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Regulations Division
Office of General Counsel
Department of Housing and Urban Development
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Room 10276
Washington, DC 20410-0500
Submitted via *regulations.gov*

RE: Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs (FR-6152) (RIN 2506-AC53)

To Whom It May Concern,

We are grateful for the opportunity to provide comments to the Office of Community Planning and Development (“CPD”) of the U.S. Department of Housing and Urban Development (the “Department”) on the Notice of Proposed Rulemaking regarding Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs (the “Proposed Rule”).¹ The Proposed Rule seeks to revise certain provisions of a rule titled Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs (the “Gender Identity Rule”),² currently codified at 24 C.F.R. § 5.106, to modify requirements on policies intended to determine the placement of transgender and gender non-conforming individuals (collectively, “gender minorities”) in single-sex and sex-segregated facilities funded by CPD.

The undersigned are scholars of law, public policy, public health, psychology, and economics, among other fields, with substantial expertise related to discrimination against lesbian, gay, bisexual, and transgender (“LGBT”) people. The undersigned are affiliated or work with the Williams Institute at the University of California at Los Angeles School of Law. The Williams Institute is a research center dedicated to conducting rigorous and independent academic research related to sexual orientation and gender identity, including on poverty, homelessness³ and other housing-related issues, and legal protections against discrimination related to both sexual orientation and gender identity.

The current Gender Identity Rule requires that gender minorities be housed in single-sex and sex-segregated facilities funded by CPD consistent with their gender identity.⁴ This rule was appropriately adopted by the Department to address the fact that “transgender and gender nonconforming persons continue to experience significant violence, harassment, and

¹ 85 Fed. Reg. 44,811 (July 24, 2020).

² 81 Fed. Reg. 64,763 (Sept. 21, 2016).

³ Which we define expansively and therefore inclusive of experiences both within and outside of traditional homeless shelters, including one’s living temporarily with friends or family (“couch surfing”) or otherwise staying in a place not ordinarily intended for housing, such as in a car, park, or abandoned building, or living on the street.

⁴ 24 C.F.R. § 5.106.

discrimination in attempting to access programs, benefits, services, and accommodations.”⁵ The Proposed Rule undermines that purpose and would replace the current rule with one lacking in both certainty and clarity that could in turn lead to facilities’ violation of non-discrimination laws, including the Fair Housing Act. Independent of any possible legal violations, however, the Proposed Rule would lead to harm to gender minority beneficiaries of CPD-funded programs if implemented—individuals who are often at the most vulnerable points in their lives when seeking such services.

In Part I, we present empirical research relevant to all CPD programs subject to the Proposed Rule, including evidence on the high prevalence of poverty, homelessness, and housing instability among gender minorities. In addition, we provide evidence regarding the health and well-being of gender minority people, including information relevant to CPD’s administration of specific grant programs such as Housing Opportunities for Persons with AIDS (“HOPWA”). Hardships facing beneficiaries of these grant programs are particularly salient given the Department’s recent commitment to providing relief to vulnerable populations impacted by the COVID-19 pandemic through its existing grant programs—including some administered by CPD—as mandated by Congress through the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”).⁶

In Part II, we discuss research finding that LGBT people, and in particular gender minorities, face significant barriers in accessing, and discrimination within, CPD-funded services, and that such experiences, in turn contribute to anti-LGBT stigma and continued poor health outcomes among LGBT people. While we provide research on the experiences of LGBT people within emergency homeless shelters specifically as an illustrative example given the availability for funding for such shelters across virtually all of CPD’s grant programs, we note that certain grants allow for the funding of additional types of facilities that, to our understanding, could permissibly and logically operate as either single-sex or sex-segregated⁷ and therefore could present similar barriers and experiences of discrimination.

In Part III, we describe how the Proposed Rule will eliminate uniformity across providers and lead to confusion for beneficiaries; risks exacerbating the barriers and discrimination faced by gender minorities in accessing CPD-funded services to which they are entitled; and, in light of both the COVID-19 pandemic and the applicability of the Proposed Rule to facilities funded by HOPWA, is likely to endanger the health of gender minorities and the public generally, and is in

⁵ 81 Fed. Reg. at 64,764.

⁶ See OFFICE OF THE CHIEF FINANCIAL OFFICER, PLANNED USE OF CARES ACT FUNDING, U.S. DEP’T OF HOUS. & URBAN DEV. 14–17 (2020), https://pandemic.oversight.gov/sites/default/files/2020-06/HUD_Agency_Plan_for_Use_of_CARES_Act_Covered_Funds_FINAL.pdf.

⁷ For example, under HOPWA, eligible facilities for grantees to develop using CPD funds include “[a]dult day care . . . alcohol and drug abuse services . . . childcare[,]” as well as shared housing arrangements, nursing homes, and other forms of supportive and transition housing. See U.S. DEP’T OF HOUS. & URBAN DEV., HOUSING OPPORTUNITIES FOR PERSONS WITH AIDS (HOPWA) GRANTEE OVERSIGHT RESOURCE GUIDE 136 (2010), https://files.hudexchange.info/resources/documents/HOPWAOversightGuide_Aug2010.pdf. Currently, CPD allows grant funding to be used for an even broader range of housing and facility types in light of shelter needs created and exacerbated by COVID-19, including “short-term hotel/motel stays . . . [which] can be used as quarantine space.” U.S. DEP’T OF HOUS. & URBAN DEV., USING HOPWA PROGRAM FUNDS FOR INFECTIOUS DISEASE PREPAREDNESS AND RESPONSE (2020), <https://www.hud.gov/sites/dfiles/CPD/documents/Using-HOPWA-Program-Funds-for-Infectious-Disease-Preparedness-and-Response.pdf>.

direct conflict with government efforts to manage the spread and impact of communicable diseases, including COVID-19 and HIV.

Finally, in Part IV, we show that CPD’s required Regulatory Impact Analysis is flawed because it failed to consider the impact of the Proposed Rule on providers and beneficiaries.

I. Gender minorities—and LGBT people more broadly—are disproportionately homeless or unstably housed, living in poverty, and vulnerable to both COVID-19 and HIV.

In the United States, approximately 4.5% of the adult population identifies as LGBT.⁸ Younger people are more likely than older people to identify as LGBT, including 8.2% of millennials (born 1980–1999).⁹ Approximately 1.4 million adults¹⁰ and 150,000 youth ages 13–17¹¹ in the United States are transgender people.

Below, we discuss research on gender minority people relevant to the various grant programs administered by CPD, primarily making note of evidence related to their experiences with poverty, homelessness, and other housing issues as all of CPD’s programs are intended to “provide decent housing, a suitable living environment, and expand economic opportunities for low and moderate income persons.”¹² We also present research on the health and well-being of gender minorities, including information on HIV rates among gender minority people and factors that leave gender minority people particularly vulnerable to serious illness related to COVID-19 infection. This research is relevant to a number of CPD grant programs with a public health focus, including HOPWA and the Department’s COVID-19 response efforts.¹³

A. Poverty and Homelessness Among Gender Minorities

A variety of research finds that LGBT people—especially youth—are significantly overrepresented among those who are homeless or unstably housed.¹⁴ The most recent national study funded by the Department estimates that LGBTQ youth make up over 20% of homeless

⁸ KERITH J. CONRON & SHOSHANA K. GOLDBERG, WILLIAMS INST., ADULT LGBT POPULATION IN THE UNITED STATES 1 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Adult-US-Pop-Jul-2020.pdf>.

⁹ Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, GALLUP (May 22, 2018), <https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx>.

¹⁰ CONRON & GOLDBERG, *supra* note 8.

¹¹ KERITH J. CONRON, WILLIAMS INST., LGBT YOUTH POPULATION IN THE UNITED STATES 1 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Youth-US-Pop-Sep-2020.pdf>.

¹² *Community Planning and Development*, U.S. DEP’T OF HOUS. & URBAN DEV. (Aug. 31, 2020), https://www.hud.gov/program_offices/comm_planning.

