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September 21, 2020

VIA ELECTRONIC SUBMISSION
(Federal eRulemaking Portal)

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

Re: Comments in Response to 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

To Whom This May Concern:

These comments are submitted on behalf of the undersigned organizations in response to the U.S. 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" ("Proposed Rule") and published in the Federal Register on July 24, 2020 (RIN 2506-AC53; Docket No. FR-6152-P-01).

These comments were led by Southern Legal Counsel, Inc. ("SLC"). Founded in 1977, SLC is a Florida statewide not-for-profit public interest law firm committed to equal justice for all and the attainment of basic human and civil rights. SLC assists individuals and groups with public

interest issues who would not otherwise have access to the justice system. SLC concentrates on people and issues in the most need of civil legal assistance, including LGBTQ individuals experiencing homelessness and housing instability. All of the partner organizations who signed on to this letter work with vulnerable populations, including LGBTQ persons experiencing homelessness and can speak directly to the significant harm the Proposed Rule will cause the populations they serve.

The undersigned organizations have serious concerns regarding the Proposed Rule and strongly oppose it. HUD acknowledges it “is not aware of data suggesting that transgender individuals pose an inherent risk to biological women,”¹ but it nonetheless proposes sweeping rule changes that would allow unfair and unlawful sex discrimination against transgender and other individuals in their time of need seeking critical shelter. The Proposed Rule would have significant adverse and unnecessary consequences as to transgender persons and other vulnerable populations. These effects would be further exacerbated due to the COVID-19 pandemic, which has economically impacted countless individuals across the country and has created additional housing insecurity. As further explained below, the Proposed Rule should not be adopted.

I. Proposed Amendments to 24 C.F.R. Parts 5 and 576.

The thrust of the Proposed Rule is to substantially recede from HUD’s 2016 rule entitled “Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development” (the “2016 Rule”) to allow temporary, emergency shelters or facilities with physical limitations that receive HUD assistance to consider biological sex in making shelter placement and accommodation decisions.² Such biological sex determinations could be made by assessing “factors such as height, the presence (but not the absence) of facial hair, the presence of an Adam’s apple, and other physical characteristics” of the shelter seeker.³ The facility also would be able to request a birth certificate, other identification, or medical records.⁴

In reconsidering – and departing from – the 2016 Rule, the Proposed Rule sets forth various amendments to 24 C.F.R. Parts 5 and 576. While the Proposed Rule should be rejected in its entirety, below are proposed amendments the undersigned organizations find to be particularly troublesome.

First, the Proposed Rule revises 24 C.F.R. § 5.106(b)-(c) so that shelter placement no longer must be made in accordance with the shelter seeker’s gender identity by allowing certain shelters to develop their own admissions policies for “determining sex.”⁵ The Proposed Rule also

¹ 85 Fed. Reg. 44811, 44815.

² *Id.* at 44812.

³ *Id.* at 44816.

⁴ *Id.* at 44815.

⁵ *Id.* at 44818.

amends 24 C.F.R. § 5.100 to narrow the definition of “gender identity.” The current definition of “gender identity” is “the gender with which a person identifies, regardless of the sex assigned to that person at birth and regardless of the person’s perceived gender identity.”⁶ The Proposed Rule revises the definition of “gender identity” to mean “actual or perceived gender-related characteristics” and therefore eliminates the mandatory deference given to the gender with which the shelter seeker identifies.⁷

The Proposed Rule further makes numerous, significant modifications to 24 C.F.R. § 5.106(c).⁸ Temporary, emergency shelters or other facilities with physical or configuration constraints may deny admission if they have a “good faith” belief the person seeking shelter is not of the sex that the shelter’s policy accommodates.⁹ Under the Proposed Rule, if the shelter has such good faith belief, then it may request the individual seeking shelter provide “information or documentary evidence” of the individual’s sex.¹⁰

If the shelter denies admission based on sex, then the Proposed Rule requires the shelter use the centralized or coordinated assessment system to give a “transfer recommendation” to a different shelter.¹¹ A transfer recommendation to an alternative facility would also be required if the person seeking shelter “states” the shelter’s policy violates the individual’s sincerely held beliefs.¹² However, the Proposed Rule only necessitates a transfer recommendation be made and does not go further in requiring that transfer to an appropriate facility actually be effectuated.

As discussed below, the undersigned organizations have significant concerns that the Proposed Rule would adversely and unlawfully impact LGBTQ individuals, and transgender persons in particular. These populations are particularly vulnerable and should be protected – not targeted by unnecessary rulemaking based on an admitted lack of data. Transgender women “are no more dangerous” than other women and it is extremely unlikely that a male will dress as a female solely to gain access to a women’s shelter¹³ – this type of concern has been squarely

⁶ 24 C.F.R. § 5.100.

