



PROPOSED ACTION
MEMORANDUM

Repealing the Anti-Trans Single-Sex Shelter Rule

Department of Housing and Urban Development
December 2020

I. Summary

As part of a Trump administration-wide campaign to roll back protections for transgender people, the Department of Housing and Urban Development (HUD) has issued a proposed rule that would allow the operators of single-sex homeless and emergency shelters to discriminate against transgender people. Specifically, it would allow shelter operators to (1) make admissions decisions based on “biological sex” rather than gender identity, and (2) determine sex based on potentially intrusive questioning. If finalized, the rule would reduce access to shelter for transgender individuals, despite their undisputed need for the service. It also exposes them to abuse and potential violence, and requires many to closet or misgender themselves. Assuming the proposed rule is finalized, HUD should act expeditiously to repeal that rule through a new round of notice-and-comment rulemaking.

II. Background and Current State

In 2012, HUD promulgated a rule (the Equal Access Rule) requiring that all HUD-assisted housing be made available without regard to actual or perceived sexual orientation, gender identity, or marital status.¹ The Equal Access Rule also prohibited most inquiries about sexual orientation or gender identity for the purposes of determining eligibility for HUD-assisted housing. In general, the Equal Access Rule was an important step forward in ensuring that the rights of LGBTQ people were protected in assisted housing.

The Equal Access Rule left one important question unresolved: how single-sex shelters should treat transgender people. For example, HUD continued to permit inquiries about sex for temporary emergency shelters.² HUD decided that further research was needed and committed to monitoring its programs to answer this question.

In 2016, HUD acted to address the outstanding issue, promulgating a new rule (the Single-Sex Rule) requiring that same-sex shelters accommodate individuals in accordance with their gender identity.³ The Single-Sex Rule also loosened the prohibition on inquiring about sexual orientation or gender identity to allow non-discriminatory and non-intrusive questions (without any demands for documentation) needed for implementation of the rule. This Rule was meant to ensure that transgender people had access to shelter generally, as many were being turned away from shelters altogether. In particular, it was designed to ensure that individuals had access to shelters consistent with their gender identity.

Under the Trump administration, HUD moved to reverse course with respect to single-sex shelters.⁴ Under a proposed rule released in July 2020 (the Proposed Rule), HUD would allow (though not require) shelter operators to consider “biological sex” in placing and accommodating individuals in single-sex shelters and give them broad discretion in crafting such policies.⁵ In effect, HUD would grant the operators of single-sex

¹ Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5661 (Feb. 3, 2012), <https://www.federalregister.gov/documents/2012/02/03/2012-2343/equal-access-to-housing-in-hud-programs-regardless-of-sexual-orientation-or-gender-identity>.

² *Id.* at 5663.

³ Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64763 (Oct. 21, 2016), <https://www.federalregister.gov/documents/2016/09/21/2016-22589/equal-access-in-accordance-with-an-individuals-gender-identity-in-community-planning-and-development>.

⁴ This is part of a broad, administration-wide effort to deny rights to transgender people. See Lolo Fadulu, *Trump's Rollback of Transgender Rights Extends Through Entire Government*, N.Y. TIMES (Dec. 6, 2019), <https://www.nytimes.com/2019/12/06/us/politics/trump-transgender-rights.html>.

⁵ Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 85 Fed. Reg. 44811 (Jul. 24, 2020),

shelters the right to deny transgender individuals access to shelters that are consistent with their gender identity. HUD claimed that this change was necessary to preserve local flexibility, to protect the religious liberty of certain faith-based shelters, and to protect “biological women” from supposed anecdotal evidence of fear of transgender women (HUD’s Final Rule admits the department “is not aware of data suggesting transgender individuals pose” such a risk).⁶

The Proposed Rule, if finalized, would not only allow outright discrimination against transgender people, it would also permit intrusive, arbitrary, or demeaning inquiries into an individual’s sex and gender identity. Notably, the Proposed Rule would permit a shelter provider to make a determination based on a “good faith belief” that an individual is not of the correct sex for the shelter, based on factors like height or the presence of an Adam’s apple. The Proposed Rule also would allow shelters to request government identification as evidence of sex (although lack of identification could not be the sole basis for denying a person admission), but would not allow shelters to demand unduly intrusive “private physical anatomical evidence.”⁷

HUD may finalize this rule before the end of the current administration. While HUD requested specific comments on three issues in its proposed rulemaking documents,⁸ the outstanding issues appear sufficiently narrow and non-technical that HUD may be able to finalize the rule by January, either in its current form or with modest revision.

