, the Proposed Rule imposes repugnant social costs that HUD failed to meaningfully consider in violation of its responsibilities under federal law.

---

<sup>43</sup> 85 Fed. Reg. 44815.

<sup>44</sup> JAMES, 2015 U.S. TRANSGENDER SURVEY, *supra* note 35 at 182; *see also* GRANT, *supra* note 30 at 4.

<sup>45</sup> JAMES, 2015 U.S. TRANSGENDER SURVEY, *supra* note 35 at 19.

<sup>46</sup> Gabriel R. Murchison, et al., *School Restroom and Locker Room Restrictions and Sexual Assault Risk Among Transgender Youth*, 143 PEDIATRICS 2902 (2019), available at <https://doi.org/10.1542/peds.2018-2902> (finding that, *inter alia*, risk of sexual assault rose by 149% for transgender girls, 26% for transgender boys, and 42% for non-binary youth assigned female at birth).

<sup>47</sup> JAMES, 2015 U.S. TRANSGENDER SURVEY, *supra* note 35 at 19 (noting a 113% percent increase in unsheltered homelessness among transgender people in recent years).

<sup>48</sup> *See* Exec. Order 12866, *supra* note 32 (requiring agencies to “assess *all* costs and benefits” and “select those approaches that maximize *net* benefits”) (emphasis added).

#### **IV. The Proposed Rule Violates the National Environmental Policy Act of 1969 and Executive Order 13132**

The Proposed Rule also violates the National Environmental Policy Act (“NEPA”) of 1964 by failing to conduct the environmental review mandated by law.<sup>49</sup> Although HUD seeks to claim an exemption from the Act pursuant to 24 C.F.R. § 50.19(c)(3), the Proposed Rule *abrogates*, rather than establishes, non-discrimination standards.<sup>50</sup> It dismantles existing discrimination protections, rather than “*promoting or enforcing* fair housing or nondiscrimination” as the NEPA exceptions contemplate. Therefore, HUD was not relieved of its obligation to conduct a thorough environmental review. HUD simply failed to do so in contravention of federal law.

The Proposed Rule also violates Executive Order 13132, entitled “Federalism,” which by HUD’s own admission “prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments or is not required by statute,” or that “preempts state law.”<sup>51</sup> The Proposed Rule violates both clauses of the Executive Order by shifting the burden of ensuring that homeless shelters refrain from discrimination against transgender individuals from HUD to state and local government. The guidance to the Proposed Rule instructs shelter operators to form their own “policies” for excluding residents based on gender, even where state and local law contain conflicting mandates.<sup>52</sup> The Proposed Rule also forces state and local governments to shoulder the financial and economic costs associated with having a growing population of unsheltered transgender people in the middle of a public health crisis where social distancing and access to hot, soapy water are essential to minimizing disease transmission.

Thus, by failing to adhere to the requirements of Executive Order 13132, the Proposed Rule violates federal law.

#### **V. The Proposed Rule Callously Places Transgender People at Risk of Death or Serious Injury from COVID-19 By Increasing Potential for Street Homelessness**

Finally, the Proposed Rule exposes transgender people to a grave and substantial risk of serious harm or death by needlessly limiting the shelter space available to them in the midst of the COVID-19 pandemic. COVID-19 poses a serious and particular risk to transgender people.<sup>53</sup>

---

<sup>49</sup> National Environmental Policy Act of 1969, 42 U.S.C. § 4321.

<sup>50</sup> See 24 C.F.R. § 50.19(c)(3) (only exempting policies which “provide for assistance *in promoting or enforcing* fair housing or nondiscrimination”).

<sup>51</sup> 85 Fed. Reg. 44818.

<sup>52</sup> 85 Fed. Reg. 44816 (stating that shelters can adapt policies that “align with, or borrow from, a state or local government’s policy for determining an individual’s sex, but is not required to do so”).

<sup>53</sup> *COVID-19 and the Human Rights of LGBTI People*, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (Apr. 17, 2020), <https://www.ohchr.org/Documents/Issues/LGBT/LGBTIpeople.pdf>.