⁷ 85 Fed. Reg. 44811, 44818.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Transitioning our Shelters, A Guide to Making Homeless Shelters Safe for People, at 13-14 (2003), available at <https://srlp.org/wp-content/uploads/2012/08/TransitioningOurShelters.pdf> (last accessed Sept. 17, 2020).

rejected as merely “hypothetical.”¹⁴ In fact, it is transgender persons themselves who often face an increased risk of harassment and assault.¹⁵ While HUD hypothesizes about these issues, the simple fact is that the collective practical experiences of the undersigned organizations and hands-on work with shelters and service providers directly contradicts HUD’s concerns about serving transgender individuals in accordance with their gender identities.

The undersigned organizations respond to HUD’s specific requests for comments below and also provide additional reasons why the Proposed Rule should not be adopted.

II. Response to HUD’s Requests for Comments.

HUD requested comments with respect to three enumerated issues.¹⁶ The undersigned organizations provide responses as follows.

A. HUD Should Maintain The Anti-Discrimination Protections In HUD’s 2012 Rule, As Well As The Protections In Its 2016 Rule.

Although the Proposed Rule significantly recedes from the 2016 Rule, in an apparent effort to re-frame the issues, HUD asks for comments not as to the 2016 Rule, but as to whether HUD should maintain the protections in its 2012 rule entitled “Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity” (the “2012 Rule”).¹⁷

HUD should keep the protections in both the 2012 Rule and 2016 Rule. The 2012 Rule broadly provides that housing should be made available regardless of gender identity and bars inquiries into gender identity and sexual orientation in various circumstances.¹⁸ This is consistent with HUD’s core mission of creating “strong, sustainable, inclusive communities and quality affordable homes for all.”¹⁹

¹⁴ *Adams by and through Kasper v. School Bd. of St. Johns Cty.*, ___ F.3d ___, 2020 WL 4561817, at *10 (11th Cir. Aug. 7, 2020) (“The School Board repeats its concern that allowing Mr. Adams [who is transgender] to use the boys’ restroom could allow ‘a non-transgender student to pose as a gender-fluid student to access the bathroom.’ ... We remain unpersuaded that this concern is anything more than hypothetical.”).

¹⁵ National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey*, at 176, *available at* <http://www.ustranssurvey.org/reports> (last accessed Sept. 17, 2020).

¹⁶ 85 Fed. Reg. 44811, 44817.

¹⁷ 77 Fed. Reg. 5662.

¹⁸ *Id.* at 5674.

¹⁹ HUD Mission, *available at* <https://www.hud.gov/about/mission> (last accessed Sept. 17, 2020) (emphasis added); *see also* 81 Fed. Reg. 64763, 64769; 77 Fed. Reg. 5662, 5672.

The 2012 Rule’s anti-discrimination provisions also are consistent with the Fair Housing Act’s (“FHA”) express prohibition against discrimination “because of ... sex” in connection with the provision of housing.²⁰ As recently confirmed by the U.S. Supreme Court in *Bostock*, the prohibition against discrimination “because of ... sex” protects transgender and homosexual individuals from discrimination.²¹ The Court found “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”²²

Bostock was recently applied by the Eleventh Circuit in *Adams*, which is analogous to the situation here in that it involved a transgender individual who self-identified as male.²³ *Adams* held a public school’s bathroom policy violated Title IX’s ban on sex discrimination and violated the Equal Protection Clause because it prohibited a transgender student, who identified as male, from using the boys’ bathroom.

Bostock and its progeny are applicable here because their Title VII discrimination analysis applies with respect to the FHA.²⁴ In addition, Courts have recognized the FHA and its protections apply to homeless shelters, including temporary or emergency shelters, because they qualify as a “dwelling” under the FHA.²⁵ In fact, HUD, in construing the FHA in the disability context, has

²⁰ See 42 U.S.C. §3604(a).

²¹ *Bostock v. Clayton Cty., Ga.*, 140 S.Ct. 1731 (2020).

²² *Id.* at 1741 (emphasis added); see also *Adams*, 2020 WL 4561817, at *12 (“With *Bostock*’s guidance, we conclude that Title IX, like Title VII, prohibits discrimination against a person because he is transgender, because this constitutes discrimination based on sex.”)

²³ *Adams*, __ F.3d __, 2020 WL 4561817.

²⁴ See, e.g., *Gamble v. City of Escondido*, 104 F.3d 300, 304 (9th Cir. 1997) (“We apply Title VII discrimination analysis in examining Fair Housing Act (‘FHA’) discrimination claims.”); *Larkin v. State of Mich. Dep’t of Social Servs.*, 89 F.3d 285, 289 (6th Cir. 1996) (“Most courts applying the FHA, as amended by the FHAA, have analogized it to Title VII of the Civil Rights Act of 1964....”); *Smith v. Avanti*, 249 F. Supp. 3d 1194, 1200 (D. Colo. 2017) (looking to Title VII cases for guidance in FHA case).

