

**STATEMENT OF
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Hearing on

**“Financial Services and the LGBTQ+ Community: A Review of Discrimination in Lending
and Housing”**

House Committee on Financial Services

Subcommittee on Oversight & Investigations

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Chair Green, Ranking Member Barr, and Members of the Subcommittee: My name is Harper Jean Tobin, and I am the Director of Policy for the National Center for Transgender Equality, a role I have served in since 2009. Thank you for the opportunity to testify regarding the challenges of, solutions to, discrimination in housing and lending faced by LGBTQ Americans.

The National Center for Transgender Equality (NCTE) is a nationwide, non-profit, non-partisan organization founded in 2003 to promote public understanding, opportunity, and well-being for the nearly two million Americans who are transgender. NCTE works with federal and state policymakers to promote informed and equitable public policies in a wide range of areas, including housing, homelessness, economic opportunity, civil rights, bias-motivated violence. In 2015, NCTE conducted the largest survey of transgender people to date, the US Transgender Survey (USTS), which explored the life experiences of nearly 28,000 transgender people.¹

I. Transgender People Are a Part of the American Community

Transgender people—people who know themselves to be a gender that is different from the one they were thought to be at birth—live in every state and every Congressional district. It is estimated that 1.4 million American adults and 150,000 youth between the ages of 13 and 18 identify as transgender.² In all, nearly two million Americans are transgender. The geographic distribution of the transgender Americans is similar to that of the United States population overall.³ Transgender people are of every age,⁴ every faith,⁵ every race and ethnicity,⁶ and come from every walk of life.

¹ Sandy E. James et al, *The Report of the 2015 U.S. Transgender Survey* (2016), www.ustranssurvey.org/reports.

² Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?* (2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-UnitedStates.pdf> (estimating that 0.6% of adults in the United States identify as transgender); Jody L. Herman et al., *Age of Individuals who Identify as Transgender in the United States* (2017), <https://williamsinstitute.law.ucla.edu/wpcontent/uploads/TransAgeReport.pdf> (estimating that 0.7% of people in the United States between the ages of 13 and 17, or 150,000 adolescents, are transgender).

³ Flores et al., *supra* note 2, at 3-4; *2015 USTS*, *supra* note 1, at 53.

⁴ Herman et al., *supra* note 2, at 3.

While being transgender need not and should not be an obstacle to success or opportunity in this country, an enormous body of research demonstrates that today transgender Americans face severe and widespread stigma and discrimination.

II. Findings of the 2015 U.S. Transgender Survey

The 2015 U.S. Transgender Survey (USTS) is the largest survey examining the experiences of transgender people in the United States, with 27,715 respondents from all fifty states, the District of Columbia, American Samoa, Guam, Puerto Rico, and U.S. military bases overseas. Conducted in the summer of 2015 by the National Center for Transgender Equality, the USTS was an anonymous, online survey for transgender adults (18 and older) in the United States, available in English and Spanish. Findings from the 2015 USTS provide a detailed look at the experiences of transgender people across a wide range of categories, such as education, employment, family life, health, housing, and interactions with the criminal justice system. The report of the 2015 USTS, along with the numerous secondary analyses of its data conducted by researchers since its publication, has helped shift how the public and policymakers view the lives of transgender people and the challenges they face.⁷

The findings of the USTS revealed disturbing patterns of mistreatment and discrimination and staggering disparities between transgender people in the survey and the U.S. population when it comes to the most basic elements of life, such as finding a job, having a place to live, accessing medical care, and enjoying the support of family and community. These extraordinary disparities were found across all segments of the transgender population, but were most pronounced among transgender people of color, transgender people with disabilities, those living with HIV, undocumented immigrants, and current and former sex workers.

Despite the undeniable hardships faced by transgender people, USTS respondents' experiences also show some of the positive impacts of growing visibility and acceptance of transgender people in the United States. One such indication is the unprecedented number of transgender people—nearly 28,000—who completed the survey. This number of transgender people who elevated their voices reflects the historic growth in visibility that the transgender community has seen in recent years.

Methodology

The 2015 U.S. Transgender Survey was developed in order to examine the experiences of transgender adults across a wide range of areas of their lives. The survey instrument was comprised of thirty-two sections with 324 possible questions, covering a broad array of topics. In addition to housing, homelessness, and shelters, it included topics related to employment,

⁵ James et al., *supra* note 1, at 55.

⁶ Andrew R. Flores, Taylor N. T. Brown, & Jody L. Herman. *Race and Ethnicity of Adults Who Identify as Transgender in the United States* (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Race-and-Ethnicity-ofTransgender-Identified-Adults-in-the-US.pdf>.

⁷ All findings in this section are taken from James et al., *supra* note 1, primarily from Chapter 13, "Housing, Homelessness, and Shelter Access," pp. 175-83. The full report, and other topical reports based on the 2015 USTS, can be found at www.ustranssurvey.org/reports.

schools, interactions with the criminal justice system, faith communities, and family life, among others. The survey was available in English and Spanish over a 34-day period. It was open to adults (age 18 and over) living in the United States who are transgender, including men, women, and people whose gender is not male or female (e.g., non-binary people). T

The USTS questionnaire was developed over the course of a year by a core team of researchers in collaboration with dozens of individuals with lived experience, advocacy and research experience, and subject-matter expertise. When developing the survey instrument, the research team focused on creating a questionnaire that could provide data to address both current and emerging needs of transgender people while gathering information about disparities that often exist between transgender people and non-transgender people throughout the United States. To achieve this, questions were included that would allow comparisons between the USTS sample and known benchmarks for the U.S. population. Questions were selected to best match those previously asked in federal government or other national surveys on a number of measures, such as measures related to income, employment status, and health.

Findings on Housing, Homelessness, and Shelters

The USTS examined respondents' experiences related to housing and homelessness, including their experiences with specific forms of housing discrimination and instability occurring in the past year because of their transgender status. It also examined respondents' access to shelters and the treatment they received in those shelters as transgender people.

1. Lower rates of home ownership

Respondents were asked what their current living arrangements were at the time they participated in the survey. Only 16% reported that they were living in a house, apartment, or condo that they owned. By contrast, the homeownership rate at the time of the survey in the U.S. was 63%, meaning that respondents were about four times less likely to own a home than the U.S. population overall.

Large differences in the rate of homeownership were consistent among age groups. For example, respondents aged 25-34 were more than three times less likely to own a home than people aged 25-34 in the U.S. overall. Respondents aged 35-44 were half as likely to own a home as members of that age group in the U.S. overall. Less than half of respondents aged 45-54 owned a home, compared to more than two thirds in the U.S. population. The homeownership rate among respondents aged 55-64 was 58%, and among respondents aged 65 and older it was 69%—compared to 75% and 78% in the U.S. population, respectively.

2. High rates of homelessness

Nearly one third (30%) of respondents had experienced homelessness during their lifetime. The homelessness rate was substantially higher among those whose family had kicked them out of the house for being transgender, with nearly three-quarters (74%) of those respondents experiencing homelessness. Compared to the overall sample, the homelessness rate was nearly twice as high among respondents who have done sex work (59%) and respondents living with HIV (59%), as well as respondents who have lost their job because of being transgender (55%).

Transgender women of color, including Native (59%), Black (51%), multiracial (51%), and Middle Eastern (49%) women, also experienced especially high rates of homelessness.

Looking only at the year prior to taking the survey, **12% of respondents reported that experienced homelessness during that year as a result of anti-transgender bias.** The homelessness rate for the previous year was especially high among those currently working in the underground economy (such as in sex work, drug sales, and other work that is currently criminalized) (37%), undocumented residents (32%), and those living with HIV (27%). Transgender women of color, including Black (31%) and Native (27%) women, were also substantially more likely to report experiencing homelessness in the past year because of being transgender.