¹³ According to CPD, “[h]ousing assistance provides the foundation from which [low-income] individuals and their families may participate in advances in HIV treatment and related care.” *Housing Opportunities for Persons with AIDS (HOPWA)*, U.S. DEP’T OF HOUS. & URBAN DEV. (last visited Sept. 4, 2020), <https://www.hud.gov/hudprograms/hopwa>.

¹⁴ ADAM P. ROMERO ET AL., WILLIAMS INST., LGBT PEOPLE AND HOUSING AFFORDABILITY, DISCRIMINATION, AND HOMELESSNESS 14 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf>.

youth¹⁵—at least 2 times higher than their proportion of the youth population in the U.S.¹⁶ Prior estimates of LGBTQ youth in various cities have similarly found high proportions of LGBTQ youth among the homeless youth population, ranging from 10–45%.¹⁷ Further supporting the understanding that youth homelessness is a major problem in the U.S., the 2015 LGBTQ Homeless Youth Provider Survey found that, across 138 agencies, service providers estimated that LGBTQ youth accounted for an average of 29% of all homeless youth served, with transgender and genderqueer youth specifically accounting for approximately 4%,¹⁸ despite estimates that only 0.73% of youth ages 13–17 in the United States are transgender.¹⁹ High rates of homelessness are also observed in school-based samples of youth. For example, according to a recent study based on the California Healthy Kids Survey—a large sample of 895,000 middle- and high-school aged youth in California—3.5% of respondents reported being unstably housed, and more than a quarter (25.3%) of those who were unstably housed identified as LGBTQ.²⁰ Furthermore, several studies have found that LGBTQ youth reported being homeless for longer periods of time, on average, than their non-LGBTQ peers.²¹

Research shows that these disparities appear to continue into young adulthood and beyond where population-based studies of households demonstrate disproportionate rates of homelessness among LGBT adults. For example, a recent population-based study of LGB adults in the U.S. found that 17% reported experiencing homelessness at some point in their lives²²

¹⁵ See *id.*; see also AMY DWORSKY, MOLLY VAN DRUNEN & ELISSA GITLOW, CHAPIN HALL AT THE UNIV. OF CHI., VOICES OF YOUTH COUNT (VoYC) YOUTH COUNT AND BRIEF YOUTH SURVEY: TECHNICAL REPORT (2017).

¹⁶ CONRON, *supra* note 11.

¹⁷ MARY CUNNINGHAM ET AL., URBAN INST., HOMELESS LGBT YOUTH (2014), <https://www.urban.org/sites/default/files/publication/22876/413209-Homeless-LGBTQ-Youth.PDF>; LANCE FREEMAN & DARRICK HAMILTON, EMPIRE STATE COAL. OF YOUTH & FAMILY SERVS., EMPIRE STATE COALITION OF YOUTH AND FAMILY SERVICES: A COUNT OF HOMELESS YOUTH IN NEW YORK CITY (2008), http://www.citylimits.org/images_pdfs/pdfs/HomelessYouth.pdf; Les B. Whitbeck et al., *Mental Disorder, Subsistence Strategies, and Victimization among Gay, Lesbian, and Bisexual Homeless and Runaway Adolescents*, 41 J. SEX RES. 329 (2004), <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1058&context=sociologyfacpub>.

¹⁸ SOON KYU CHOI ET AL., WILLIAMS INST., SERVING OUR YOUTH 2015: THE NEEDS AND EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH EXPERIENCING HOMELESSNESS (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Serving-Our-Youth-June-2015.pdf>; see also LAURA E. DURSO & GARY J. GATES, WILLIAMS INST. WITH TRUE COLORS FUND AND THE PALETTE FUND, SERVING OUR YOUTH: FINDINGS FROM A NATIONAL SURVEY OF SERVICE PROVIDERS WORKING WITH LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH WHO ARE HOMELESS OR AT RISK OF BECOMING HOMELESS (2012), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf>.

¹⁹ CONRON, *supra* note 11, at 5.

²⁰ LAURA BAAMS ET AL., LGBTQ YOUTH IN UNSTABLE HOUSING AND FOSTER CARE, 143 PEDIATRICS e20174211 (2017), <https://pediatrics.aappublications.org/content/pediatrics/143/3/e20174211.full.pdf>. Generally consistent with the literature on youth, we use “LGBTQ”—with the Q representing questioning or queer youth—to capture those youth whose identities are less developed or more fluid. See *generally*, BIANCA D.M. WILSON ET AL., WILLIAMS INST., SEXUAL AND GENDER MINORITY YOUTH IN FOSTER CARE: ASSESSING DISPROPORTIONALITY AND DISPARITIES IN LOS ANGELES (2014). Certainly, adults question their sexual orientation or gender identity and identify as queer; however, few studies relevant to this discussion address housing among adults who specifically identify as queer or questioning; hence, we generally use “LGBT” when discussing adults.

²¹ See, e.g., *id.*; FREEMAN & HAMILTON, *supra* note 16.

²² BIANCA D.M. WILSON ET AL., WILLIAMS INST., HOMELESSNESS AMONG LGBT ADULTS IN THE U.S. (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Homelessness-May-2020.pdf>.

(compared to a general population estimate of 6%).²³ Similarly, another nationally-representative sample of adults found that LGBT people ages 18–25 years reported experiencing homelessness in the prior year at a rate two times higher than the rate among non-LGBT young adults.²⁴ With respect to gender minorities specifically, in a recent nationally-representative sample, 8% of transgender adults reported experiences of homelessness (including living temporarily with friends or family, in a shelter or group home, or in a place not intended for housing such as on the street or in a car, park, or abandoned building) in the year prior to the survey, compared to only 1% of cisgender, heterosexual adults.²⁵ Additionally, 30% of transgender adults in this same survey reported having moved two or more times in the two years prior, compared to only 11% of cisgender adults.²⁶ Similarly, among respondents to the 2015 U.S. Transgender Survey (“USTS”)—the largest survey of transgender and gender non-conforming people to date—30% reported having experienced homelessness at some point in their lives, with 12% having had such an experience within the past year.²⁷ In the USTS, transgender women of color reported the highest rates of lifetime experiences with homelessness compared to other transgender subgroups, particularly among American Indian women (59%), Black women (51%), and Middle Eastern women (49%).²⁸

The Department’s own January 2019 point-in-time estimate of homelessness provides additional information on gender minorities’ experiences with homelessness.²⁹ According to the Department, 3,255 transgender people were experiencing homelessness at that time, as were 1,362 gender non-conforming people.³⁰ Researchers have estimated that the number of adult transgender people experiencing homelessness has increased 88% since 2016 (with a 113% increase in those experiencing unsheltered homelessness in the same period),³¹ which appears consistent with the Department’s own counts demonstrating some degree of significant increase. For example, the Department reported that at the same time in the prior year, fewer transgender (2,521) and gender non-conforming people (1,173) were homeless.³² Larger proportions of both transgender and gender non-conforming homeless people were found to be unsheltered than

²³ Vincent A. Fusaro, Helen G. Levy & H. Luke Shaefer, *Racial and Ethnic Disparities in the Lifetime Prevalence of Homelessness in the United States*, 55 DEMOGRAPHY 2119 (2018), <https://doi.org/10.1007/s13524-018-0717-0>.

²⁴ Matthew H. Morton et al., *Prevalence and Correlates of Youth Homelessness in the United States*, 62 J. ADOLESCENT HEALTH 14 (2018), doi:10.1016/j.jadohealth.2017.10.006; M.H. MORTON ET AL., CHAPIN HALL AT THE UNIV. OF CHI., MISSED OPPORTUNITIES: LGBTQ YOUTH HOMELESSNESS IN AMERICA (2018), <https://voicesofyouthcount.org/wp-content/uploads/2018/05/VoYC-LGBTQ-Brief-Chapin-Hall-2018.pdf>.

²⁵ See WILSON ET AL., *supra* note 22.