Litigation over any finalized rule is possible. In addition to claims that the rule is arbitrary and capricious as a substantive matter, there are arguments that the rule is inconsistent with statutory protections in the Violence Against Women Act (which, as of its 2013 reauthorization, prohibits its funding recipients from discriminating on the basis of gender identity⁹) and potentially the Fair Housing Act (which, under the Supreme Court’s reasoning in *Bostock v. Clayton County*, prohibits discrimination against LGBTQ people as a form of sex discrimination¹⁰).

III. Justification for Repeal

Advocates expect that the Proposed Rule, if finalized, would expose unhoused transgender individuals to unsafe conditions, prevent them from securing shelter, and deny them recognition of their gender identity.

Transgender and gender non-conforming individuals are at particularly high risk of homelessness. According to one study, nearly one-third of transgender and nonbinary individuals experience homelessness at some point in their lifetime.¹¹ The same study found that one in five unhoused youths identifies as LGBTQ. Removing discriminatory barriers to shelter for this population is not only necessary to affirm their equality and dignity, but also as a core component of HUD’s efforts to provide shelter to those at highest risk of homelessness.

<https://www.federalregister.gov/documents/2020/07/24/2020-14718/making-admission-or-placement-determinations-based-on-sex-in-facilities-and-community-planning-and>.

⁶ *Id.* at 44815.

⁷ *Id.* at 44816.

⁸ Specifically: (1) whether to repeal the 2012 Equal Access Rule as well; (2) what evidence should be used to determine an individual’s biological sex under the Proposed Rule; and (3) whether/how shelters should be required to provide a recommendation of an alternative shelter where they deny a person accommodation based upon the rule.

⁹ 42 U.S.C. § 12291(b)(13)(A).

¹⁰ *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020); *see also* *Smith v. Avanti*, 249 F. Supp. 3d 1194, 1200 (D. Colo. 2017) (interpreting Fair Housing Act in light of Title VII case law). The applicability of the Fair Housing Act here presents difficult legal questions. Each of the HUD rules at question here was meant to apply to those shelters that are *not* “dwellings” covered by the Fair Housing Act, *see, e.g.*, 85 Fed. Reg. 44812, as any single-sex policies in covered shelters can run afoul of the FHA, *see* *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1049-52 (9th Cir.). But courts have not fully resolved when shelters constitute “dwellings” that are covered by the Fair Housing Act, creating uncertainty and potential for conflict to arise.

¹¹ Adam P. Romero et al., UCLA School of Law Williams Institute, *LGBT People and Housing Affordability, Discrimination and Homelessness* (Apr. 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf>.

Additionally, there is evidence that without the Single-Sex Rule (or something like it), transgender individuals—especially transgender women—will struggle to find shelter. A study by the Center for American Progress, which HUD cited extensively in promulgating the Single-Sex Rule, found that only 30% of shelters contacted were willing to house transgender women with other women.¹² Twenty-one percent refused the transgender women shelter altogether, 13% would house them in isolation or with men, and another 21% were unsure how to proceed.¹³ In a separate 2011 survey of transgender individuals who had tried to access homeless shelters, 29% reported having been turned away and 42% reported that they were required to stay in facilities for the wrong gender; 25% were physically assaulted and 22% were sexually assaulted while in shelter.¹⁴ The 2015 U.S. Transgender Survey found that 10% of respondents sought shelter and stayed in one or more shelters in the previous year.¹⁵ Twenty-six percent of respondents did not seek shelter out of fears of being mistreated as a transgender person; indeed, seventy percent of those who stayed at a shelter “faced some sort of mistreatment, such as being forced out, harassed, or attacked because of being transgender.”¹⁶ One-quarter of respondents who stayed at shelter “decided to dress or present as the wrong gender in order to stay at the shelter”; fourteen percent reported that “the shelter staff forced them to dress or present as the wrong gender” in order to remain.¹⁷ Thus, absent legal protections, many transgender women will be denied shelter, while others will be forced to risk facing abuse or assault (all while being required to identify as the wrong gender) in men’s shelters.