²⁵ See, e.g., *Defiore v. City Rescue Mission of New Castle*, 995 F.Supp.2d 413, 418 (W.D. Pa. 2013) (finding emergency shelter was “dwelling” for FHA purposes); *Hunter on Behalf of A.H. v. Dist. of Columbia*, 64 F. Supp. 3d 158, 174, 176 (D. D.C. 2014) (noting “several courts have concluded that temporary homeless shelters are ‘dwellings’ under the FHA” and finding shelters at issue were dwellings under FHA); *Woods v. Foster*, 884 F.Supp. 1169, 1173-74 (N.D. Ill. 1995) (“Although the Shelter is not designed to be a place of permanent residence, it cannot be said that the people who live there do not intend to return—they have nowhere else to go. ... [T]he length of time one expects to live in a particular place does is not the exclusive factor in determining whether the place is a residence or a ‘dwelling.’ Because the people who live in the Shelter have nowhere else to ‘return to,’ the Shelter is their residence in the sense that they live there and not in any other place.”); *Jenkins v. New York City Dept. of Homeless Servs.*, 643 F.

issued a rule acknowledging that “shelters intended for occupancy as a residence for homeless persons” constitute a “dwelling unit.”²⁶

In accord with *Bostock*, portions of the 2012 Rule are aimed at protecting transgender individuals seeking shelter admission at HUD-assisted facilities, and under the 2012 Rule, “HUD programs must be open and available to persons regardless of sexual orientation or gender identity.”²⁷ The 2012 Rule and its protections should be maintained.

But it is not enough to only preserve the 2012 Rule. The 2016 Rule went further than the 2012 Rule, imposed additional necessary protections with respect to gender identity, and must be maintained as well. The Proposed Rule and its reconsideration of the 2016 Rule should be rejected. The 2016 Rule affords critical protections to transgender persons that will be eliminated, without adequate justification, if the Proposed Rule is adopted. The 2016 Rule, with respect to single-sex facilities, reasonably requires that persons be placed in accordance with their self-identified gender identity and bars inquiries into a person’s sex with respect to temporary or emergency shelters.²⁸

The Proposed Rule would eliminate these crucial protections for transgender individuals under the 2016 Rule and allow single-sex shelters to consider biological sex without regard to gender identity in making admission decisions, resulting in transgender persons being subject to denial of admission into facilities merely because of their transgender status. This would unfairly and unlawfully lead to prohibited sex discrimination. As explained above, homeless shelters, including temporary and emergency shelters, are subject to the FHA’s ban on sex discrimination. The Proposed Rule erroneously disregards this legal principle.

Further, the data underscore the need to maintain both the 2012 Rule and 2016 Rule to protect the at-risk transgender population. HUD admits it “is aware that transgender individuals experience poverty, housing instability, mental health issues, domestic violence, and homelessness at high rates” and shelter access for them is “critical.”²⁹ Nearly one-third of transgender individuals report experiencing homelessness.³⁰ Of the transgender individuals experiencing

Supp. 2d 507, 517 (S.D.N.Y. 2009) (“This [definition of dwelling in the FHA] has often been interpreted to include homeless shelters.”); *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941, 945 (9th Cir. 1996) (applying FHA to homeless shelter).

²⁶ 24 C.F.R. § 100.201; *Hunter*, 64 F. Supp. 3d 158, at 175 (HUD “has promulgated a regulation which explicitly identifies ‘sleeping accommodations in shelters intended for occupancy as a residence for homeless persons’ as an example of a ‘dwelling unit.’”).

²⁷ 77 Fed. Reg. 5662, 5668.

²⁸ 81 Fed. Reg. 64763, 64775

²⁹ 85 Fed. Reg. 44811, 44815.

³⁰ The Report of the 2015 U.S. Transgender Survey, at 176.

homelessness, a staggering 63% are unsheltered.³¹ Transgender persons suffer high rates of housing discrimination, and 70% report being mistreated while staying at a homeless shelter.³² More than half report being physically, sexually, and/or verbally harassed or assaulted while staying at homeless shelters.³³

Many transgender persons are not even able to gain entry to shelters – 29% are denied admission.³⁴ Moreover, transgender suffering is high, with 40% of transgender individuals having attempted suicide in their lifetime – 9 times the national average rate.³⁵ Further, the number of transgender individuals experiencing homelessness has increased by 88% since 2016, and the number of individuals experiencing unsheltered homelessness has increased by 113% during that same time period.³⁶ These statistics reinforce the need to keep both the 2012 Rule and 2016 Rule and ensure adequate protections for transgender, LGBTQ, and other vulnerable persons.

B. Biological Sex Should Not Be Considered – Consequently, There Is No Need To Define “Good Faith” Belief For Determining Biological Sex Or Consider Evidence of Biological Sex.

HUD should not authorize shelter providers to use biological sex at all, much less a “good faith” belief of one’s biological sex as the standard for making shelter admissions determinations.