Respondents were also asked about their living situation at the time that they took the survey. Experiences of homelessness and housing instability occurred at high rates, even though respondents who were experiencing housing instability at the time the survey was fielded were likely underrepresented in the sample. **Nearly one in ten (9%) respondents was living temporarily with friends or family because they could not afford their own housing. Approximately half of one percent (0.53%) of respondents were experiencing homelessness at the time they participated in the survey,** including those who were living in a shelter (other than a domestic violence shelter) or on the street. For context, in 2015 the Department of Housing and Urban Development estimated that on a given night 0.18% of the U.S. population was experiencing homelessness. While it is not possible to generalize from the USTS sample to the general population—especially when it comes to estimates of people experiencing homelessness, who were likely underrepresented in the USTS sample—if this rate were to hold true for the transgender population overall, it would suggest that there may more than 7,400 transgender people experiencing homelessness at a given time in the United States.

3. Housing discrimination and instability in the previous year

Respondents were asked about specific experiences with housing discrimination and instability that occurred *in the past year* because they were transgender.⁸ These experiences included, among others, being evicted from their home, being denied a home or apartment, experiencing homelessness, or having to sleep in different places for short period of time (such as on a friend's couch).

In the year prior to taking the survey, 6% of respondents were denied a home or apartment because of being transgender when they attempted to buy or rent one. While the USTS cannot be generalized to the transgender population as a whole, it is noteworthy that 6% of the adult transgender population would represent approximately 84,000 individuals. Housing discrimination was even more common among transgender people of color. More than one in six (17%) Black women had been denied a home or apartment in the previous year because of being

⁸ Respondents were given the choice of answering “yes,” “no,” or “does not apply to me” for each housing situation. For example, a respondent who did not try to rent or buy a home or apartment in the past year could select “does not apply to me” when asked about being denied a home or apartment.

transgender. Multiracial women (15%) and Latinas (11%) also reported this experience at higher rates.

In just the year prior to taking the survey, five percent (5%) of respondents were evicted from their home or apartment because of being transgender. Undocumented residents faced especially high rates of eviction in the past year that occurred specifically because of their transgender status, with nearly one fifth (18%) reporting this experience. Transgender people with disabilities (8%) and people of color, including Native (9%) and Black (9%) respondents, were also more likely to report eviction.

Overall, **nearly one third (30%) of respondents to whom these situations applied—23% of all respondents—experienced one or more forms of housing discrimination or instability in the previous year because they were transgender.** This rate was especially high among respondents who were currently doing sex work or other work in the underground economy, with more than half (59%) reporting one of more of these experiences. More than half (59%) of respondents who had been kicked out of the house by their family at some point experienced housing instability in the previous year. Undocumented residents (50%) and transgender women of color were also more likely to have had one or more of these experiences in the past year, including Black (49%), multiracial (39%), Native (39%), and Latina (37%) women.

4. Barriers to accessing emergency shelter

Respondents who experienced homelessness in the previous year because of being transgender were asked if they had gone to a homeless shelter during that year. More than one quarter (26%) reported that, in the previous year, they *did not try* to go to a homeless shelter because they were afraid of being mistreated as a transgender person. Additionally, 6% were outright denied access to a shelter because of being transgender, a rate that spiked to 30% among multiracial women and 13% among Black women.

Those who did stay in shelters frequently experienced mistreatment because of being transgender. **In the previous year, seven in ten transgender shelter-seekers (70%) faced mistreatment at a shelter because of being transgender,** such as being forced out, harassed, or physically assaulted because they were transgender.

Nearly one in ten (9%) respondents who stayed at a shelter in the past year was thrown out after the shelter staff found out that they were transgender. Nearly half (44%) decided to leave the shelter because of being mistreated or feeling unsafe, even when they had nowhere else to go.

Transgender people are frequently denied access to shelters consistent with their gender identity, often forcing them to choose between suppressing their deeply held identity and attempting to present themselves as the sex they were assigned at birth on one hand, and foregoing shelter access entirely on the other. One quarter (25%) of respondents decided to dress or present as the “wrong gender” (the phrasing used in the questionnaire) in order to feel safe in a shelter. Additionally, 14% said the shelter staff forced them to dress as the “wrong gender” as a condition of staying in the shelter. This could mean, for example, that a transgender woman who

has lived as a woman for many years is forced to hide her breasts and pretend to be a man in order to access shelter.

Respondents who stayed at a homeless shelter in the past year were also asked about harassment and violence they may have faced. Nearly half (49%) reported that they were verbally harassed at a shelter because they were transgender. Nearly one fifth (19%) were physically attacked, and 17% were sexually assaulted at the shelter because they were transgender.

Unfortunately, other researchers have also found that some shelters continue to turn away people in need simply because they are transgender.⁹ Researchers have also found that LGBTQ people turned away from shelters cannot easily find someplace else to go.¹⁰

Additional USTS Findings on the Drivers and Impacts of Homelessness

Transgender people's experiences with housing and homelessness are affected by and contribute to their health, financial stability, and overall wellness. Several key findings from the USTS are presented here to provide important context.

1. Transgender people face high rates of unemployment and poverty

The high rates of homelessness and low rates of home ownership in the USTS should be understood in the context of high rates of poverty and unemployment. Transgender people in the sample were far more likely to be unemployed and living under the poverty line than the adult population in the United States overall. At the time that the survey was fielded, the unemployment rate in the U.S. was 5%. Among USTS respondents, the unemployment rate was three times higher (15%).

Similarly, while the poverty rate among U.S. adults was 12%, nearly one in three (29%) USTS respondents were living under the poverty line.

2. Family support or rejection is a key factor in transgender homelessness

While most respondents reported that their family was supportive of them as a transgender person, too many faced rejection from their families. One in twelve (8%) respondents who were out to their immediate family were kicked out of the house because of being transgender, and one in ten (10%) ran away from home. Many transgender people are forced to leave their homes to avoid abuse. In the USTS, one in ten (10%) respondents who were out to their immediate family experienced violence at the hands of a family member because they were transgender.

⁹ Caitlin Rooney, Laura E. Durso, & Sharita Gruberg, *Discrimination Against Transgender Women Seeking Access to Homeless Shelters* (Jan. 7, 2016), <https://www.americanprogress.org/issues/lgbt/reports/2016/01/07/128323/discrimination-against-transgender-women-seeking-access-to-homeless-shelters/> (reporting results of matched-pair testing of 100 shelters in four states in 2015).

¹⁰ Sarah Kellman, Laura E. Durso, Sharita Gruberg, & Caitlin Rooney, *The Dire Consequences of the Trump Administration's Attack on Transgender People's Access to Shelters* (Jul. 31, 2019), <https://www.americanprogress.org/issues/lgbt/news/2019/07/31/472988/dire-consequences-trump-administrations-attack-transgender-peoples-access-shelters/> (reporting results from nationally representative 2017 survey of LGBTQ adults).

USTS respondents were substantially less likely to face homelessness and housing instability when they had their family's support. Noted above is the stark finding that almost three quarters (74%) of respondents who were kicked out of the house for being transgender faced homelessness. Among respondents who face violence from a family member because of being transgender, nearly six in ten (59%) experienced homelessness. Those with unsupportive families were far more likely to experience homelessness than those with supportive families: 45% of those who said that their families were generally unsupportive experienced homelessness, compared to 27% of those who said that their family was currently supportive.

3. Transgender homelessness is linked to poor health, suicidality, and victimization

Respondents who experienced homelessness faced far poorer health outcomes compared to the sample overall. For example, 59% of those who have experienced homelessness have attempted suicide, compared to the already-startling rate of 40% in the sample overall. These respondents were also nearly twice as likely as the general sample and nine times more likely than the U.S. population to be living with HIV, with an HIV prevalence of 2.7%.

Those who had experienced homelessness in their lifetime were more likely to face abuse and violence. In the overall sample, nearly half (47%) of respondents had been sexually assaulted. Among people who had experienced homelessness, that figure spikes to nearly two thirds (65%). Additionally, 61% experienced intimate partner violence.