Nearly 23% of transgender people in the U.S. have one or more underlying conditions known to increase either the risk of contracting COVID-19 or the severity of the resulting illness.<sup>54</sup> Transgender people also face significant barriers to accessing healthcare that make receiving preventative care, early diagnosis, or treatment difficult or impossible. For example, nearly half a million transgender adults have not seen a doctor in the past year because they could not afford it, and around 10% of transgender adults are uninsured.<sup>55</sup>

These risks are further compounded when transgender people experience unsheltered homelessness. Guidance from the Centers for Disease Control and Prevention (“CDC”) specifies that sleeping outdoors poses unique risks to individuals during the pandemic due to a lack of adequate access to hygiene and sanitation facilities, or connection to services and healthcare.<sup>56</sup> The danger of this compounding effect is not hypothetical; it is *inevitable* given the disproportionate rates of homelessness experienced by transgender people, especially those who are Black, Brown, and Disabled (as discussed in section III). Moreover, these conditions are only likely to worsen as the economic impacts of the pandemic are felt, and drastic unemployment, medical debt, and a “dormant eviction crisis”<sup>57</sup> further strain the capacity of the shelter system.

The Proposed Rule allows shelters to turn transgender people away on the weak premise that a “transfer recommendation to an alternative shelter” is enough to address the critical need for shelter they face. This premise ignores the extra burden that such denials will place on transgender people’s ability to find shelter, and the Hobson’s choice they may face even when they do find it: to go unsheltered amid a global health pandemic or to sleep in a shelter that is incongruous with their gender identity, where they face other forms of emotional and physical harm.<sup>58</sup> It is egregious and inhuman for HUD to promulgate a rule that will lead to such untenable choices in the midst of the “greatest public health crisis [to] hit this nation in a century.”<sup>59</sup> CCR further calls on HUD to rescind the Proposed Rule on this account.

## CONCLUSION

In order to ensure that its housing programs are “open to all eligible families and individuals without regard to actual or perceived sexual orientation, gender identity, or marital

---

<sup>54</sup> Jody L. Herman & Kathryn O’Neill, *supra* note 38.

<sup>55</sup> *Id.*

<sup>56</sup> *Interim Guidance on Unsheltered Homelessness and Coronavirus Disease 2019 (COVID-19) for Homeless Service Providers and Local Officials*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 6, 2020), <http://cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html>

<sup>57</sup> Meghann M. Cuniff, *An eviction crisis is coming, housing lawyers warn*, ABA JOURNAL (Sept. 10, 2020), <https://www.abajournal.com/web/article/With-federal-moratorium-extended-housing-lawyers-still-warn-pending-eviction-crisis>.

<sup>58</sup> GRANT, *supra* note 30 at 4.

<sup>59</sup> *See Coronavirus in Context: CDC Director Discusses Next Steps in the War Against COVID*, WEBMD, <https://www.webmd.com/coronavirus-in-context/video/robert-redfield> (last visited Sept. 22, 2020) (interview with Dr. Robert Redfield, Director of the Centers for Disease Control and Prevention).

status,” HUD must refrain from removing existing protections for transgender people or redefining “gender identity” so as to license discrimination against the over 1.5 million adults and youth who identify as transgender in the U.S.

The federal government cannot fund discrimination as contemplated by the Proposed Rule without running afoul of the U.S. Constitution and the Administrative Procedure Act. Nor can it justify so flippantly jeopardizing the lives and livelihoods of millions of transgender people—many of whom experience compounded marginalization because of poverty, race, and disability—especially in the midst of an unprecedented global health pandemic. Accordingly, the Center for Constitutional Rights respectfully asks that you heed our request and withdraw the Proposed Rule in its entirety.

Sincerely,



**Chinyere Ezie**  
Staff Attorney

**Center for Constitutional Rights**  
666 Broadway, 7th Floor  
New York, NY 10012