²⁶ Ilan H. Meyer et al., Findings from a U.S. Transgender Population Study, Presentation at the United States Professional Association for Transgender Health Conference, (Sept. 2019).

²⁷ SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 176 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

²⁸ See *id.* at 178.

²⁹ See MEGHAN HENRY ET AL., U.S. DEP’T OF HOUS. & URBAN DEV., THE 2019 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS – PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 10, <https://files.hudexchange.info/resources/documents/2019-AHAR-Part-1.pdf>.

³⁰ *Id.*

³¹ See NAT’L ALL. TO END HOMELESSNESS, TRANSGENDER HOMELESS ADULTS & UNSHELTERED HOMELESSNESS: WHAT THE DATA TELL US (2020), <https://endhomelessness.org/wp-content/uploads/2020/07/Trans-Homelessness-Brief-July-2020.pdf>.

³² See MEGHAN HENRY ET AL., U.S. DEP’T OF HOUS. & URBAN DEV., THE 2018 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS – PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 11, <https://files.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf>.

sheltered in both 2018³³ and 2019,³⁴ reflecting other estimates that 56% of homeless transgender adults are unsheltered, compared to 48% of cisgender adults.³⁵ Furthermore, the Department has found that while 8% more cisgender women and 5% more cisgender men became homeless between January 2018 and January 2019, a staggering 30% more transgender people became homeless in the same period, an increase characterized by the Department as “driven by an increase in unsheltered individuals.”³⁶

There are a variety of factors driving the prevalence of housing instability and homelessness among gender minorities and LGBT people more broadly. One primary driver of such homelessness is family rejection of LGBTQ youth’s sexual orientation or gender identity.³⁷ Another is the prevalence of experiences with discrimination among these populations, as discussed below. A third appears to be challenges around housing affordability faced by LGBT people, likely driven by the prevalence of poverty among these groups—in particular, certain subpopulations including transgender people and LGBT people of color.³⁸ According to a recent analysis of representative data from 35 states (collected between 2014 and 2017), more than one in five (21.6%) LGBT adults in the United States were living in poverty, compared to 15.7% of cisgender straight adults.³⁹ However, poverty is not evenly distributed among LGBT people: According to this same study, transgender adults experience one of the highest poverty rates among LGBT people, with nearly one in three (29.4%) living in poverty.⁴⁰ This reflects prior research similarly finding that transgender adults disproportionately experience poverty when compared to both LGB and cisgender straight people.⁴¹ The high prevalence of poverty, and related housing and food insecurity, among LGBT people of color⁴² points to the likelihood that the same drivers impacting the high rates of ethnic minority homelessness are producing these high rates of homelessness among LGBT people.

³³ *Id.*

³⁴ HENRY ET AL., *supra* note 29 (noting that 2,019 homeless transgender people were unsheltered, while 1,236 were sheltered; similarly, 1,065 gender non-conforming people were unsheltered, compared to 297 who were sheltered).

³⁵ JACKIE JANOSKO, NAT’L ALL. TO END HOMELESSNESS, DEMOGRAPHIC DATA PROJECT — PART I: GENDER MINORITIES (2019), <https://endhomelessness.org/wp-content/uploads/2019/09/DDP-Gender-Minorities-Brief-09272019-byline-single-pages.pdf>.

³⁶ See HENRY ET AL., *supra* note 29, at 22.

³⁷ See ROMERO ET AL., *supra* note 14, at 16–17.

³⁸ *Id.* at 9–10.

³⁹ M. V. LEE BADGETT, SOON KYU CHOI & BIANCA D.M. WILSON, WILLIAMS INST., LGBT POVERTY IN THE UNITED STATES: A STUDY OF DIFFERENCES BETWEEN SEXUAL ORIENTATION AND GENDER IDENTITY GROUPS 2 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf>.

⁴⁰ *Id.*

⁴¹ See generally M. V. Lee Badgett, *Left Out? Lesbian, Gay, and Bisexual Poverty in the U.S. Population*, 37 POPULATION RESEARCH & POL’Y REV. 667 (2018); Christopher S. Carpenter et al., *Transgender Status, Gender Identity, and Socioeconomic Outcomes in the United States*, INDUSTRIAL & LABOR RELATIONS REV. (2020), doi:10.1177/0019793920902776 (volume not yet assigned).

⁴² BIANCA D.M. WILSON, M. V. LEE BADGETT & ALEXANDRA-GRISEL H. GOMEZ, WILLIAMS INST., “WE’RE STILL HUNGRY” – LIVED EXPERIENCES WITH FOOD INSECURITY AND FOOD PROGRAMS AMONG LGBT PEOPLE 2 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-Food-Bank-Jun-2020.pdf>; WILSON ET AL., *supra* note 22.

B. Health and Well-Being of Gender Minorities

Research has consistently found that housing instability and homelessness increase the risk of violence victimization, exploitation, and poor health among LGBT people, meaning that existing disparities risk being worsened whenever LGBT people seek and are denied meaningful access to housing-related services. For example, among respondents to the California Healthy Kids Survey, LGBTQ youth who were unstably housed or in foster care reported worse school performance, less safe school climates (including more fights and victimization in school), worse mental health, and higher rates of substance use, relative to both LGBTQ youth in stable housing, and non-LGBTQ youth who were unstably housed.⁴³ These findings therefore also suggest that LGBTQ youth may be more vulnerable and susceptible to the negative impacts of housing instability than their heterosexual and cisgender peers. Similarly, USTS respondents who had experienced homelessness in their lifetime were more likely to face abuse and violence, including sexual assault and intimate partner violence (with 62% of those having experienced homeless reporting lifetime experiences with same, compared to 54% among all transgender respondents).⁴⁴ Experiencing homelessness was also associated with a higher prevalence of suicide thoughts and attempts among USTS respondents: 20.4% of those who experienced homelessness in the past year attempted suicide during that time (compared to 5.6% of those who had not had such experiences with homelessness attempting suicide during that time).⁴⁵

While evidence on the impacts of homelessness on gender minorities is of particular relevance to this proposed rulemaking, data showing existing health and health care access disparities among gender minority people regardless of housing status is especially relevant at a time that chronic illnesses are strongly associated with vulnerability to COVID-19 transmission and effects. For example, we recently found that 137,600 transgender people lack health insurance and 450,000 have not gone to a doctor in the past year because they could not afford it.⁴⁶ Additionally, research has shown that many gender minority people are particularly vulnerable to serious illness that may exacerbate a COVID-19 infection. As the Department has recently been provided with supplemental funding by Congress meant to enable aid to low-income individuals impacted by COVID-19 through its existing grant programs, such data are particularly relevant to this rulemaking. According to our recent research, 319,800 transgender adults in the United States have one or more medical conditions that may put them at increased risk of serious illness related to COVID-19, including asthma (208,500), diabetes (81,100), heart disease (72,700), and HIV (74,800), and approximately 217,000 transgender adults in the U.S. are age 65 or older.⁴⁷

⁴³ See BAAMS ET AL., *supra* note 20.

⁴⁴ See JAMES ET AL., *supra* note 27.

⁴⁵ JODY L. HERMAN ET AL., WILLIAMS INST., SUICIDE THOUGHTS AND ATTEMPTS AMONG TRANSGENDER ADULTS: FINDINGS FROM THE 2015 U.S. TRANSGENDER SURVEY 13 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Suicidality-Transgender-Sep-2019.pdf>.

⁴⁶ JODY L. HERMAN & KATHRYN O'NEILL, WILLIAMS INST., VULNERABILITIES TO COVID-19 AMONG TRANSGENDER ADULTS IN THE U.S. 2 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-COVID19-Apr-2020.pdf>.

⁴⁷ HERMAN & O'NEILL, *supra* note 46, at 1.