4. Survivors of conversion therapy report higher rates of homelessness

Conversion therapy is the harmful and medically baseless attempt to change someone's gender identity or try to stop them from being transgender. Approximately one in seven (13%) USTS respondents had experienced conversion therapy directed at their gender identity.¹¹ Those respondents were more likely to have experienced homelessness, with about half (46%) having been homeless.

III. Fair housing and lending laws forbid anti-transgender discrimination

For nearly twenty years, federal courts have overwhelmingly held that discrimination targeting transgender people is covered by federal sex discrimination statutes, including the Fair Housing Act and the Equal Credit Opportunity Act.¹² As early as 2000, the First Circuit held that

¹¹ Additionally, 10% experienced conversion therapy directed at their sexual orientation.

¹² See, e.g., *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017) (holding that discrimination against transgender students constitutes sex discrimination under Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the U.S. Constitution); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016) (holding that discrimination against transgender students likely constitutes sex discrimination under Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the U.S. Constitution); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (holding that termination of employee based on her gender transition, transgender status and unsubstantiated "bathroom concerns" constitutes sex-based discrimination in violation of the Equal Protection Clause of the U.S. Constitution); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (holding that termination of employee based on her gender transition constitutes sex-based discrimination under Title VII of the 1964 Civil Rights Act); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (holding that termination of employee based on her gender transition constitutes sex-based discrimination under Title VII); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (holding that refusal to serve transgender customer constitutes sex-based discrimination under the Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187

discriminating against a person because they are transgender or do not conform to gender stereotypes is unlawful sex discrimination under the Equal Credit Opportunity Act.¹³ In that case, a bank teller refused to serve a customer she perceived to be male because the customer wore traditionally feminine clothing, instructing the customer to go home and change. Describing the customer in now-outdated language as “cross-dressing,” the First Circuit held that the customer could state a sex discrimination claim under the Equal Credit Opportunity Act, because the teller perceived the customer to be male and “she thought that [the customer’s] attire did not accord with his male gender,” whereas she would have served a customer whom she perceived to be female if they dressed in the same manner.¹⁴

In 2010, HUD followed this body of case law in adopting the view that the Fair Housing Act prohibits discrimination against transgender people.¹⁵ In accordance with this interpretation, in 2013 the Justice Department brought an action under the Fair Housing Act against a housing provider who allegedly evicted a woman and her partner because she was transgender.¹⁶ In 2014, the Justice Department successfully settled this case, obtaining relief for the couple.¹⁷

In 2016, in the preamble to its final rule on discriminatory harassment under the Fair Housing Act, HUD again confirmed its adherence to this understanding of the Fair Housing Act:

HUD agrees with the commenters’ view that the Fair Housing Act’s prohibition on sex discrimination prohibits discrimination because of gender identity. In *Price Waterhouse v. Hopkins*, the Supreme Court interpreted Title VII’s prohibition of sex discrimination to encompass discrimination based on non-conformance with sex stereotypes, stating that “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” Taking note of *Price Waterhouse* and its progeny, in 2010, HUD issued a memorandum recognizing that sex discrimination prohibited by the Fair Housing Act includes discrimination because of gender identity. In 2012, the Equal Employment Opportunity Commission (EEOC) reached the same conclusion, “clarifying that claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII’s sex discrimination prohibition.” Following the EEOC’s decision, the Attorney General also concluded that:

the best reading of Title VII’s prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status. The most straightforward reading of

(9th Cir. 2000) (holding that the Gender Motivated Violence Act (GMVA) applied to targeting of a transgender person); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); see also *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (holding that discrimination against transgender workers may sometimes constitute sex discrimination under Title VII but that such discrimination was not covered in all cases).

¹³ *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000).

¹⁴ *Rosa*, 214 F.3d at 215–16.

¹⁵ See Dep’t of Housing & Urban Dev., *HUD Issues Guidance on LGBT Housing Discrimination Complaints*, Press Release (July 1, 2010), <https://archives.hud.gov/news/2010/pr10-139.cfm>.

¹⁶ *U.S. v. Toone*, No. 6:13-cv-00744 (E.D. Tex. filed Oct. 3, 2013).

¹⁷ *U.S. v. Toone*, No. 6:13-cv-00744, Mediated Settlement Order (E.D. Tex. July 17, 2014).

Title VII is that discrimination “because of . . . sex” includes discrimination because an employee’s gender identification is as a member of a particular sex, or because the employee is transitioning, or has transitioned, to another sex.

HUD reaffirms its view that under the Fair Housing Act, discrimination based on gender identity is sex discrimination. Accordingly, quid pro quo or hostile environment harassment in housing because of a person’s gender identity is indistinguishable from harassment because of sex.¹⁸

In recent years, the vast majority of federal courts and the EEOC have continued to adhere to the view that sex-based discrimination includes anti-LGBTQ discrimination. In 2017, for example, a federal district court ruled on the case of a landlord who refused to rent to two women and their children because one of them was transgender, saying their “uniqueness” would jeopardize the landlord’s “low profile” in the community.¹⁹ The court held that the case squarely presented allegations of discrimination on the basis of sex stereotypes under *Price Waterhouse v. Hopkins*. Applying similar principles, in 2018 the U.S. Court of Appeals for the Seventh Circuit held that a pattern of harassment towards an assisted living facility resident based on her 30-year relationship with another woman, in which “[f]or 15 months, she was bombarded with threats, slurs, derisive comments about her family, taunts about a deadly massacre, physical violence, and spit,” constituted sex-based discrimination under the Fair Housing Act.²⁰

In addition to the sale and rental of housing, the Fair Housing Act applies to a wide range of residential facilities, from assisted-living and skilled nursing homes to transitional housing programs. In some cases, the Fair Housing Act also applies to emergency shelters. Courts have held that whether a facility constitutes a covered “dwelling” under the Act is a fact-specific inquiry based on factors including how long individuals reside there and whether they view it as a place to return to during that time.²¹ Applying this standard, courts have held that some homeless shelters are covered under the Fair Housing Act, while others are not, based on the application of these factors to how the shelter is operated.²² Accordingly, many (though not all) homeless shelters are covered under the Fair Housing Act’s prohibition on discrimination on the basis of sex, including discrimination against LGBTQ individuals.

¹⁸ Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act; Final Rule, 81 Fed. Reg. 63054, 63058 (Sept. 14, 2015) (internal citations omitted).

¹⁹ *Smith v. Avanti*, 249 F.Supp.3d 1194 (D. Colo. Apr. 5, 2017).

²⁰ *Wetzel v. Glen St. Andrew Living Cmty.*, 901 F.3d 856 (7th Cir. 2018).

²¹ See, e.g., *United States v. Columbus Country Club*, 915 F.2d 877 (3d Cir. 1990); *United States v. Hughes Memorial Home*, 396 F.Supp. 544 (W.D.Va. 1975).

²² Compare, e.g., *Hunter ex rel. A.H. v. D.C.*, 64 F.Supp.3d 158, 177 (D.D.C. 2014) (homeless shelter is a dwelling under the FHA); *Boykin v. Gray*, 895 F.Supp.2d 199, 207 (D.D.C. 2012) (same); *Jenkins v. New York City Dep’t of Homeless Servs.*, 643 F.Supp.2d 507, 517–18 (S.D.N.Y.2009) (same); *Woods v. Foster*, 884 F.Supp. 1169, 1173 (N.D.Ill.1995) (same); with *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 717 F.Supp.2d 1101, 1109 (D. Idaho 2010), aff’d on other grounds, 657 F.3d 988 (9th Cir. 2011) (homeless shelter is not a dwelling under the FHA).