As discussed above, homeless shelters, including temporary or emergency shelters, are subject to the FHA’s prohibition against sex discrimination. Allowing providers to attempt to make a “good faith” determination as to the biological sex of the shelter seeker authorizes and encourages discrimination against transgender persons based on sex stereotyping, which is

³¹ Transgender Homeless Adults & Unsheltered Homelessness: What the Data Tell Us. *National Alliance to End Homelessness* (July 2020), at 1, available at <https://endhomelessness.org/wp-content/uploads/2020/07/Trans-Homelessness-Brief-July-2020.pdf> (last accessed Sept. 17, 2020).

³² The Report of the 2015 U.S. Transgender Survey, at 176.

³³ *Id.*

³⁴ Injustice at Every Turn, A Report of the National Transgender Discrimination Survey, at 4, available at <https://transequality.org/issues/resources/national-transgender-discrimination-survey-full-report> (last accessed Sept. 17, 2020).

³⁵ The Report of the 2015 U.S. Transgender Survey, at 5.

³⁶ See, Transgender Homeless Adults & Unsheltered Homelessness: What the Data Tell Us, at 1.

unlawful.³⁷ Even in his dissent in *Bostock*, Justice Alito conceded “evidence [of sex stereotyping] is relevant to prove discrimination because of sex.”³⁸

If HUD permits shelters to make determinations as to a person’s biological sex, such determinations risk being made based on gender stereotypes. For example, a transgender individual may self-identify as female but the shelter provider, based on the use of prohibited gender stereotypes, may conclude the person does not fit with female stereotypes and is therefore a male who cannot be admitted to the shelter.

In fact, the Proposed Rule squarely authorizes such discriminatory conduct: “For example ... if a single-sex facility permissibly provides accommodation for women, and its policy is to serve only biological women, without regard to gender identity, it may decline to accommodate a person who identifies as female but who is a biological male.”³⁹ All the shelter provider would need to do is assert such discriminatory action was the result of a good faith belief of the person’s biological sex. This type of sex discrimination and gender stereotyping against transgender persons is unlawful under *Bostock* and should not be authorized under the Proposed Rule.

In addition, HUD’s list of proposed factors for determining biological sex are nonsensical, unworkable as a practical matter, and further invite prohibited gender stereotyping. HUD permits using “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.”⁴⁰ These factors erroneously indicate that a provider’s perception of biological sex, and what the related characteristics should be, control over the shelter seeker’s self-identification with a particular gender identity or gender expression.

The provider could never truly make a determination of a person’s biological sex because that is a medical determination. Instead, the provider will necessarily make assumptions based on stereotypes about physical characteristics and gender expression of men or women. There is no

³⁷ *Bostock*, 140 S.Ct. at 1746 (“By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today.”); *Adams*, __ F.3d __, 2020 WL 4561817, at *10 (finding, “the Constitution does not tolerate any form of gender stereotyping....”); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (plurality opinion) (case finding sex stereotyping is action based on gender and has legal relevance), superseded on other grounds by statute as recognized in *Comcast Corp. v. Nat’l Ass’n of African American-Owned Media* 140 S.Ct. 1009 (2020).

³⁸ *Bostock*, 140 S.Ct. at 1764 (Alito, J., dissenting) (“Such evidence [of sex stereotyping] is relevant to prove discrimination because of sex, and it may be convincing where the trait that is inconsistent with the stereotype is one that would be tolerated and perhaps even valued in a person of the opposite sex.”).

³⁹ 85 Fed. Reg. 44811, 44812.

⁴⁰ *Id.* at 44816.

way for providers to make a biological sex determination without engaging in prohibited sex stereotyping.

The Proposed Rule also allows shelter providers to request evidence of biological sex, including “government identification.”⁴¹ However, lack of access to identification is a significant unmet need of homeless individuals.⁴² This obstacle is compounded further for transgender individuals, who cannot obtain identification documents reflecting their affirmed name without a legal name change, which is a court process that requires significant time and access to resources. Further, identification with the affirmed gender marker is especially difficult to obtain because it is burdensome, costly for homeless individuals, and requires access to medical care because many states, at minimum, require a physician’s letter.⁴³ While lack of government identification cannot be the “sole” basis for an admissions decision under the Proposed Rule, it could potentially be one of the reasons for admissions denial. Such a policy puts homeless persons, and particularly transgender homeless persons, at a distinct disadvantage in terms of obtaining shelter and as such should be rejected.

C. Experiences from Homeless and Housing Services Providers Implementing LGBTQ Inclusive Policies and Practices in Central Florida.

i. Homeless Services Network of Central Florida

The Homeless Services Network of Central Florida is a signatory to this comment and the lead agency for the HUD Continuum of Care FL-507 for the area including Osceola, Seminole, and Orange Counties, including the Cities of Orlando, Kissimmee, and Sanford.