Turning to HIV specifically—relevant given CPD’s role in administering HOPWA grants and the applicability of the Proposed Rule to single-sex and sex-segregated facilities funded by same—research indicates that transgender people are disproportionately impacted by HIV.⁴⁸ According to recent prevalence estimates, approximately 14% of transgender women and 3% of transgender men in the United States are living with HIV, or 9.2% of transgender people overall.⁴⁹ This is in contrast to significantly lower prevalence rates among overall adults in the United States, estimated as being lower than 0.5%.⁵⁰ Similarly, according to the CDC, transgender people received an HIV-positive diagnosis at three times the national average across the 3 million HIV testing events it received reporting for in 2017.⁵¹ Research has found that housing instability and homelessness increase one’s risk of acquiring HIV and other infections, and they are associated with worse outcomes for people living with HIV in both the general and LGBT populations (especially among men who have sex with men and transgender people), including increased barriers to accessing care, lower treatment adherence, and lower rates of viral suppression.⁵² The CDC itself has recognized that “[m]any transgender people face stigma, discrimination, social rejection, and exclusion that prevent them from fully participating in society, including accessing . . . housing These factors affect the health and well-being of transgender people, placing them at increased risk for HIV.”⁵³

Gender minorities are disproportionately impacted by poverty, homelessness, and other housing issues, as well as a constellation of chronic illnesses and health issues that are likely exacerbated by housing instability and likely create additional vulnerabilities to serious illness related to COVID-19. Together, these data suggest that gender minority people are, in turn, disproportionately in need of services funded by CPD. CPD should therefore consider the impact of this rulemaking on gender minority people, including the likelihood that the rule will exacerbate health disparities already facing transgender people.

⁴⁸ HIV AND TRANSGENDER COMMUNITIES: ISSUE BRIEF, CTRS. FOR DISEASE CONTROL & PREVENTION (2019), <https://www.cdc.gov/hiv/pdf/policies/cdc-hiv-transgender-brief.pdf>; see also Sari L. Reisner & Gabriel R. Murchison, *A Global Research Synthesis of HIV and STI Biobehavioural Risks in Female-to-Male Transgender Adults*, 11 GLOBAL PUB. HEALTH 866 (2016).

⁴⁹ See Jeffrey S. Becasen et al., *Estimating the Prevalence of HIV and Sexual Behaviors among the US Transgender Population: A Systematic Review and Meta-Analysis, 2006–2017*, 109 AM. J. PUB. HEALTH e1 (2019); Stefan D. Baral et al., *Worldwide Burden of HIV in Transgender Women: A Systematic Review and Meta-Analysis*, 13 LANCET INFECTIOUS DISEASES 214 (2012).

⁵⁰ CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 48.

⁵¹ *Transgender People*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 12, 2019), <https://www.cdc.gov/hiv/group/gender/transgender/index.html>.

⁵² John Ecker et al., *A Review of the Literature on LGBTQ Adults who Experience Homelessness*, 66 J. HOMOSEXUALITY 297 (2019), doi:10.1080/00918369.2017.1413277; Jacob J. Wainwright et al., *Socioeconomic, Behavioral, and Clinical Characteristics of Persons Living with HIV Who Experience Homelessness in the United States, 2015-2016*, AIDS & BEHAV. (2019) doi:10.1007/s10461-019-02704-4; Angela A. Aidala et al., *Housing Status, Medical Care, and Health Care Among People Living with HIV/AIDS: A Systematic Review*, 106 AM. J. PUB. HEALTH e1 (2016), doi:10.2105/AJPH.2015.302905; Jesse B. Fletcher et al., *Housing Status and HIV Risk Behaviors among Transgender Women in Los Angeles*, 43 ARCHIVES OF SEXUAL BEHAV. 1651 (2014), doi:10.1007/s10508-014-0368-1.

⁵³ CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 51.

II. Gender minorities—and LGBT people more broadly—face widespread discrimination, as well as related stigma, that increase the likelihood that they will need access to CPD-funded services.

LGBT people who are homeless have regularly reported harassment, violence, and other challenges in accessing shelters and other services that may prolong their homelessness, and in turn their continued need for CPD-funded services. While the Gender Identity Rule was promulgated to address remaining barriers to access by ensuring that gender minorities would be sheltered consistent with their gender identity, the Proposed Rule risks undermining that purpose by creating uncertainty and increasing the risk that gender minorities will be forced to occupy facilities that do not align with their gender. As laid out in more detail below, that reality will in turn chill the willingness of a population in need of CPD-funded services to seek those services out for fear of experiencing discrimination.

Below, we discuss research on the barriers to access—including being forced to accept accommodation inconsistent with their gender identity—encountered by gender minority people with respect to emergency homeless shelters, and indicate ways these findings likely extend to other types of facilities covered by the Proposed Rule that may, similar to some emergency homeless shelters, be permitted to operate as single-sex or sex-segregated. It is important that the Department consider the generalizability of reported barriers to access in homeless shelters to the contexts of other single-sex and sex-segregated facilities because there is no existing research indicating that the negative impact of denying a person access changes depending on the type of facility through which one attempts to seek services. Additionally, below we provide evidence on discrimination experienced by gender minorities in other settings that increases the likelihood that they will require access to CPD-funded services, as well as on the effect of such stigma and discrimination on their health and well-being.

A. Discrimination within Emergency Shelters

Research finds that gender minorities experience high levels of discrimination and harassment within emergency homeless shelters and related services: For example, among USTS respondents who experienced homelessness and stayed in a shelter in the previous year, 70% reported some form of mistreatment, including being harassed, assaulted, or kicked out because of their gender identity.⁵⁴ Notably, these data were collected prior to the introduction of the Gender Identity Rule, i.e., before the Department required that all CPD-funded facilities house gender minorities in sex-segregated and single-sex facilities consistent with their gender identity. LGBTQ youth further report that staff have harassed and discriminated against them, refused to work with them, or refused to acknowledge their gender identity or allow their desired gender expression.⁵⁵ Unsurprisingly, then, more than one-quarter (26%) of USTS respondents who experienced homelessness in the previous year avoided staying in a shelter because they feared being mistreated as a transgender person.⁵⁶ And for those who remain in shelters, some reported having to choose between changing and sleeping in shared quarters with people of their sex

⁵⁴ See JAMES ET AL., *supra* note 27.

⁵⁵ Deborah Coolhart & Maria T. Brown, *The Need for Safe Spaces: Exploring the Experiences of Homeless LGBTQ Youth in Shelters*, 82 CHILD & YOUTH SERVS. REV. 230 (2017), doi:10.1016/j.childyouth.2017.09.021.

⁵⁶ See JAMES ET AL., *supra* note 27.

assigned at birth (where they lack privacy and encounter harassment), or being isolated from other residents altogether.⁵⁷

Across the scientific literature, a frequently cited problem faced by homeless and unstably housed gender minorities is that they are housed according to their sex assigned at birth or natal sex (i.e., transgender girls and women being housed with cisgender boys and men, and transgender boys and men being housed with cisgender girls and women), rather than in accordance with their gender identity or their own assessment of where they will be safest.⁵⁸ Such actions are likely to place these individuals, particularly transgender girls and women, at risk for violence and harassment.⁵⁹ To address these and other “significant barriers faced by transgender and gender nonconforming persons when accessing temporary, emergency shelters and other facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or bathing facilities,”⁶⁰ the Department issued the Gender Identity Rule in 2016. In other words, the Department recognized then that single-sex and sex-segregated facilities must be required to place individuals consistent with their gender identity in order to avoid putting gender minorities in situations where they will be at increased risk of violence, discrimination, and harassment.

B. Discrimination in Other Settings

Throughout their lives, gender minorities, and LGBT people more broadly, face discrimination in housing, employment, and elsewhere—all of which increase their risk of homelessness.⁶¹ For example, an exploratory study (funded by the Department) of matched pairs of transgender and cisgender individuals who posed as renters seeking apartments in the Washington, D.C. metropolitan area found that housing providers told transgender testers about fewer rental units than they did cisgender testers.⁶² In the USTS, 6% of respondents reported

⁵⁷ Caitlin Rooney et al., *Discrimination Against Transgender Women Seeking Access to Homeless Shelters*, CTR. FOR AM. PROGRESS (Jan. 7, 2016), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2016/01/07/128323/discrimination-against-transgender-women-seeking-access-to-homeless-shelters>.