However, the Justice Department under the Trump Administration has repudiated that view, first in an October 6, 2017 Attorney General memo,²³ and more recently in briefs to the Supreme Court in three cases arising under Title VII of the 1964 Civil Rights Act. The first two consolidated cases, *Bostock v. Clayton County Georgia* and *Altitude Express, Inc. v. Zarda* present the question of whether the prohibition of sex-based discrimination in Title VII of the Civil Rights Act of 1964 applies to discrimination based on an individual's sexual orientation.²⁴ In a third case to be heard separately, *R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission*, the Supreme Court will decide whether Title VII prohibits discrimination against transgender people based on (1) their transgender status or (2) sex stereotyping under the Court's 1989 precedent *Price Waterhouse v. Hopkins*.²⁵

The Trump Administration has asked the Supreme Court to strip away legal protections that LGBTQ Americans have enjoyed, and that numerous federal courts have recognized, for many years. While the Fair Housing Act and the Equal Credit Opportunity Act are separate and distinct statutes, these cases could have implications for housing and lending protections, underscoring the need to preserve protections for all Americans.

IV. HUD's Equal Access Rule is the product of extensive deliberation and based on substantial evidence

Independent of federal sex discrimination statutes, HUD is authorized to, and has wisely chosen to, prohibit arbitrary discrimination in HUD-funded programs. The current HUD Equal Access Rule (codified at 5 C.F.R. sections 5.105 and 5.106) is the product of years of development, study, and experience by HUD in consultation with direct service providers across the country. The Rule, and particularly its 2016 clarification, built on the success of the 2013 Violence Against Women Reauthorization Act, which extended the same protections to VAWA-funded programs, with broad support from the domestic and sexual violence field.²⁶ The Rule also reflects the successful experiences of hundreds of cities and counties and over 20 states, covering nearly half the U.S. population, that have similar laws protecting equal housing opportunity and equal access to emergency shelters.²⁷

As previously noted, HUD first recognized that the Fair Housing Act prohibits anti-LGBTQ bias as early as 2010. In 2011, after consultation with housing providers and advocates, HUD first proposed the Equal Access Rule, citing "evidence suggesting that LGBT individuals and families do not have equal access to housing," and stating that, "[i]n considering the mounting evidence of violence and discrimination against LGBT persons, the Department is concerned that its own

²³ Memorandum from Attorney General Jeff Sessions, *Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Oct. 4, 2017), <https://assets.documentcloud.org/documents/4067383/Attachment-2.pdf>.

²⁴ 139 S. Ct. 1599 (2019).

²⁵ 139 S. Ct. 1599 (2019).

²⁶ See, e.g., National Task Force to End Sexual and Domestic Violence, *Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community* (Apr. 17, 2018), <http://www.4vawa.org/ntf-action-alerts-and-news/2018/4/17/anti-sexual-assault-and-domestic-violence-organizations-in-support-of-full-and-equal-access-for-the-transgender-community>.

²⁷ See Movement Advancement Project, *Equality Maps: Nondiscrimination Laws* (last accessed Oct. 24, 2019), https://www.lgbtmap.org/equality-maps/non_discrimination_laws.

programs may not be fully open to LGBT individuals and families.”²⁸ In finalizing the rule in 2012, HUD stated further that “the exclusion of an individual or family from HUD housing for no reason other than that the individual is LGBT or the family has one or more LGBT members is inconsistent with HUD’s mission to ensure decent housing and a suitable living environment for all.”²⁹ It further explained that these protections are critical to fulfilling HUD’s mission and the programs authorized by Congress:

HUD’s mission is to create strong, sustainable, inclusive communities and quality affordable homes for all. This includes LGBT persons, who have faced difficulty in seeking housing. Excluding any eligible person from HUD-funded or HUD-insured housing because of that person’s sexual orientation or gender identity contravenes HUD’s responsibility under the Department of Housing and Urban Development Act to work to address “the needs and interests of the Nation’s communities and of the people who live and work in them.” (See 42 U.S.C. 3531.) Congress has repeatedly charged the Department with serving the existing housing needs of all Americans.³⁰

In the 2012 final rule, HUD did not specify how the Rule’s nondiscrimination requirement applied to emergency shelter programs that were sex-specific, stating that it wished conduct further research and “monitor its programs so as to ascertain whether additional guidance may be necessary.”³¹ However, the Rule by its terms prohibits discrimination in all HUD-funded programs, including emergency shelters.

Following further study and consultation with housing providers and advocates, and further legal developments, HUD issued guidance in early 2015 strongly urging shelters to provide equal access in accord with an individual’s sincerely held gender identity.³² Shortly thereafter, HUD

²⁸ Equal Access to Housing in HUD Programs—Regardless of Sexual Orientation or Gender Identity, 76 Fed. Reg. 4194, 4195 (proposed Jan. 24, 2011) (to be codified at 24 C.F.R., pts. 5, 200, 203, 236, 570, 574, 982).

²⁹ Equal Access to Housing in HUD Programs Regardless of Sexual Orientation of Gender Identity; Final Rule, 77 Fed. Reg. 5662, 5673.

³⁰ *Id.* at 5672 (*citing* section 2 of the Housing Act of 1949, 42 U.S.C. 1441 (“The Congress hereby declares that the general welfare and security of the Nation and the health and living standards of its people require...the realization as soon as feasible the goal of a decent home and a suitable living environment for every American family...”); section 2 of the Housing and Urban Development Act of 1968, 12 U.S.C. 1701 (“The Congress affirms the national goal, as set forth in section 2 of the Housing Act of 1949, of ‘a decent home and a suitable living environment for every American family’”); sections 101 and 102 of the Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. 12701-702 (“The Congress affirms the national goal that every American family be able to afford a decent home in a suitable environment... The objective of national housing policy shall be to reaffirm the long-established national commitment to decent, safe, and sanitary housing for every American by strengthening a nationwide partnership of public and private institutions able...to ensure that every resident of the United States has access to decent shelter or assistance in avoiding homelessness...[and] to improve housing opportunities for all residents of the United States”); *and* section 2(b) of the Housing and Community Development Act of 1974, 42 U.S.C. 5301 note (“The purpose of this Act, therefore, is—(1) to reaffirm the principle that decent and affordable shelter is a basic necessity, and the general welfare of the Nation and the health and living standards of its people require the addition of new housing units to remedy a serious shortage of housing for all Americans.”))

³¹ *Id.* at 5666.

³² Dep’t of Housing & Urban Dev., *Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities* (Feb. 20, 2015).

proposed to clarify the Equal Access Rule's application to sex-specific programs, in accordance with the guidance.³³ In so doing, HUD stated:

Given HUD's mission to provide equal housing opportunities for all, and the significant violence, harassment, and discrimination faced by transgender individuals and other persons who do not identify with the sex they were assigned at birth in attempting to access programs, benefits, services, and accommodations, HUD has a responsibility to provide leadership in establishing a policy for HUD's community development programs that addresses these serious concerns.³⁴

HUD explained that it reviewed existing research and the experiences of HUD's programs since 2012 to assess the need for more specific guidance:

As a result of its review, HUD determined that the 2012 Equal Access Rule did not adequately address the 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. Specifically, HUD found that transgender and gender nonconforming persons continue to experience significant violence, harassment, and discrimination in attempting to access programs, benefits, services, and accommodations. For instance, at a listening session on lesbian, gay, bisexual, and transgender (LGBT) issues conducted with the U.S. Interagency Council on Homelessness, homeless service providers reported that transgender persons are often discriminatorily excluded from shelters or face dangerous conditions in the shelters that correspond to their sex assigned at birth. Some commenters reported that, if given the choice between a shelter designated for assigned birth sex or sleeping on the streets, many transgender shelter-seekers would choose the streets.³⁵

HUD therefore added clarifying language to the Equal Access Rule, making clear that in order to avoid discrimination in these settings, individuals should be "placed, served, and accommodated in accordance with that individual's gender identity."³⁶ The Department further explained that it adopted this approach only "[a]fter considering the feedback from HUD recipients and subrecipients, the experiences of the beneficiaries of HUD's community development programs who have been denied access because of their gender identity, research on transgender discrimination in shelter settings, and the actions taken by other Federal agencies to address access to programs, benefits, services, and accommodations in accordance with an individual's

³³ Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs, 80 Fed. Reg. 72642 (proposed Nov. 20, 2015) (to be codified at 24 C.F.R. pt. 5).