In 2018, the Continuum of Care adopted a “Policy on Gender Inclusion and Non-Discrimination with Respect to Sexual Orientation or Gender Identity.” This policy reflects a commitment to Equal Access and to Housing First and low-barrier access to housing and services. The policy requires programs to participate in annual training on service inclusion and non-discrimination and to adopt internal policies and practices that indicate adherence to the CoC policy on gender inclusion and non-discrimination. Every year since 2018, the CoC offers intensive training on LGBTQ+ cultural competency; legal requirements to provide Equal Access to LGBTQ+ individuals under the federal Fair Housing Act, the 2012 and 2016 Equal Access

⁴¹ *Id.* at 44816.

⁴² *See* Photo Identification Barriers Faced by Homeless Persons: The Impact of September 11, A Report by the National Law Center on Homelessness & Poverty (April 2004), at 4, *available at* https://nlchp.org/wp-content/uploads/2018/10/ID_Barriers.pdf (last accessed Sept. 17, 2020); *see also* Engaging Legal Services in Community Efforts to End Homelessness, U.S. Interagency Council on Homelessness (February 2017), at 2, *available at* https://www.usich.gov/resources/uploads/asset_library/Engaging_Legal_Services.pdf (last accessed Sept. 21, 2020).

⁴³ *See, e.g.*, National Center for Transgender Equality’s national resource on how to update name and gender markers on state and federal IDs and records, *available at* <https://transequality.org/documents> (last accessed Sept. 21, 2020).

Rules, and local human rights ordinances; practical tips on developing inclusive and affirming housing and homeless services, with a special focus on serving transgender individuals in accordance with their gender identity; and workshops to develop ongoing strategies to build towards full compliance with the CoC Policy.

The CoC's commitment to this work of inclusion is not simply about ensuring programs are not discriminating. The CoC believes that ensuring access to housing and homeless services to LGBTQ+ persons and families is essential to ending homelessness. One 2018 Point-in-Time (PIT) Count found 2,053 homeless individuals on a single night in Orange, Osceola, and Seminole counties.⁴⁴ According to Orange County Public Schools' figures, nearly 9,700 students experienced homelessness the past academic year. *Id.* The annual homeless census in 2018 found 268 homeless youth in the three-county area served by the Homeless Services Network of Central Florida, 93 of whom identified as LGBTQ.⁴⁵

The Homeless Services Network is the lead agency for the Central Florida Commission on Homelessness (HUD CoC FL-507), with over 300 member organizations. In 2019 8,763 unique persons were identified as experiencing homelessness by Central Florida's Homelessness Emergency Response System, and of those, 1,559 were unsheltered. Unsheltered persons often encounter barriers to shelter entry that complicate delivery of services to resolve their experience of homelessness. Transgender, gender-nonconforming, and non-binary adults experience unsheltered homelessness at much higher rates than their cisgender (non-transgender) counterparts. Unaccompanied homeless LGBTQ youth are particularly put at risk when experiencing the trauma of homelessness due issues such as family rejection. Studies documenting youth homelessness in Central Florida conclude that over 1/3 of homeless youth are LGBTQ.⁴⁶ In the 2019 Point in Time Count, 5% of youth identified as Transgender or Gender Non-Conforming.⁴⁷ We cannot end homelessness without ensuring equal access to services for persons regardless of gender identity or sexual orientation.

The CoC FL-507 conducts annual trainings to assist homeless service providers in their efforts to provide services to LGBTQ persons experiencing homelessness. This effort to ensure equal access to services emerged from a collaborative partnership between homeless service providers, LGBTQ advocates, and the City of Orlando. This effort has been embraced universally without objection. Homeless services providers, including faith-based organizations, are working to develop practices of inclusion and equal access to standard operating procedures. Some

⁴⁴ Coalition for the Homeless of Central Florida, *available at* <https://www.centralfloridahomeless.org/the-problem> (last accessed Sept. 17, 2020).

⁴⁵ "LGBTQ alliance seeks to find answers for 'most vulnerable' homeless population," (Apr. 10, 2019), *available at* <https://www.orlandosentinel.com/news/os-ne-lgbtq-homeless-central-florida-20190410-story.html> (last accessed Sept. 17, 2020).

⁴⁶ *Id.*

⁴⁷ Point-In-Time Count FL-507 Orlando/Orange, Osceola, Seminole Counties CoC, *available at* <https://www.centralfloridacoc.org/wp-content/uploads/2019/05/2019-CoC-FL-507-PIT-Homeless-Summary-FINAL.pdf> (last accessed Sept. 17, 2020).

organizations are investing in facility upgrades to ensure compliance to the equal access commitment made by the community and the HUD Rule. CoC FL-507 is actively collaborating with Southern Legal Counsel to provide technical assistance for ongoing training and incorporation of best practices.