⁵⁸ Coolhart & Brown, *supra* note 55; Jama Shelton, *Transgender Youth Homelessness: Understanding Programmatic Barriers Through the Lens of Cisgenderism*, 59 CHILD & YOUTH SERVS. REV. 10 (2015), doi:10.1016/j.chilyouth.2015.10.006.

⁵⁹ See ROMERO ET AL., *supra* note 14, at 18–19.

⁶⁰ 81 Fed. Reg. at 64,764.

⁶¹ See ROMERO ET AL., *supra* note 14.

⁶² DIANE K. LEVY ET AL., THE URBAN INST., A PAIRED- TESTING PILOT STUDY OF HOUSING DISCRIMINATION AGAINST SAME-SEX COUPLES AND TRANSGENDER INDIVIDUALS (2017), https://www.urban.org/sites/default/files/publication/91486/2017.06.27_hds_lgt_final_report_report_finalized.pdf. Matched-pairs testing has consistently found the presence of sexual orientation and gender identity discrimination in real-world housing scenarios. One pilot study of matched-pairs in a same-sex or a different-sex couple posing as renters seeking apartments in two large metropolitan areas found that housing providers treated lesbians and heterosexual women comparably, but were biased at different steps in the rental process against gay men compared with heterosexual men. *Id.* Specifically, providers were less likely to schedule an appointment with gay men, told gay men about fewer available units, and quoted gay men \$272 more in average yearly rental costs. *Id.* A matched-pairs study conducted by the Department itself found evidence of discrimination against both male and female same-sex couples in online rental markets across the country: Different-sex couples were favored over male same-sex couples in 15.9% of field tests, and over female same-sex couples in 15.6% of tests. SAMANTHA FRIEDMAN ET AL., U.S. DEP’T OF HOUS. & URBAN DEV., AN ESTIMATE OF HOUSING DISCRIMINATION AGAINST SAME-SEX COUPLES (2013), https://www.huduser.gov/portal/Publications/pdf/Hsg_Disc_against_SameSexCpls_v3.pdf.

being denied a home or apartment, and 5% reported being evicted, in the previous year because of their gender identity.⁶³ Even higher percentages of transgender women of color (17% of Black women, for example) and undocumented respondents (18%) reported being denied homes or apartments because of their gender identity.⁶⁴ Some gender minorities also reported experiencing violence, harassment, and being made to feel unwelcome by neighbors and landlords. For example, in *Smith v. Avanti*, a same-sex couple (including someone who is transgender) was denied a rental apartment because of the “uniqueness” of their relationship, which the landlord suggested would disrupt her “low profile” in the community.⁶⁵

Such experiences with forms of housing discrimination are not uncommon among LGBT people more broadly.⁶⁶ According to one nationally representative sample, 22% of LGBT people reported experiencing discrimination based on their sexual orientation or gender identity while attempting to rent or buy housing at some point in their lives.⁶⁷ In another nationally-representative sample, LGB adults were significantly more likely than their heterosexual peers to report being prevented from moving to or buying a house or apartment (15% and 6%, respectively).⁶⁸ Inherently, housing discrimination directly implicates one’s ability to remain in safe, stable, affordable housing, and therefore increases one’s possible need for CPD-funded services.

In a similar vein, LGBT people are disproportionately likely to experience discrimination in employment settings. Looking at gender minorities who participated in the USTS and had a job in the past year, 30% reported being fired, denied a promotion, or experiencing some other form of mistreatment in the workplace due to their gender identity or expression.⁶⁹ One in six (16%) respondents who have ever been employed reported losing a job due to their gender identity or expression, with transgender women (18%) more likely to have had such an experience than transgender men (14%) and non-binary people (7%).⁷⁰ Like housing discrimination, employment discrimination directly implicates one’s ability to afford housing, and therefore impact gender minorities’ ability to remain in safe, stable housing and thus increases their possible need for CPD-funded services. For example, affording rent or buying a home could be difficult for someone who loses their job or is not promoted due to discrimination. Discrimination early in life could compound over time to further limit financial security and housing affordability across the life course, thus creating a continued need to access services—and in turn, sustaining risk of continued discrimination.⁷¹

⁶³ JAMES ET AL., *supra* note 27.

⁶⁴ *Id.*

⁶⁵ F. Supp. 3d 1194 (D. Colo. 2017).

⁶⁶ See ROMERO ET AL., *supra* note 14.

⁶⁷ NPR, ROBERT WOOD JOHNSON FOUND. & HARVARD T.H. CHAN SCH. OF PUB. HEALTH, DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF LGBTQ AMERICANS (2017), <https://www.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf>.

⁶⁸ ILAN H. MEYER, WILLIAMS INST., EXPERIENCES OF DISCRIMINATION AMONG LESBIAN, GAY AND BISEXUAL PEOPLE IN THE US 1 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Discrimination-Work.pdf>.

⁶⁹ See JAMES ET AL., *supra* note 27.

⁷⁰ *Id.*

⁷¹ See ROMERO ET AL., *supra* note 14, at 23.

C. Impact of Discrimination and Stigma

Unchecked homelessness and housing instability have far-reaching effects on the health and well-being of gender minority youth and adults. Experiences with discrimination while homeless or living in an unstable housing situation can compound these risks, ensuring the continued negative impact of homelessness on gender minorities' financial security, health, well-being, and dignity. Any individual who is denied access to an emergency homeless shelter, for example, must, at a minimum, experience the difficulty of searching for a new shelter, with no certainty of being offered shelter by the next facility. If such a shelter does not exist, or is outside of a reasonable traveling distance, the person may face long-term unsheltered homelessness and/or have to move to an area with access to affirming services, if that is even feasible.

Discrimination related to sexual orientation or gender identity can also be psychologically damaging to the victim, because such discrimination carries a strong symbolic message of disapprobation of something core to that person's identity. This is true of all forms of discrimination, from slurs and harassment to more tangible actions such as being denied access to a shelter. According to one recent nationally representative survey, for example, among LGBT people who experienced sexual orientation or gender identity discrimination in the past year: 68.5% reported that discrimination negatively affected their psychological well-being; 43.7% reported that discrimination negatively impacted their physical well-being; 52.8% reported that discrimination negatively impacted their work environment.⁷²

In addition, anti-LGBT stigma drives well-documented health disparities between the LGBT and non-LGBT populations, including: disproportionately high prevalence of psychological distress, depression, anxiety, substance-use disorders, and suicidal ideation and attempts among LGBT people—many of which are two to three times greater among sexual and gender minorities than the non-LGBT majority.⁷³ According to the Institute of Medicine, “[c]ontemporary health disparities based on sexual orientation and gender identity are rooted in and reflect the historical stigmatization of LGBT people.”⁷⁴ Likewise, the Office of Disease Prevention and Health Promotion at the U.S. Department of Health and Human Services has explained: “Research suggests that LGBT individuals face health disparities linked to societal stigma, discrimination, and denial of their civil and human rights” and “[s]ocial determinants affecting the health of LGBT individuals largely relate to oppression and discrimination.”⁷⁵

⁷² Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways*, CTR. FOR AM. PROGRESS (May 2, 2017), <https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/>.

⁷³ See, e.g., *Lesbian, Gay, Bisexual, and Transgender Health*, OFFICE OF DISEASE PREVENTION & HEALTH PROMOTION, <https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health> (last visited Sept. 1, 2020); INSTITUTE OF MEDICINE, *THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING* 62 (2011).

⁷⁴ INSTITUTE OF MEDICINE, *supra* note 73, at 32.

⁷⁵ OFFICE OF DISEASE PREVENTION & HEALTH PROMOTION, *supra* note 73; see also *Stigma and Discrimination*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/msmhealth/stigma-and-discrimination.htm> (last visited Sept. 1, 2020).