³⁴ *Id.* at 72645.

³⁵ *Id.* at 72644.

³⁶ 24 C.F.R. § 5.106(b)(2).

gender identity.”³⁷ Around the same time, HUD also adopted a companion rule for HUD’s Native American and Native Hawaiian programs.³⁸

Over the course of several years, HUD conducted three comment periods and received over 2,500 public comments on the Equal Access Rule from a wide range of stakeholders. Comments from housing and homelessness organizations, including direct providers of emergency shelter, overwhelmingly supported the Rule’s approach. The 2015 guidance subsequently codified in the Rule was announced with fanfare at the National Conference on Ending Homelessness, hosted by the National Alliance to End Homelessness.³⁹

HUD correctly determined in adopting the Rule in 2012 and in clarifying it in 2016 that the Rule does not impose any new costs on shelters or local communities, save for the *de minimis* cost of keeping records of policy changes.⁴⁰ But the Rule produces substantial benefits by providing clear national guidelines that are consistent with state and federal law and help ensure people are served based on need rather than who they are. As HUD stated in adopting the 2016 final rule:

This clarification will benefit clients accessing CPD-funded programs, including those with temporary, emergency shelters and other buildings and facilities, by assuring that all clients receive equal access and will benefit the CPD-funded facilities by making compliance with HUD’s equal access requirements easier.

These requirements benefit all occupants by ensuring that providers understand that they need to be responsive to individual health, safety, security, and privacy concerns, while ensuring that they do not take any discriminatory steps to address these concerns.⁴¹

The HUD Equal Access Rule, as adopted in 2012 and clarified in 2016, thus represents an approach proven to be successful through decades of experience across the country in a wide variety of settings, consistent with applicable laws, and developed over many years through extensive engagement with a wide range of stakeholders. Every question and concern raised about the Rule by the current Administration was thoroughly considered, tested, and debunked years ago.

V. The Trump Administration has worked consistently to undermine Equal Access protections

Despite the robust evidence, experience, deliberation, and stakeholder engagement that produced the Equal Access Rule, the Trump Administration has sought to undermine Equal Access protections since its inception.

³⁷ *Id.* at 72645.

³⁸ Equal Access to Housing in HUD’s Native American and Native Hawaiian Programs—Regardless of Sexual Orientation or Gender Identity; Final Rule, 81 Fed. Reg. 80989 (Nov. 17, 2016).

³⁹ National Alliance to End Homelessness, *HUD Secretary Julián Castro’s Keynote Remarks, 2015 Family and Youth Homelessness Conference* (Mar. 2, 2015), <https://endhomelessness.org/hud-secretary-julian-castros-keynote-remarks-2015-family-and-youth-homeless>.

⁴⁰ Equal Access in Accordance With an Individual’s Gender Identity in Community Planning and Development Programs; Final Rule, 81 Fed. Reg. 64763, 64781 (Sept. 21, 2016).

⁴¹ *Id.*

On March 10, 2017, HUD announced it would withdraw two important agency-proposed policies designed to protect LGBTQ people experiencing homelessness. One would have required HUD-funded emergency shelters to put up a poster or “notice” to residents of their right to be free from discrimination under the Equal Access Rule.⁴² The other announced a program evaluation to assess the impact of the LGBTQ Youth Homelessness Prevention Initiative, implemented by HUD and other agencies over the last three years.⁴³ The program evaluation notice was later reissued⁴⁴; the equal access notice was not.

Also in March 2017, HUD removed links to four key HUD publications from its website, which it had developed together with service providers to outline practices for serving transgender people facing homelessness and complying with the Equal Access Rule.⁴⁵ Despite directives from House appropriators,⁴⁶ HUD has never restored those publications, although NCTE has housed them on our own website ever since.⁴⁷

Since that time, HUD has consistently and publicly assured stakeholders that it had no plans to roll back the Equal Access Rule—including in a statement by Secretary Ben Carson to this committee on May 21, 2019. However, the very next day HUD released its Spring 2019 Regulatory Agenda, revealing that it was in fact planning to cut back the Equal Access Rule after all. In its Regulatory Agenda, HUD stated that it intended to roll back the Rule’s protections for those seeking emergency shelter, permitting programs to deny shelter and services to transgender people.⁴⁸ Remarkably, even before Secretary Carson’s false claims to this committee, HUD had already quietly sent this proposal to the Office on Management and Budget a month prior, with no public description.

⁴² 60-Day Notice of Proposed Information Collection: Notice on Equal Access Regardless of Sexual Orientation, Gender Identity, or Marital Status for HUD’s Community Planning and Development Programs, Withdrawal, 82 Fed. Reg. 13359 (Mar. 10, 2017).

⁴³ 60-Day Notice of Proposed Information Collection: Implementation Phase Review of the Lesbian, Gay, Bisexual, Transgender and Queer (LGBTQ) Youth Homelessness Prevention Initiative, Withdrawal, 82 Fed. Reg. 13359 (Mar. 10, 2017).

⁴⁴ Notice of Proposed Information Collection: Implementation Phase Evaluation of LGBTQ Youth Homelessness Prevention Initiative, 82 Fed. Reg. 55389 (Nov. 21, 2017).

⁴⁵ Nat’l Ctr. For Transgender Equality, *HUD Purges Publications that Helped Shelters Keep Transgender People Safe*, Press Release (Apr. 27, 2017), <https://transequality.org/press/releases/hud-purges-publications-that-helped-shelters-keep-transgender-people-safe>.

⁴⁶ See Office of Congressman Mike Quigley, *Quigley Leads T-HUD Member Letter to Secretary Carson on Continued Absence of LGBT Housing Resources*, Press Release (Oct. 4, 2018), <https://quigley.house.gov/media-center/press-releases/quigley-leads-t-hud-member-letter-secretary-carson-continued-absence>.

⁴⁷ Nat’l Ctr. For Transgender Equality, *HUD Purges Publications that Helped Shelters Keep Transgender People Safe*, Press Release (Apr. 27, 2017), <https://transequality.org/press/releases/hud-purges-publications-that-helped-shelters-keep-transgender-people-safe>.

⁴⁸ Dept. of Housing and Urban Development, Spring 2019 Regulatory Agenda, “Revised Requirements Under Community Planning and Development Housing Programs (FR-6152); Proposed rule,” RIN: 2506-AC53.

The Secretary's explanation for lying to this committee was essentially the same one the White House has given for its ban on transgender troops: we don't discriminate, but turning transgender people away isn't discrimination.⁴⁹

Advocates for the homeless and for survivors of sexual and domestic violence have been quick to condemn this heartless move. Well over a year ago, the National Task Force to End Sexual and Domestic Violence denounced HUD's efforts to undermine the Rule, stating:

We serve everyone in domestic and sexual violence shelters and programs, including men, women, and non-binary survivors, as all individuals need a safe place to go when experiencing interpersonal violence. The reasoning is simple. Transgender people experience unconscionably high rates of sexual assault and domestic violence—and forcing them out of facilities consistent with the gender they live every day makes them further vulnerable to assault.⁵⁰

The National Task Force has since reiterated its opposition to this attempted rollback of protections, as have leading other national and local groups working to end homelessness and domestic violence.⁵¹

Yet despite opposition from the leading voices on the front lines, HUD has doubled down on these attacks. On July 3, HUD erased from its 2019 Notice of Funding Availability all mentions or incentives for ensuring that homelessness programs don't discriminate and that they make efforts to reach vulnerable LGBTQ Americans.⁵² And last month, Secretary Carson shocked his own staff by launching into an unprompted and demeaning tirade against transgender people while visiting a HUD field office.⁵³ The Secretary has refused to apologize, and dismissed criticism of his comments and his policy proposals as "identity politics" and "political correctness."⁵⁴

⁴⁹ See Justin Wm. Moyer, *Rep. Jennifer Wexton says 'inept' Ben Carson should resign as HUD secretary*, Wash. Post (May 23, 2019), https://www.washingtonpost.com/local/virginia-politics/rep-jennifer-wexton-says-inept-ben-carson-should-resign-as-hud-secretary/2019/05/23/45f8d9f0-7d84-11e9-a3dd-d481bcdabfe6_story.html.