In the experience of Central Florida's Continuum of Care, the HUD Equal Access Rule has not been a burden to ongoing operations. Contrarily, the Rule's implementation became a strategic opportunity for collaboration, resulting in more effective service delivery to persons experiencing homelessness. The reversal of this Rule will only serve to increase discrimination, trauma and misery associated with the experience of homelessness in our community. We strongly oppose HUD's attempt to reverse its previous guidance.

ii. Equality Florida

One of the partners in this collaborative effort and the CoC's annual trainings on LGBTQ+ Equal Access has been Equality Florida, who is a signatory to this comment. Equality Florida, the state's largest LGBTQ civil rights organization, has serious concerns regarding the Proposed Rule and strongly opposes it. Transgender citizens are one of our most vulnerable communities and the Proposed Rule would place them in an even more vulnerable position. Each year during hurricane season, Equality Florida receives dozens of calls from frightened transgender individuals who have been required to evacuate and have then been turned away from safe shelters due to their gender status. The Proposed Rule is blatantly harmful to a vulnerable community in their most vulnerable time.

In addition, studies show that transgender citizens and especially transgender people of color are being disproportionately impacted by the COVID-19 pandemic. Transgender people are often employed in lower-paying positions in the service, entertainment, hospitality, and non-profit sectors that are experiencing disproportionate layoffs due to the pandemic, and thus are rendering transgender citizens homeless and in need of shelter. To then experience discrimination and marginalization when seeking critical shelter is especially unacceptable.

Finally, Equality Florida opposes the Proposed Rule because of its assumed premise that transgender people in some way pose a public safety risk. Numerous state and national studies show, and HUD acknowledges it "is not aware of data suggesting that transgender individuals pose an inherent risk to biological women."⁴⁸ The Proposed Rule erases one's affirmed, lived gender identity, and instead relies on ambiguous physical qualifications to prove one's gender while seeking secure and safe shelter.

iii. The Zebra Coalition

The Zebra Coalition, another signatory to the comment, is a member of the CoC and presents at the annual CoC training on LGBTQ+ cultural competency. The Zebra Coalition provides housing and homeless services to LGBTQ youth. Based on Zebra's work with young people experiencing homelessness, it would be very harmful to ignore a person's gender identity when determining care for housing. As housing providers, it is our goal to offer safe placement for

⁴⁸ 85 Fed. Reg. 44811, 44815.

young adults in crisis. This rule would cause more harm by allowing critical systems of care to turn away our most vulnerable youth.

iv. The One Orlando Alliance

The One Orlando Alliance (“The Alliance”) is another partner in this collaborative effort, assists with the CoC’s annual trainings on LGBTQ+ Equal Access, and is a signatory to this comment. In the wake of the Pulse shooting in Orlando, Florida, in 2016, more than 18 different LGBTQ+ focused organizations, with full support of both the City of Orlando and Orange County Government, unanimously agreed to move forward on creating a formal non-profit organization dedicated to unifying and empowering the LGBTQ+ Community in Central Florida. The Alliance has since grown and now represents a coalition of over 40 LGBTQ+ nonprofit partner organizations.

The Alliance has been a vital partner in the collaborative effort to encourage Central Florida’s housing and homelessness service providers to build their capacity to meet the vast needs of the LGBTQ community, and particularly the transgender community. The Alliance recognizes that, despite being over-represented among individuals experiencing homelessness, LGBTQ people, and transgender people in particular, have been completely left out of the conversation surrounding how to improve housing and homeless services. However, the work that has been done collaboratively with the signatories to this comment to enhance the capacity of the Central Florida Continuum of Care has changed that reality and given the LGBTQ community an active role in the advancement of affirming and inclusive housing and homeless service provision. To highlight just two of the myriad examples, the Alliance has done significant work with the Salvation Army and the Coalition for the Homeless to transform those organizations into safe havens for LGBTQ individuals, when prior to this collaborative effort, there were few if any shelters where The Alliance felt comfortable sending their transgender clients.

The Alliance recognizes that the progress made in Central Florida is due in large part to having dedicated leadership within the Central Florida CoC and the City of Orlando, who value and prioritize the safety and well-being of the LGBTQ community. Unfortunately, not every city, county, region, or CoC has the benefit of strong, committed leadership and elected officials who will ensure that the inclusion and safety of LGBTQ individuals is a priority from the top down. While Central Florida will remain firm in its commitment to protecting and serving the LGBTQ community regardless of HUD’s position or policy,⁴⁹ many areas across the country do not have the benefit of such leadership within their city, county, or CoC, and the consequences of HUD’s

⁴⁹ See City of Orlando Letter dated July 28, 2020, stating that “all organizations that receive funding from the City of Orlando have a contractual obligation to comply with Chapter 57 of the Code of the City of Orlando, which defines “Gender Identity” as actual or perceived sex, and shall also include a person's gender identity, self-image, appearance, expression or behavior, whether or not that gender identity, self-image, appearance, expression or behavior is different from that traditionally associated with the sex assigned to that person at birth.” *available at* <https://watermarkonline.com/2020/08/03/orlando-officials-speak-out-against-huds-proposed-anti-transgender-amendment/>, Aug. 3, 2020 (last accessed Sept. 21, 2020).

proposed rule would be devastating. Even within Central Florida, there remain shelters and service providers who resist taking steps to protect and serve LGBTQ individuals and are only complying with the bare minimum requirements due to the protections currently in place under the Equal Access Rules. If HUD's proposed rule were to take effect, it would cause direct harm to LGBTQ individuals across the country and possibly result in irreparable damage to the communities most in need of the services that HUD-funded organizations provide.