Moreover, while HUD claims in the Proposed Rule to be protecting women who are victims of domestic violence, there is no evidence to support this assertion. Indeed, in the Proposed Rule itself the Department admits that “HUD is not aware of data suggesting that transgender individuals pose an inherent risk to biological women.”¹⁸ Advocates for domestic violence victims also largely opposed the rule.¹⁹ In fact, because transgender and nonbinary individuals are already subject to highly elevated rates of domestic and sexual violence, advocates are particularly concerned about their ability to access shelter when facing abuse. Notably, the National Network to End Domestic Violence organized comments in opposition to the Proposed Rule from hundreds of domestic violence organizations.²⁰

IV. Proposed Action

If the Trump administration fails to finalize the Proposed Rule before the new administration takes office, HUD can simply decline to issue a final rule without any further process. On the other hand, if a final rule (Final Rule) emerges in the waning days of the Trump administration, HUD should repeal it, thereby returning to the framework set out in the 2016 Single-Sex Rule.

¹² Caitlin Rooney, et al., Center for American Progress and the Equal Rights Center, *Discrimination Against Transgender Women Seeking Access to Homeless Shelters* (January 7, 2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/01/06113001/HomelessTransgender.pdf>

¹³ *Id.*

¹⁴ Jaime M. Grant et al., National Center for Transgender Equality, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 106* (2011), https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf.

¹⁵ James, S. E., et al., “The Report of the 2015 U.S. Transgender Survey,” National Center for Transgender Equality 180 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

¹⁶ *Id.* at 180–81.

¹⁷ *Id.* at 181–82.

¹⁸ 85 Fed. Reg. at 44815.

¹⁹ Press Release, National Low Income Housing Coalition, Joint Statement on HUD Proposal That Would Allow Discrimination Against Transgender People Seeking Shelter (Jul. 1, 2020), <https://nlihc.org/news/joint-statement-hud-proposal-would-allow-discrimination-against-transgender-people-seeking?cType=EmailBlastContent&cId=cd36602c-f45c-448f-adcb-1ca23b148b3b> (see statements of National Coalition Against Domestic Violence and National Network to End Domestic Violence, among others).

²⁰ Letter from National Network to End Domestic Violence to HUD Office of General Counsel, Sep. 22, 2020, https://nnedv.org/wp-content/uploads/2020/04/Library_Policy_Sign-on_116_HUD_Survivor_Services_22Sept2020.pdf.

This can be accomplished through either the traditional notice-and-comment rulemaking process or through an expedited mechanism that allows HUD to publish an Interim Final Rule that would be effective immediately. If HUD chooses to pursue an IFR—a riskier path, legally—it should both articulate why it has “good cause” to avoid pre-promulgation notice and comment, perhaps based on the emergency context of a potential COVID-fueled eviction crisis, and engage in a post-IFR comment process leading to a final rule to help insulate the rulemaking from challenge to the good-cause finding.

Notice and Comment

The most straightforward path to repealing any Final Rule is through a new round of notice-and-comment rulemaking. This would follow the standard sequence of issuing a proposed rule, receiving public comment, and then responding to those comments and issuing a final rule. Presumably, in promulgating any such rule, HUD would continue to rely on its general authority to promulgate rules necessary to carry out its functions, as it relied on this authority to issue the Equal Access Rule and Single-Sex Rule.²¹

In doing so, HUD must still set forth a reasoned explanation for its change.²² HUD must account for the facts and circumstances that motivated its prior position in issuing the Final Rule and any reliance interests based upon that prior policy.²³ Thus, a mere disagreement with the Trump administration would not suffice to justify a reversion to the Single-Sex Rule, much less a revision that includes new, modified provisions. Rather, HUD should be careful to explain the flaws with the Trump Final Rule. These might include legal flaws, such as any inconsistencies with VAWA, or a factual record showing the harms flowing from the Trump Rule. HUD should also explain that it is promulgating the new rule to better align with *Bostock*’s holding that sex includes sexual orientation and gender identity²⁴; even though the definition of “sex” is not directly at issue, HUD can explain that the new rule is part of an agency-wide effort to adopt consistent policies.²⁵

Depending on the timing of a future rulemaking, HUD should work to assemble a record showing how single-sex shelters have responded to the Trump Rule (or even in anticipation of that rule, based on the content of the Proposed Rule), and how it has affected both transgender individuals seeking shelter and cisgender women in single-sex shelters. Such facts would bolster any efforts to revert to the Single-Sex Rule. At a minimum, HUD could solicit comment on this and any other empirical evidence on the negative effects of the Final Rule in the new rulemaking.