⁵⁰ National Task Force to End Sexual and Domestic Violence, *Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community* (Apr. 17, 2018), <http://www.4vawa.org/ntf-action-alerts-and-news/2018/4/17/anti-sexual-assault-and-domestic-violence-organizations-in-support-of-full-and-equal-access-for-the-transgender-community>

⁵¹ See, e.g., Office of Information and Regulatory Affairs, EO 12866 Meetings Search Results: RIN 2506-AC53, <https://www.reginfo.gov/public/do/eom12866SearchResults?pubId=201904&rin=2506-AC53>.

⁵² See Office of Congresswoman Jennifer Wexton, *Reps. Wexton, Pressley Slam Secretary Carson's Latest Attack on Transgender Americans*, Press Release (Sept. 19, 2019), <https://wexton.house.gov/media/press-releases/rep-wexton-pressley-slam-secretary-carson-s-latest-attack-transgender>.

⁵³ Tracy Jan & Jeff Stein, *HUD Secretary Ben Carson makes dismissive comments about transgender people, angering agency staff*, WASH. POST (Sept. 19, 2019), <https://www.washingtonpost.com/business/2019/09/19/hud-secretary-ben-carson-makes-dismissive-comments-about-transgender-people-angering-agency-staff>.

⁵⁴ Tracy Jan, *Pressed on transgender comments, HUD's Carson says political correctness is 'going to destroy our nation'*, WASH. POST (Oct. 22, 2019), <https://www.washingtonpost.com/business/2019/10/22/pressed-transgender-comments-huds-carson-says-political-correctness-is-going-destroy-our-nation/>; Tracy Jan, *As Democrats call for his resignation, HUD Secretary Ben Carson defends his controversial comments about transgender people*, WASH. POST (Sept. 20, 2019), <https://www.washingtonpost.com/business/2019/09/20/democrats-call-his-resignation-hud-secretary-ben-carson-defends-his-controversial-comments-about-transgender-people>.

VI. HUD's proposal is inconsistent with authorizing statutes and other federal laws

The Administration's attempt to gut the Equal Access Rule flies in the face of the very Congressional enactments that authorize HUD's programs and that authorized the Rule in the first place, and conflicts with federal civil rights statutes.

Purposes of HUD's authorizing statutes

As previously discussed, the Rule is grounded in Congress's clear directions across the Department's authorizing statutes that HUD funds be used to help those in need. For example, Section 2 of the Housing Act of 1949 states that its purpose is the "realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family."⁵⁵ Similarly, the purpose of the McKinney-Vento Homeless Assistance Act of 1987 is "to meet the critically urgent needs of the homeless of the Nation."⁵⁶ Likewise, the stated Congressional purpose of the National Affordable Housing Act of 1990 is "to ensure that every resident of the United States has access to decent shelter or assistance in avoiding homelessness."⁵⁷

The Equal Access Rule serves these purposes by ensuring that no person facing homelessness is denied shelter or assistance simply because of who they are. It flouts the will of Congress for HUD to encourage recipients to use these program funds to turn people out on the street and prolong homelessness in a population that already faces it at extreme rates.

Moreover, HUD's plan to endorse discrimination in shelter access would directly conflict with statutory requirements under the Violence Against Women Act (VAWA), and create confusion for agencies receiving both HUD and VAWA funding. VAWA, as amended in 2013, prohibits discrimination against transgender survivors of violence seeking shelter and services.⁵⁸ VAWA's nondiscrimination protections were strongly supported by the National Task Force to End Sexual and Domestic Violence and its hundreds of member organizations and have been successfully in place for years. HUD has recognized that VAWA applies to many HUD programs and recipients of HUD funding, codifying its own regulations that incorporate VAWA protections.

As previously discussed, the Fair Housing Act's prohibition on sex discrimination applies, in many cases, to emergency shelters and transitional housing programs, and the vast majority of federal courts agree that it applies to anti-transgender discrimination. A proposal to authorize discrimination against transgender shelter-seekers would therefore condone and encourage practices that the Fair Housing Act forbids. Whatever the merits of the current Justice Department's contrary legal view, the legal landscape in this area could soon shift, and it would be inappropriate to move forward with any rulemaking at this time in light of the Supreme Court's pending decisions in three cases potentially impacting the legal underpinnings of this rule. Although the Fair Housing Act is a separate and distinct statute from Title VII of the Civil Rights Act, the resolution of these cases could potentially have the effect of altering the contours of or even invalidating the legal underpinnings of HUD's proposed changes. This could render any resulting regulation either invalid or unnecessary, or require further rulemaking to clarify or

⁵⁵ 42 U.S.C. § 1441.

⁵⁶ 42 U.S.C. § 11301(b)(2).

⁵⁷ 42 U.S.C. § 12702(1).

⁵⁸ 34 U.S.C. § 12291(b)(13)(A).

correct its provisions. As such, proceeding with rulemaking at this time could lead to overwhelming confusion and legal uncertainty for HUD-funded entities, local communities, and individuals seeking help. Additionally, given the substantial implications these pending decisions have for HUD's planned changes, a final rule adopted without benefit of public comment informed by the Supreme Court's rulings would deprive the public of a meaningful opportunity to comment under the Administrative Procedure Act.

VII. HUD has failed to provide a reasoned basis for rolling back these critical protections

HUD has failed to provide any real evidence that the carefully considered protections in the Rule, which mirror laws long in place across much of the nation, must be rescinded. While it is understandable that someone not familiar with the history of this issue might have questions and concerns about how nondiscrimination protections for transgender people would work in practice, we do not have to imagine the answers to those questions. We already have those answers in the form of decades of experiences with hundreds of state and local laws that now cover half the country; two decades of federal case law; several years of nationwide experience with the Rule itself and VAWA's parallel protections; and HUD's extensive past consultations with experts in the field. The Department twice determined that the Rule poses no substantial costs and creates important benefits for covered entities and for some of our nation's most vulnerable residents. As previously noted, the Equal Access Rule has been successful and widely embraced by leaders in the field based on actual experience, which has long disproven the myths and speculations raised by Secretary Carson to justify this policy change.⁵⁹

The Rule requires shelters to address individual privacy concerns

Secretary Carson has falsely claimed that the Equal Access Rule somehow compromises personal privacy, a claim that ignores the facts, the law, and very text of the Rule itself. The Equal Access Rule explicitly requires that HUD-funded shelters "must take nondiscriminatory steps that may be necessary and appropriate to address privacy concerns raised by residents or occupants."⁶⁰ At the same time, the Rule provides shelters with broad flexibility to determine how best to address any privacy concerns that are brought to staff, which could include a variety of steps to provide more private accommodations or visual separation for an individual upon request, or for all residents.

The Rule's prohibition on discrimination, while permitting programs to address individual privacy concerns, is consistent with the longstanding policies of many shelter providers, and with the requirements of hundreds of local and state laws and of federal case law. The consistent experience of these states and local communities has been that simply welcoming shelter-seekers who are transgender without discrimination helps those in need and harms no one. Moreover, numerous courts across the country over the last two decades have held that nondiscrimination laws and policies that permit transgender and non-transgender individuals alike to access public

⁵⁹ National Task Force to End Sexual and Domestic Violence, *Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community* (Apr. 17, 2018), <http://www.4vawa.org/ntf-action-alerts-and-news/2018/4/17/anti-sexual-assault-and-domestic-violence-organizations-in-support-of-full-and-equal-access-for-the-transgender-community>.