D. Transfer Policies Must Be Implemented In A Timely, Non-Discriminatory Way, And The Transfer Recommendation Requirement Is Not Unduly Burdensome.

HUD should not allow shelter providers to attempt to determine biological sex when making admissions and placement determinations, which would obviate the need for the transfer provision in the Proposed Rule. Attempting to make biological sex determinations would lead to prohibited sex discrimination based on sex stereotyping and other factors. As mentioned above, transgender women are not more dangerous than other women. Nonetheless, the Proposed Rule unfairly targets transgender individuals, and the 2016 Rule requiring shelters to accept gender self-identification should be preserved.

To the extent the Proposed Rule is adopted, which it should not be, shelter policies must be coordinated and implemented by the Continuum of Care in a way that serves persons in a timely and non-discriminatory fashion.⁵⁰ Time limitations should be imposed so that a transfer recommendation to an alternative facility is made contemporaneously with the decision to deny shelter admission. At minimum, the transfer recommendation should be made the same day shelter admission is denied. Delays in making the transfer recommendation would unduly risk the safety and health of the person seeking shelter.

Other protections should be included as well. A transfer recommendation, alone, is insufficient. The recommendation should be to a facility that has agreed to accept the shelter seeker. If this is the intent of the Proposed Rule, then Section 5.106(c)(4) should be clarified to explain this. Requirements should also be added to ensure the transfer, if agreed to by the shelter seeker, is actually effectuated. Further requirements should be imposed mandating that the alternative shelter is in a location that is reasonably accessible to the person seeking shelter.

Finally, if the Proposed Rule is adopted, a transfer provision must be included and is not overly burdensome. To the contrary, it would be overly burdensome on the individual seeking shelter to deny admission and expect the person to be able to find another available shelter. Absent

⁵⁰ The Continuum of Care is a HUD program “designed to promote communitywide commitment to the goal of ending homelessness; provide funding for efforts by nonprofit providers, and State and local governments to quickly rehouse homeless individuals and families while minimizing the trauma and dislocation caused to homeless individuals, families, and communities by homelessness; promote access to and effect utilization of mainstream programs by homeless individuals and families; and optimize self-sufficiency among individuals and families experiences homelessness.” See Continuum of Care (COC) Program (2020), *available at* <https://www.hudexchange.info/programs/coc/> (last accessed Sept. 17, 2020).

providing a transfer recommendation to an alternative facility, individuals who are denied shelter access risk having no place to stay merely because the shelter has chosen to exclude based on sex.

III. Additional Grounds For Rejecting The Proposed Rule.

The Proposed Rule should be further rejected because it violates the Administrative Procedure Act (the “APA”) and administrative rulemaking requirements imposed by the U.S. Supreme Court. The APA sets forth procedural rules with which federal executive agencies must abide when promulgating and issuing regulations and conducting adjudicatory proceedings.⁵¹ The APA is intended to safeguard the rights of the public and entities affected by agency decisions, while ensuring that agencies retain the degree of flexibility necessary to achieve their delegated responsibilities.⁵² The Proposed Rule contravenes the APA and related administrative rulemaking requirements.

A. The Proposed Rule Violates The APA Because It Contravenes Existing Law, Including The Fair Housing Act.

Under the APA, “rule” is broadly defined as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency
....”⁵³

There are two distinct types of rules created by an administrative agency: legislative rules and interpretive rules. A legislative rule has “the ‘force and effect of law’”⁵⁴ and is one that “create[s] new law, rights, or duties, in what amounts to a legislative act.”⁵⁵ An interpretive rule “‘reminds’ affected parties of existing duties” and “explain[s] ambiguous terms in legislative enactments.”⁵⁶ Interpretive rules do not “effect[] a substantive change in the regulations.”⁵⁷

⁵¹ See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653 (1990).

⁵² *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (conurrence).

⁵³ 5 U.S.C. § 551(4).

⁵⁴ *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92 (2015) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 203-303 (1999)).

⁵⁵ *White v. Shalala*, 7 F.3d 296, 303 (2d Cir.1993).

⁵⁶ *Am. Hosp. Ass’n. v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

⁵⁷ *Shalala v. Guernsey Memorial Hosp*, 514 U.S. 87, 91 (1995) (citing *Guernsey Memorial Hospital v. Sec’y of Health and Human Services*, 996 F.2d 830, 832 (1993)).