The relationship between stigma and health has most clearly been articulated in the “minority stress” research literature. The minority stress model, which the Institute of Medicine has recognized to be a core perspective for understanding LGBT health,⁷⁶ describes how LGBT people experience chronic stress stemming from their stigmatization. While stressors—such as loss of housing or a job—are ubiquitous in society and are experienced by LGBT and non-LGBT people alike, LGBT people are uniquely exposed to stress arising from anti-LGBT stigma and prejudice. Prejudice leads LGBT people to experience *excess* exposure to stress compared with non-LGBT people who are not exposed to anti-LGBT prejudice (all other things being equal). This excess stress exposure confers an elevated risk for diseases caused by stress, including mental and physical health problems.⁷⁷

When a gender minority person faces discrimination because of their gender identity, that is a “prejudice event,” a type of minority stress, that has effects that are both tangible (i.e., the implications of needing to find a new shelter) and symbolic (i.e., the personal rejection and reverberation of social disapprobation). Further, experiencing discrimination—and even the threat of experiencing discrimination—increases expectations of future rejection and discrimination among LGBT people, including gender minorities. This expectation is another form of minority stress because it leads to vigilance by those seeking to defend themselves against potential discrimination. Indeed, discrimination and the resulting minority stress can lead to future avoidance of services and therefore increased risk of continued homelessness. And, unlike tangible prejudice events, expectations of rejection and discrimination are stressful even in the absence of a specific event and are based on what the LGBT person has learned from direct experience and from observation of how others like them are treated as social minorities.

III. The Proposed Rule stands to exacerbate disparities among gender minorities, eliminate uniformity and create confusion among CPD grantees and beneficiaries, and is contrary to efforts to safeguard public health.

Under the Proposed Rule, facilities would not be required to defer to an individual’s gender identity when determining their placement in single-sex and sex-segregated facilities.⁷⁸ Instead, grantees would be allowed to develop their own policies that would allow consideration of a host of factors and personal characteristics. Providing such broad discretion to grantees stands to exacerbate discrimination and gender identity-related disparities, eliminates uniformity among CPD grantees, and could result in increased need for CPD-funded programs and other government benefits.

⁷⁶ INSTITUTE OF MEDICINE, *supra* note 73, at 20.

⁷⁷ See Brandon L. Velez et al., *Testing the Tenets of Majority Stress Theory in Workplace Contexts*, 60 J. COUNSELING PSYCH. 532 (2013); Craig R. Waldo, *Working in a Majority context: A Structural Model of Heterosexism as Minority Stress in the Workplace*, 46 J. COUNSELING PSYCH. 218 (1999); see also Brief of Amici Curiae Ilan H. Meyer, PhD, and Other Social Scientists and Legal Scholars Who Study the LGB Population in Support of Respondents, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (filed Oct. 30, 2017), <https://williamsinstitute.law.ucla.edu/publications/amicus-masterpiece-cakeshop/>.

⁷⁸ 85 Fed. Reg. at 44,812.

A. Exacerbates Discrimination and Existing Disparities

The Proposed Rule stands to exacerbate the discrimination to which gender minorities are already subject. As discussed above, LGBTQ people are both more likely to be homeless or housing unstable, and to experience discrimination and harassment while attempting to access homeless shelters and related services.⁷⁹ Additionally, LGBTQ youth appear to remain homeless for longer periods of time than their non-LGBTQ peers.⁸⁰

Despite these realities, the Proposed Rule risks heightening the discriminatory treatment gender minorities encounter. The Proposed Rule allows providers to rely on sex stereotypes and, at their discretion, to insist that gender minorities access only those facilities that are consistent with their sex assigned at birth. Unlike the current Gender Identity Rule, which was intended to reduce the “significant violence, harassment, and discrimination in attempting to access programs, benefits, services, and accommodations”⁸¹ to which gender minorities are subject, the Proposed Rule would authorize discriminatory treatment that could, in turn, reduce the likelihood that this vulnerable population will seek life-saving CPD-funded services for fear of experiencing discrimination on the basis of their gender identity.⁸² This outcome is not hypothetical; for example, 26% of USTS respondents who were homeless nonetheless avoided shelters for fear of discrimination.⁸³

CPD attempts to mitigate the fact that individuals could be denied access to services (or be forced to accept compromised services) by requiring that covered facilities unwilling to provide shelter “provide a transfer recommendation to an alternative shelter or accommodation.”⁸⁴ However, this requirement fails to meaningfully address the problem as it does not require that transfer to an alternative provider actually occur—it merely requires that a recommendation be given. According to a recent nationally representative survey, 68% of LGBTQ respondents said it would be either somewhat difficult (28%), very difficult (31%) or impossible (9%) for them to find an alternative homeless shelter if they were refused access to their nearest shelter location.⁸⁵ For those in non-metropolitan areas, 76% similarly said it would be either somewhat difficult (21%), very difficult (36%), or impossible (19%) to find alternative shelter.⁸⁶ Finally, 62% of all respondents estimated needing to travel over 10 miles to find such an alternative shelter if denied access to the one closest to them.⁸⁷ Gender minorities in the sample reported even greater possible barriers to access: 87% of respondents who identified as transgender, nonbinary, agender, genderqueer, or gender nonconforming said it would be somewhat difficult (31%), very difficult (40%), or impossible (16%) to find alternative shelter if

⁷⁹ See generally ROMERO ET AL., *supra* note 14.

⁸⁰ See, e.g., CHOI ET AL., *supra* note 16; FREEMAN & HAMILTON, *supra* note 16.

⁸¹ 81 Fed. Reg. at 64,764.

⁸² See JAMES ET AL., *supra* note 27.

⁸³ *Id.*

⁸⁴ 85 Fed. Reg. at 44,815.

⁸⁵ Theo Santos, Lindsay Mahowald & Sharita Gruberg, *The Trump Administration’s Latest Attack on Transgender People Facing Homelessness*, CTR. FOR AM. PROGRESS (Sept. 3, 2020), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/09/03/490004/trump-administrations-latest-attack-transgender-people-facing-homelessness/>.

⁸⁶ *Id.*

⁸⁷ *Id.*

denied access initially, and 93% of such gender minority respondents estimated they would need to travel over 10 miles to find alternative shelter.⁸⁸

These findings suggest that requiring a transfer *recommendation* does not ensure that beneficiaries will in fact receive meaningful access to shelter and other services, much less in ways that accord with their gender identity. This is borne out by the limited existing data: According to one telephone test of 100 shelters in Connecticut, Washington, Tennessee, and Virginia, for example, only 30% of respondents were willing to house transgender women with other women, and 21% of those surveyed indicated they would refuse shelter to transgender women entirely.⁸⁹ Finally, because the Proposed Rule eliminates existing recordkeeping requirements without implementing a substitute, it will be impossible to determine whether this requirement has been successful in ensuring that beneficiaries can meaningfully access the services to which they are entitled.

B. Eliminates Uniformity

The Proposed Rule will likely result in placement policies that are not uniform across facilities funded by CPD. As such, the Proposed Rule contradicts the Department’s prior position that there was a “compelling need” for uniformity across these policies—a conclusion that was based on years of research demonstrating that allowing individual providers to design their own policies would result in discrimination against transgender people.

In 2012, the Department issued the Equal Access Rule aimed at “ensuring fair and equal access to housing for all Americans, regardless of their sexual orientation, gender identity, nonconformance with gender stereotypes, or marital status.”⁹⁰ This rule prohibited discrimination on these bases in programs and activities of the Department, as well as in housing that receives Department assistance or financing.⁹¹ However, in 2016, the Department found that, despite the Equal Access Rule, “transgender and gender nonconforming persons continue to experience significant violence, harassment, and discrimination in attempting to access programs, benefits, services, and accommodations.”⁹² Therefore, the Department found it necessary to issue another rule—the Gender Identity Rule—to mandate that service providers funded in whole or in part by CPD provide equal access to programs, benefits, services, and accommodations in accordance with an individual’s gender identity, and clarified within that Rule that grantees should defer to an individual’s self-identification when determining placement in facilities allowed to be maintained as either single-sex or sex-segregated.⁹³

⁸⁸ *Id.*

⁸⁹ Caitlyn Rooney, Laura E. Durso & Sharita Gruberg, *Discrimination Against Transgender Women Seeking Access to Homeless Shelters*, CTR. FOR AM. PROGRESS (Jan. 7, 2016), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2016/01/07/128323/discrimination-against-transgender-women-seeking-access-to-homeless-shelters/>.