⁶⁰ 24 C.F.R. § 5.106(c)(2).

facilities consistent with their deeply and sincerely held gender identity do not violate any right to privacy or discriminate against any individual.⁶¹

The Rule is consistent with religious freedom

There is nothing more sacred to most faith traditions than helping all those in need. Pursuant to federal laws and HUD regulations, faith-based organizations can and do participate in HUD programs and do good work every day, complying with the same program requirements as well other organizations.⁶² In the Fair Housing Act, Congress established significant exemptions for religious organizations, but did not extend them to shelters that serve all persons in need regardless of their faith.⁶³ Faith-based programs across the country can and do welcome transgender people every day without exclusion or discrimination, in compliance with the Equal Access Rule and the Fair Housing Act. When any entity uses federal funds to help some of our most vulnerable neighbors, HUD needs to ensure that all eligible people in need are served equally.

Court cases cited by HUD demonstrate the appropriateness of the Rule

To justify rolling back the Rule’s protections, HUD has pointed to two lawsuits that do not involve the Rule, and do nothing to justify a policy of encouraging shelters to put transgender people on the streets.⁶⁴ On the contrary, these cases illustrate the need for and appropriateness of the Equal Access Rule.

In one case, an Anchorage shelter repeatedly turned away a homeless woman named Samantha Coyle simply because she is transgender.⁶⁵ She had been referred there by another shelter, and knew she could not safely stay in a men’s shelter as the only woman there. After being turned away, she was forced to sleep outdoors in the woods. When it received an inquiry from a local human rights agency, the shelter claimed that Anchorage’s nondiscrimination ordinance violated the federal and state constitutions.⁶⁶ Ultimately, the district court ruled that the specific local Anchorage ordinance didn’t apply to the shelter in the first place.⁶⁷ This case centered on a local law and did not involve the Equal Access Rule, but it does illustrate the kind

⁶¹ *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018), reh’g en banc denied, 897 F.3d 515 (3d Cir. 2018); *Cruzan v. Special Sch. Dist. No. 1.*, 294 F.3d 981, 983 (8th Cir. 2002); *Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F.Supp.3d 1075 (D. Or. 2018); *Crosby v. Reynolds*, 763 F. Supp. 666 (D. Me. 1991). In one recent case, a court held that a Title IX claim by a girl who objected to transgender-inclusive policies could withstand a motion to dismiss, noting that “[w]hether [plaintiff] can ultimately prevail on this claim is a question for another day.” *Students and Parents for Privacy v. Township High Sch. Dist. 211*, 377 F.Supp.3d 891, 900 (N.D. Ill. 2019). The judge did not find there was any substantive violation, but observed that simply pleading “I was subjected to sexual harassment” is sufficient to survive a motion to dismiss under circuit precedent, *id.*, and that plaintiffs also alleged verbal harassment by peers and school officials. *Id.* at 895–96. The court dismissed the privacy claims. *Id.* at 901–02.

⁶² See 24 CFR § 5.109.

⁶³ 42 U.S.C. § 3607(a).

⁶⁴ See HUD Press Office, *WHAT YOU NEED TO KNOW: HUD to Help Local Homeless Shelters Serve Their Clients’ Needs* (May 23, 2019).

⁶⁵ Jill Burke, *Transgender woman at center of Downtown Soup Kitchen lawsuit speaks out*, KTUU (Jan. 17, 2019), <https://www.ktuu.com/content/news/Transgender-woman-at-center-of-Downtown-Soup-Kitchen-lawsuitspeaks-out-504529741.html>.

⁶⁶ *Downtown Soup Kitchen v. Municipality of Anchorage*, 3:18-cv-00190, at *12 (D. Alaska Aug. 9, 2019).

⁶⁷ *Downtown Soup Kitchen*, 3:18-cv-00190, at *33.

of unfortunate and harmful discrimination against vulnerable shelter-seekers that the Rule was designed to address.

In the other case cited by HUD, a group of former residents claim that staff at a shelter in Fresno failed to protect them from harassment by another woman at the shelter, who allegedly made lewd comments and tried to view them while they showered.⁶⁸ In addition, the plaintiffs argue the shelter should not have admitted the woman who allegedly harassed them, and instead should have turned her away because she was transgender. This case, which is currently in the midst of discovery,⁶⁹ has nothing to do with the Equal Access Rule. The conduct alleged in the complaint in this case, if true, would be inappropriate for any shelter resident, transgender or not. The Equal Access Rule does not prevent shelter staff from addressing and stopping inappropriate behavior by anyone—in fact, it requires them to do so. In the 2016 final rule, HUD urged that “providers should have policies and procedures in place to support residents and staff in addressing and resolving...harassment” in shelters,⁷⁰ and noted that harassment in shelters may violate the Rule as well as the Fair Housing Act.⁷¹ Furthermore, as noted, the Rule explicitly requires shelters to respond to privacy concerns raised by residents.⁷²

In sum, none of the rationales cited by HUD for its proposed rollback have a credible basis in facts or law.

VIII. HUD’s planned rollback would impose many serious costs on shelter-seekers and society

As described in HUD’s Spring 2019 Regulatory Agenda, the planned rollback of the Equal Access Rule would carry serious costs for covered entities, local communities, vulnerable shelter-seekers, and society as a whole. These costs include:

- **Costs of having to sleep outside of shelters and of spending longer periods of time without stable housing.** HUD’s proposal will likely lead to transgender people being turned away from, and in some cases simply giving up on even seeking, emergency shelter, and instead sleeping on the street or engaging in survival sex or survival crimes. As previously discussed, this problem could potentially affect thousands of people each year. More discriminatory denials of shelter will also likely increase the time it takes for these individuals to be connected to stable housing. HUD should consider existing research on the costs of lack of shelter access and homelessness in assessing these impacts.⁷³

⁶⁸ *McGee v. Poverello House*, No. 1:18-cv-00768, at *2 (E.D. Cal. Jul. 1, 2019).

⁶⁹ *See McGee*, No. 1:18-cv-00768 at *1.

⁷⁰ Equal Access in Accordance With an Individual’s Gender Identity in Community Planning and Development Programs; Final Rule, 81 Fed. Reg. 64763. 64768 (Sept. 21, 2016).

⁷¹ *Id.* at 64777, n. 23; *see also* 24 C.F.R. § 100.600 (implementing the Act’s harassment protections).

⁷² 24 C.F.R. § 5.106(c)(2).

⁷³ While HUD might argue that some communities never have enough beds for everyone, and beds unavailable to transgender people will be filled by others, this is not always true and the rule may cause a net decrease in access to shelter. HUD has no evidence that non-transgender individuals experiencing homeless are actually suffering decreased access or other harms because of the current rule that will lead to offsetting savings from rolling back current protections. Moreover, transgender shelter-seekers are unusually vulnerable on the street due to the high

- **Health costs of experiencing discrimination.** A large body of research demonstrates that experiences of discrimination, such as being turned away from a shelter, have measurable short- and long-term effects on both physical and mental health, which can in turn affect morbidity and mortality, with economic and non-economic costs for individuals, families, the health care system, and the economy.⁷⁴
- **Health costs of the nationwide, high-profile stigmatizing message of the Proposed Rule.** A body of research demonstrates that high-profile public policy changes regarding the civil rights of LGBTQ people can have significant positive or negative effects on population health.⁷⁵
- **Costs caused by encouraging shelters to adopt higher barriers to access for everyone, such as requiring shelter-seekers to show ID to verify gender.** Barriers such as requiring IDs are contrary to evidence-based practices for ensuring access to shelter for those who need it most. To the extent the Proposed Rule encourages shelters to require ID or other documentation of gender or ask invasive personal questions, this could act as barriers for many shelter-seekers, not just those who are transgender. HUD should consider existing research on the benefits of low-barrier shelter practices and the costs of high barriers, and estimate costs resulting from the Proposed Rule by assuming a percentage of shelters who may adopt new barriers as result.
- **Familiarization, administrative, and legal costs for covered entities.** Because it is a departure from past policy, creates confusion regarding the national standard, and may conflict with other federal, state, and local laws and regulations, the Proposed Rule will require more effort to understand than simply having an employee spend an hour reading it, as HUD estimates. They may also need legal advice and, if they engage in discriminatory conduct in reliance on the new rule, they may incur costs related to litigation, state enforcement actions, or loss of state or local funding. Entities that operate in more than one locality or state currently benefit from a consistent national standard, and will have to spend more resources understanding differing laws and requirements.
- **Intangible costs in decreased fairness, equity, personal freedom, personal privacy, and respect for fundamental rights.** Under applicable Executive Orders and OMB

rates of violence and other forms of trauma that they face, so a night on the street typically incurs a higher societal cost for a transgender person than a non-transgender person.