Instead, interpretive rules allow agencies an opportunity to announce future intentions in a non-binding manner.⁵⁸

Legislative rules are subject to APA requirements, including that such rules cannot contravene or conflict with existing law.⁵⁹ A legislative rule is treated as unlawful when it appears to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”⁶⁰

The Proposed Rule is a legislative rule because it specifically seeks to effectuate a substantive change to HUD’s 2016 Rule by allowing shelter providers to use biological sex in determining whether an individual is able to receive benefits from the shelter. However, as discussed above, the Proposed Rule contravenes the purpose of, and prohibitions in, the FHA. Specifically, the Proposed Rule discriminates on the basis of sex against those individuals who do not identify with their biological sex when they are seeking housing at a HUD-assisted shelter, in effect, stripping them of their rights under the FHA. By violating the FHA, the Proposed Rule violates the APA and should not be adopted.

B. The Proposed Rule Violates The APA And Related Administrative Rulemaking Requirements Because It Was Issued Without Sufficient Justification.

Agencies, like HUD, are typically free to change their existing policies by altering or repealing rules or other agency pronouncements.⁶¹ In executing a policy change, however, an agency must comply with the text of the APA’s procedural requirements and the related administrative rulemaking requirements articulated by the U.S. Supreme Court.⁶²

An agency must display awareness that it is changing its position.⁶³ An agency may not depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.⁶⁴ An agency must provide a more detailed justification when the “new policy rests upon factual findings that contradict those which underlay its prior policy” or where the “prior policy has engendered

⁵⁸ *Pacific Gas and Elec. Co. v. Fed. Power Comm.*, 506 F.2d 33, 38 (D.C. Cir. 1974).

⁵⁹ *See Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 676 (N.D. Tex. 2016) (“When final agency actions are presented for judicial review, the APA provides that reviewing courts should ‘hold unlawful and set aside agency action’ that is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [the] law.’”) (citing 5 U.S.C. § 702(2)).

⁶⁰ *Id.*

⁶¹ *See generally Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-27 (2016).

⁶² *See* 5 U.S.C. § 553; *Navarro*, 136 S. Ct. 2117, 2125-27.

⁶³ *Navarro*, 136 S. Ct. 2117, 2125-27.

⁶⁴ *United States v. Nixon*, 418 U.S. 683, 696 (1974).

serious reliance interests that must be taken into account.”⁶⁵ “In such cases, it is not that further justification is demanded by the mere fact of policy change, but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”⁶⁶ Agency action that departs from a prior policy without acknowledging the change, or that creates an unexplained inconsistency with prior policy, is generally viewed as arbitrary and capricious.⁶⁷

Here, the unavoidable conclusion is that the Proposed Rule violates the APA and related administrative rulemaking requirements because it was issued without the reasoned explanation required in light of HUD’s substantial change in position and the significant reliance interests involved.

Generally, the Proposed Rule seeks to allow shelter providers the ability to use the belief of one’s biological sex to determine whether he or she qualifies to stay in its shelter or benefit from its shelter programs. On the other hand, the 2012 Rule and, to an even greater extent, the 2016 Rule empower the individual seeking shelter to self-identify his or her gender. These policies directly compete with one another. HUD attempts to justify the Proposed Rule by providing insufficient reasons as to why the 2016 Rule apparently unduly burdened emergency and single-sex facilities, and fails to mention any justification for departing from the 2012 Rule, which prohibits inquiries regarding gender identity except in narrow circumstances. Maintaining all three rules in some form will lead to inconsistent application and confusion amongst the shelter providers subject to the Proposed Rule.

Moreover, the Proposed Rule seeks to change policies that have been in place for eight years and that local shelter providers have come to rely upon. Further, these preexisting rules are based upon providing fair and equal housing to all. Proposing a rule that significantly changes how equal housing is provided warrants a more detailed explanation as to the departure from the 2012 Rule and 2016 Rule – especially since HUD concedes it lacks data showing transgender women are any more dangerous than other women. However, HUD fails to provide an adequately reasoned explanation for its decision. The Proposed Rule is insufficiently supported and should be rejected in full.

Conclusion

The undersigned organizations strongly oppose the Proposed Rule as unnecessary and unlawful. The Proposed Rule violates the sex-discrimination principles set forth by the U.S. Supreme Court in *Bostock*, is wholly unsupported by data, and does not align with HUD’s central mission of ensuring discrimination-free housing for all persons, including LGBTQ individuals.

⁶⁵ *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

⁶⁶ *Encino Motorcars, LLC*, 136 S. Ct. at 2126.

⁶⁷ *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005).

The Proposed Rule unnecessarily targets LGBTQ persons, and transgender individuals, in particular. It should not be adopted.

Thank you for the opportunity to submit comments regarding the Proposed Rule. If you have any questions or concerns, please do not hesitate to contact Samantha Howell at samantha.howell@southernlegal.org.

Respectfully Submitted,

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