⁹⁰ *HUD LGBTQ Resources*, U.S. DEP’T OF HOUS. & URBAN DEV., https://www.hud.gov/LGBT_resources (last visited Sept. 3, 2020).

⁹¹ Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5661 (Feb. 3, 2012).

⁹² 81 Fed. Reg. at 64,764.

⁹³ *Id.* at 64,763.

In issuing the Gender Identity Rule, the Department noted its objection to non-uniformity in this regard, even when considering the needs of “temporary, emergency shelters and other facilities with physical limitations or configurations that require and are permitted to have shared sleeping quarters or shared bathing facilities.”⁹⁴ Although the Department originally proposed that those emergency shelters be given the authority to decide, on a case-by-case basis, whether to house beneficiaries consistent with their gender identities,⁹⁵ the Department ultimately required that even such shelters defer to gender identity when making sex-based placements, suggesting a compelling need for uniformity even when circumstances might otherwise suggest a need for flexibility.⁹⁶ As the Department stated, it “has never intended to give broad discretion to recipients and participants to make case-by-case decisions [about sex-based placement,]”⁹⁷ because it “studied the issue for 4 years and determined, following the lead of other Federal agencies, that to ensure equal access, the general rule must be that individuals are accommodated in accordance with their gender identity. If [the Department] were to provide broader discretion, placement decisions would rely on more subjective factors that might differ from provider to provider based on the views, beliefs, and unsubstantiated fears of individual shelter staff.”⁹⁸

Despite this history, CPD has now chosen to reverse course and instead allow policies that would leave it to the discretion of providers whether to give deference to an individual’s self-identification. In formulating these policies, grantees would be permitted to consider a host of factors including privacy and safety,⁹⁹ and certain physical characteristics including “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.”¹⁰⁰ While the Proposed Rule would allow for policies that provide for placement consistent with an individual’s gender identity, such policies would no longer be uniformly required across all CPD-funded facilities.¹⁰¹ To the extent that any providers implement placement policies that rely

⁹⁴ *Id.* at 64,776.

⁹⁵ *Id.* at 64,777.

⁹⁶ *Id.*

⁹⁷ *Id.* at 64,776.

⁹⁸ *Id.* at 64,777.

⁹⁹ *Id.* at 44,818.

¹⁰⁰ *Id.* at 44,816.

¹⁰¹ In addition to eliminating uniformity, the Proposed Rule could expose providers to legal liability by leading them to think they are allowed to adopt policies that conflict with federal, state, and local laws. Despite the Proposed Rule’s assertion that the Fair Housing Act (“FHA”) does not apply to covered providers, courts have determined that the FHA does apply in some circumstances, as determined on a case-by-case basis. 85 Fed. Reg. at 44,812; *Schwartz v. City of Treasure Island*, 544 F.3d 1201, 1215 (11th Cir. 2008) (halfway houses for recovering addicts); *Lakeside Resort Enter. v. Bd. of Supervisors of Palmyra Twp.*, 455 F.3d 154, 158–60 (3rd Cir. 2006) (treatment facility); *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941, 942 (9th Cir. 1996) (homeless shelter); *Hovsons, Inc. v. Twp. of Brick*, 89 F.3d 1096, 1103 (3rd Cir. 1996) (nursing home); *Connecticut Hosp. v. City of New London*, 129 F. Supp. 2d 123, 135 (D. Conn. 2001) (halfway houses for substance abuse treatment); *Woods v. Foster*, 884 F. Supp. 1169, 1175 (N.D. Ill. 1995) (homeless shelter); *Baxter v. City of Belleville*, 720 F. Supp. 720, 731 (S.D. Ill. 1989) (residence for terminally ill); *U.S. v. Hughes Mem’l Home*, 396 F. Supp. 544, 549 (W.D. Va. 1975) (home for needy children). The Fair Housing Act, like Title VII of the Civil Rights Act, prohibits discrimination based on sex. 42 U.S.C. § 3601 (2020). In *Bostock v. Clayton County*, 590 U.S. ___ (2020), the U.S. Supreme Court determined that Title VII’s prohibition on sex discrimination encompasses discrimination based on gender identity. Given that courts often look to Title VII case law when interpreting analogous provisions in other laws, there is no plausible argument that *Bostock* would not apply to claims brought under the sex non-discrimination provisions of the FHA. *See, e.g., Grimm v. Gloucester Cty. Sch. Bd.*, No. 19-1952, 2020 WL 5034430, at *23 (4th Cir. Aug. 26, 2020), *as amended* (Aug. 28, 2020) (applying *Bostock* to find that acts of gender identity discrimination violate Title IX’s prohibition on

on factors other than an individual’s self-identification, transgender people will likely experience discrimination and be left without adequate access to needed services.

C. Results in Increased Need for Services

As noted above, CPD administers grant programs like HOPWA in recognition of the connection between meaningful access to stable housing and retention to care and management of disease. The data discussed in this comment show that gender minorities are disproportionately impacted by poverty, homelessness, and other housing issues; by HIV; and are particularly vulnerable to serious illness related to COVID-19, including because there are high concentrations of LGBT people within industries likely to be impacted by the pandemic.¹⁰² Together, these data suggest that gender minority people are generally likely to be in disproportionate need of services funded by CPD, independent of the Proposed Rule.

The Proposed Rule, however, anticipates that covered providers will have an enhanced flexibility to limit or otherwise outright deny gender minority people’s access to certain single-sex and sex-segregated facilities, including conditioning access on accepting accommodation consistent with their sex assigned at birth. In other words, the Proposed Rule will allow for situations where gender minority people could be denied access to CPD-funded services—which, under the Gender Identity Rule, they may currently be able to access—despite data demonstrating their need for such services. As explained above, experiencing denials of or limitations on access as allowed under the Proposed Rule will likely result in gender minorities experiencing additional minority stress, which will in turn only continue to increase their exposure to the types of conditions that then require the aid of CPD-funded services.

IV. CPD failed to engage in an adequate regulatory impact analysis, and, in particular, failed to consider the costs of the proposal on gender minorities and their ability to access CPD-funded services.

Under Executive Orders 12866 and 13563, CPD is required to fully analyze the costs and benefits of proposed rules.¹⁰³ “Agencies have long treated costs as a centrally relevant factor in

sex discrimination); *Adams v. Sch. Bd. of St. Johns Cty., Fla.*, 968 F.3d 1286 (11th Cir. 2020) (same). Moreover, many state and local laws prohibit housing discrimination based on gender identity and/or sex, and may also apply to CPD grantees. CHRISTY MALLORY, LUIS A. VASQUEZ & CELIA MEREDITH, WILLIAMS INST., LEGAL PROTECTIONS FOR LGBT PEOPLE AFTER *BOSTOCK V. CLAYTON COUNTY* 10 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Bostock-State-Laws-Jul-2020.pdf>. Consistent with longstanding principles of non-discrimination law, these laws would prohibit providers from failing to treat beneficiaries in accordance with their gender identity. By asserting that the FHA does not apply to covered entities, the Proposed Rule could lead providers to incorrectly believe that they are allowed to adopt discriminatory policies.