⁷⁴ See, e.g., Jaclyn M. White Hughto, Sari L. Reisner, & John E. Pachankis, *Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions*, 147 *SOCIAL SCIENCE & MEDICINE* 147, 222–231 (2015); Mark L. Hatzenbuehler, et al., *Stigma as a Fundamental Cause of Population Health Inequalities*, 103 *AM J. PUB. HEALTH* 813, 816 (2013); Tohru Nemoto, Birte Bödeker, & Mariko Iwamoto, *Social Support, Exposure to Violence and Transphobia, and Correlates of Depression Among Male-To-Female Transgender Women with a History of Sex Work*, 101 *AM J. PUB. HEALTH* 1980 (2011); Kristen Clements-Nolle, Rani Marx, & Mitchell Katz, *Attempted Suicide Among Transgender Persons: The Influence of Gender-Based Discrimination and Victimization*, 51 *J. HOMOSEXUALITY* 53 (2009); Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 *PSYCHOL. BULLETIN* 674, 679–85 (2003); Vickie M. Mays & Susan D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 *AM J. PUB. HEALTH* 1869, 1874 (2001).

⁷⁵ See, e.g., Julia Raifman et al., *Difference-in-Differences Analysis of the Association Between State Same-Sex Marriage Policies and Adolescent Suicide Attempts*, 171 *JAMA PEDIATR.* 350 (2017); John R. Blosnich et al., *Mental Health of Transgender Veterans in US States With and Without Discrimination and Hate Crime Legal Protection*, 106 *AM. J. PUB. HEALTH.* 534 (2016); Mark L. Hatzenbuehler et al., *Effect of Same-Sex Marriage Laws on Health Care Use and Expenditures in Sexual Minority Men: A Quasi-Natural Experiment*, 102 *AM. J. PUB. HEALTH* 285 (2012); Mark L. Hatzenbuehler et al., *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study*, 100 *AM J. PUBLIC HEALTH*, 452 (2010).

guidance, agencies must also consider such intangible costs of proposed rules. Courts have repeatedly recognized that the Constitution protects transgender people's rights to define and express their identity, to make personal and medical decisions regarding their transition, to privacy regarding their transgender status and details of their transition, and to equal dignity and treatment. This proposal would erode respect for those fundamental rights and freedoms.

In assessing these potential costs, HUD should consider a range of assumptions regarding the percentage (whether 5, 10, 25, or 50 percent) by which the current Equal Access Rule would likely affect these phenomena over a ten-year period, in light of existing demographic data on the size of the transgender population.⁷⁶ Ultimately, for all the reasons described above, it is impossible to justify rolling back the Equal Access Rule's protections for vulnerable shelter-seekers.

IX. Congress should take action to ensure equal opportunity in housing and lending and access to emergency shelter

Housing and lending discrimination against transgender people, including discrimination in access to emergency shelter and other critical safety-net programs, remains widespread. Together with other social and economic barriers, this problem drives lower rates of home ownership and staggering rates of homelessness among transgender Americans. To date, many states and localities have adopted explicit nondiscrimination protections, as has HUD for programs it funds, and courts have long recognized that the Fair Housing Act and Equal Credit Opportunity Act also prohibit anti-transgender bias. However, the Trump Administration's efforts to undermine both those statutory protections and the HUD Equal Access Rule are deeply concerning and threaten to roll back progress in advancing housing opportunity.

There are many steps Congress can and should take to address this serious national problem. Ultimately, **one of the most important steps Congress can take is to enact H.R. 5, the Equality Act, which has already been passed by the House.** The Equality Act would explicitly clarify that existing statutes, including the Fair Housing Act and the Equal Credit Opportunity Act, prohibit discrimination on the basis of gender identity and sexual orientation. In addition, the Equality Act would extend civil rights protections in public spaces and services and federally funded programs, including HUD programs—essentially codifying the Equal Access Rule. By ensuring clear, comprehensive, and nationwide protections, the Equality Act would not only directly address housing and lending discrimination but would also combat the stigma and economic marginalization that drive housing disparities. Approximately seven in ten (69%) Americans support laws protecting LGBT people from discrimination, with majorities in every state, across political parties, and across age groups.⁷⁷ NCTE joins civil rights, business, and faith leaders across the country in urging the Senate to pass it.

Absent Senate action on the Equality Act, **the House should act immediately to pass H.R. 3018, offered by Rep. Wexton and already passed by this committee, which would block**

⁷⁶ See, e.g., Jody L. Herman et al, *Age of Individuals who Identify as Transgender in the United States*. (2017).

⁷⁷ Daniel Greenberg et al., *Americans Show Broad Support for LGBT Nondiscrimination Protections* (Mar. 12, 2019), <https://www.prii.org/research/americans-support-protections-lgbt-people>.

HUD from rolling back Equal Access protections. This simple, narrowly targeted bill would block the current rule change proposed by HUD and preserve the Equal Access Rule's critical and proven protections.

In addition, HUD's anti-transgender proposal must be understood in the context both of the Trump Administration's wider assault on the dignity and freedoms of transgender Americans, and of HUD's wide-ranging efforts to undermine years of progress and best practices in increasing housing opportunities and ending homelessness. This committee has rightly focused attention on other troubling and callous moves by HUD in recent months, including:

- HUD's proposal to evict tens of thousands of children in mixed-immigrant status families;
- HUD's proposal to effectively gut the Fair Housing Act's disparate impact protections, which have been critical in addressing discrimination based on race, disability, and sex, including discrimination targeting domestic violence survivors;
- HUD's retreat from supporting the proven Housing First model embraced by leaders across the country, which to date has included not only public swipes at the model by Secretary Carson but actually removing Housing First principles and incentives from HUD funding notices; and
- HUD's push for legislation to dramatically increase rents for public housing.

These alarming steps show a pattern of callousness toward our most vulnerable community members and undermine any claim that rolling back Equal Access protections is somehow aimed at protecting anyone.

Congress should block other Administration attacks on housing opportunity by advancing measures such as H.R. 2763, which would prevent the eviction of tens of thousands of families under the HUD mixed-immigrant status rule.

To fully ensure that all Americans, including LGBTQ Americans, can have access to safe, stable, and affordable housing, civil rights enforcement must go hand in hand with critical investments in increasing house opportunities and ending homelessness. Accordingly, **Congress should make ambitious investments in ending homelessness, such as those contemplated in H.R.1856, the Ending Homelessness Act of 2019.**

Finally, **Congress, including this committee, should pursue vigorous oversight of HUD's civil rights activities, including its efforts to undermine and roll back protections for LGBTQ Americans at some of the most vulnerable moments in their lives.** We applaud the efforts of this committee to date to demand answers and hold Secretary Carson and Administration officials accountable for their responsibilities to vulnerable Americans, and urge you to continue doing so, including by uncovering the processes by which HUD has developed its ill-considered attack on the Equal Access Rule.

The National Center for Transgender Equality applauds the Subcommittee for holding this important hearing, and we look forward to working with you to advance these goals.