¹⁰² The Human Rights Campaign Foundation estimates that, based on data from the 2018 General Social Survey, over 5 million LGBTQ people are employed in sectors likely to be impacted by the COVID-19 pandemic, including many whose work requires frequent close contact with others. See CHARLIE WHITTINGTON ET AL., HUMAN RIGHTS CAMPAIGN FOUND., THE LIVES & LIVELIHOODS OF MANY IN THE LGBTQ COMMUNITY ARE AT-RISK AMIDST THE COVID-19 CRISIS 2 (2020), https://assets2.hrc.org/files/assets/resources/COVID19-IssueBrief-032020-FINAL.pdf?_ga=2.94294430.205881203.1588012193-590966580.1588012193 (naming the top five industries for LGBTQ people as restaurants and food services, hospitals, K–12 education, colleges and universities, and retail).

¹⁰³ Exec. Order No. 12866, §§ 6-7, 58 Fed. Reg. 51,735 (Oct. 4, 1993); Exec. Order No. 13563, § 1(c), 76 Fed. Reg. 3821 (Jan. 21, 2011).

determining whether to regulate,” and “any disadvantage could be termed a cost.”¹⁰⁴ However, CPD has failed to meet this obligation here because it did not assess and account for the foreseeable costs of the Proposed Rule, including to beneficiaries of CPD-funded services—and gender minorities in particular—and to the government in terms of increased discrimination and impacts to public health.

While CPD argues that the Proposed Rule is necessary due to safety concerns raised by cisgender women, it also states that it is “not aware of data suggesting that transgender individuals pose an inherent risk to [cisgender] women”¹⁰⁵ Instead, CPD relies only on “anecdotal evidence that some women may fear that non-transgender, biological men may exploit the process of self-identification under the current rule in order to gain access to women’s shelters.”¹⁰⁶ In other words, CPD has offered no credible evidence that transgender women—or gender minorities more broadly—pose a risk to the safety of cisgender women within CPD-funded facilities, nor has it provided any evidence, for example, of cisgender men posing as transgender women to gain access to CPD facilities. Further, CPD has offered no justification as to why the “anecdotal” fears of cisgender women over undocumented potential risks would outweigh the rights of transgender women seeking CPD services to which they are entitled. The broad scope of this Proposed Rule demands a much more robust, evidence-based, overall analysis than what has been conducted by CPD here.

For example, the Proposed Rule is expressly designed to expand the circumstances in which CPD grantees will be excused from serving certain beneficiaries who seek services at single-sex and sex-segregated facilities. Yet, CPD’s brief discussion of the costs of the Proposed Rule does not note whether it considered the impact of the rule on such beneficiaries, noting simply that the proposal is “not economically significant.”¹⁰⁷ However, the definition of “economically significant” impact under Executive Order 12866¹⁰⁸ demonstrates otherwise. As one example, in light of the recognized link between access to housing and health care outcomes, and the likelihood that the Proposed Rule will lead at least some already vulnerable gender minority people to be refused or otherwise avoid services, it appears likely that the Proposed Rule will “adversely affect . . . public health” within the context of the current COVID-19 pandemic (as individuals refused service are at risk of remaining unsheltered, a population which faces particular challenges in abiding by certain practices intended to slow the spread of COVID-19, as recognized by the CDC)¹⁰⁹ and would therefore be the type of rulemaking intended to undergo impact analysis under Executive Order 12866.

¹⁰⁴ *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

¹⁰⁵ 85 Fed. Reg. at 44,815.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 44,817.

¹⁰⁸ Exec. Order No. 12866, § 3(f)(1) (defined as “an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities”).

¹⁰⁹ *Interim Guidance on People Experiencing Unsheltered Homelessness*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 6, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html>.

Additionally, while CPD is obligated “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible,”¹¹⁰ CPD did not attempt to analyze or quantify several costs or benefits including:

- Increased access to services. CPD has suggested, for example, that the Proposed Rule will result in increased access to services because providers with religious convictions could be discouraged from providing services if required to house gender minorities consistent with their gender identities.¹¹¹ But CPD has provided no concrete data to show that such facilities have sought or will seek to limit their provision of services if not permitted to discriminate. In fact, available data suggest that the Gender Identity Rule has not limited service provision in any way. Per records provided by the Department following a March 2017 FOIA request submitted by the Center for American Progress, it does not appear that any faith-based organizations sought waiver of the Department’s 2012 Equal Access and 2016 Gender Identity Rules through to May 31, 2017.¹¹² Although the available data indicate that no religious facilities have sought an exemption to the Gender Identity Rule, the Proposed Rule may encourage such facilities to discriminate against transgender beneficiaries by expressly authorizing them to do so.
- Impact of the Proposed Rule on the vulnerable populations served by CPD-funded programs, including on the health and well-being of beneficiaries likely to experience delays, denials, gaps, and other problems related to access to services if the rule were to be implemented. Because the Proposed Rule is expressly designed to broaden circumstances where gender minority individuals can be denied access to services without a guarantee that they will be served elsewhere, it is likely that those denials will increase. CPD must thus consider the risks of harm to these individuals, along with, more broadly, the public health risks posed when such individuals are unable to access services they need. Additionally, because the Proposed Rule would allow facilities to craft sex determination policies inclusive of a broad range of factors—including height and facial hair—that would affect all of those who fail to conform to certain sex stereotypes but are not transgender, CPD must consider harms to these individuals as well.
- Increased government expenditures on CPD-funded services or other government-funded benefits that beneficiaries may be forced to (continue to) utilize on account of discrimination permitted by the Proposed Rule making it difficult for them to secure shelter and the benefits associated with same. In particular, we urge such consideration in instances where permitted discrimination could compound challenges in areas impacted by housing need, including efforts to control the spread of COVID-19 and HIV and programs related to food insecurity.¹¹³ As discussed above, data from the Department show that gender minority people are particularly likely to be homeless, and to be unsheltered when homeless. The Proposed Rule, by inviting denials of access to such

¹¹⁰ Exec. Order No. 13563, § 1(c).

¹¹¹ 85 Fed. Reg. at 44,814.

¹¹² Santos et al., *supra* note 85.

¹¹³ WILSON ET AL., *supra* note 42 (noting that, among a sample of low-income LGBTQ in Los Angeles and Kern County, a lack of access to housing with a kitchen and places to store food were cited as key barriers to being able to use charitable food services among participants).

individuals, risks increasing the unsheltered homelessness rate among this population and the likelihood that gender minorities remain homeless for longer periods of time. This would, in turn, ensure that such individuals are eligible for (and continue to remain eligible for longer periods of time) government programs contingent on being homeless or at risk of losing housing,¹¹⁴ including such programs not administered by CPD.¹¹⁵

To the extent that there is uncertainty about the costs or benefits of the Proposed Rule, CPD should follow existing White House guidance and conduct “additional research prior to rulemaking” to address any such uncertainties, because “[t]he costs of being wrong may outweigh the benefits of a faster decision.”¹¹⁶ And even if some of harms posed by the Proposed Rule are uncertain or challenging to quantify, the magnitude of them is significant and not zero,¹¹⁷ and as such CPD should reconsider its analysis and classification of the economic significance of the Proposed Rule.

V. Conclusion

In light of the risks the Proposed Rule poses to the health and well-being of gender minority people, and CPD’s failure to consider those effects as part of this rulemaking, it should be withdrawn in its entirety. Thank you for your consideration. Please direct any correspondence to vasquezl@law.ucla.edu.

Respectfully Submitted,

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¹¹⁴ See *Continuum of Care (CoC) Homeless Assistance Program*, BENEFITS.GOV, <https://www.benefits.gov/benefit/5889> (last visited Sept. 22, 2020).

¹¹⁵ See, e.g., *Spotlight on Homelessness*, SSA.GOV (2020), <https://www.ssa.gov/ssi/spotlights/spot-homeless.htm> (describing a program funded by the Substance Abuse and Mental Health Services Administration to “designed to increase access to the disability income benefit programs administered by SSA for eligible adults who are experiencing or at risk of homelessness and have a serious mental illness, medical impairment, and/or a co-occurring substance use disorder.”).

¹¹⁶ Office of Mgmt. & Budget, Exec. Office of the President, Circular A-4 at 39 (Sept. 17, 2003).

¹¹⁷ See, e.g., *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1200 (9th Cir. 2008).

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