Interim Final Rule, with Post-Promulgation Comment

If HUD wishes to act more expeditiously, but bear additional legal risk, it can repeal the Final Rule through an interim final rule (IFR). There are two complementary legal bases for using an IFR, without pre-promulgation notice and comment: first, the “good-cause” standard set forth in the Administrative Procedure Act (APA); and second, the Supreme Court’s recent decision in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*.²⁶

Traditionally, it had been understood that the Administrative Procedure Act requires notice and comment to precede a legally binding rule, except in specific, enumerated circumstances (such as specific statutory

²¹ It may be worth considering whether augmenting that authority with HUD’s rulemaking authority under the Fair Housing Act adds anything to HUD’s powers in this context. But given that HUD has applied the single-sex rules only to shelters that are not “dwellings” under the Fair Housing Act, it likely would not strengthen HUD’s authority. Instead, doing so would only add an additional source of legal risk.

²² *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

²³ *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125-26 (2016).

²⁴ *Bostock* at 1737.

²⁵ It’s possible a Final Rule will attempt to distinguish *Bostock*, in which case a new rule will need to address that argument.

²⁶ 140 S. Ct. 2367 (2020).

authorizations or the APA's "good-cause" exemption²⁷), so that there is a meaningful opportunity for the agency to incorporate those comments. HUD has restated its obligations to go through notice and comment, except for good cause (or other enumerated exceptions) in its own regulations.²⁸

Most likely, it would be difficult, although not necessarily impossible, for HUD to demonstrate good cause for avoiding notice and comment, under the APA standard, in rescinding any Trump Final Rule. The good-cause standard requires that notice and comment be "impracticable, unnecessary, or contrary to the public interest."²⁹ These three categories correspond, very roughly, to emergency situations, to routine or insignificant rulemakings, and to circumstances where the notice itself would harm the public. The agency's burden of showing that it falls within this standard is heavy, as the D.C. Circuit has been clear that "the good cause exception is to be 'narrowly construed and only reluctantly countenanced.'"³⁰

Here, HUD might try to argue that notice and comment would be impracticable, given the emergency context of the pandemic. Millions of Americans have lost their jobs, at levels not seen since the Great Depression. As eviction moratoriums end, financially devastated families may be displaced in huge numbers, creating urgent needs for shelter.³¹ Notably, the CDC claimed good cause (as an alternative, back-up legal justification) for not going through notice and comment in establishing an eviction moratorium during the pandemic.³² However, the argument for good cause is not necessarily strong here. First, eviction moratoria and other related policies may blunt the effect of the pandemic on homelessness, as may landlord behavior. And second, any effort to rescind the Trump Final Rule addresses long-standing civil rights issues not directly connected to the pandemic; only the urgency of the policy, but not its content or motivation, is emergency-related. It is not clear whether a court would find that good cause exists.

However, the *Little Sisters* decision may provide another justification for promulgating a rule without first seeking public comment. In *Little Sisters*, multiple agencies jointly promulgated an IFR regarding contraceptive access, invoking the good-cause exception and seeking post-promulgation notice and comment. While challenges were pending, however, the agencies issued a new final rule, purportedly in response to the comments they received. The Court held that that process complied with the APA's notice-and-comment requirements, because the agencies solicited comment and then issued a new rule. In doing so, it rejected the plaintiffs' argument that the agencies were required to show that they acted with an "open mind" in issuing the final rule. Importantly, the Court expressly declined to decide whether the agencies had good cause to issue the IFR in the first place, given that the new rule superseded the IFR. The Court's decision would seem to indicate that agencies can, without good cause, issue IFRs immediately, seek post-promulgation comment, and (appropriately addressing comments received) issue a new rule. However, it remains unclear the extent to which *Little Sister* marks a seminal moment in APA rulemaking or simply a blip on the radar.³³

Thus, HUD could issue an IFR reverting to the Single-Sex Rule. The IFR would invoke the APA's good-cause exception, explaining how delay of the repeal would cause urgent and severe harm to transgender individuals who are homeless or at risk of being homeless during the concurrent public health, economic, and eviction crises triggered by the COVID-19 pandemic. By also soliciting comments on how to update the Single-Sex Rule, and expeditiously issuing a new final rule, HUD could also take advantage of *Little Sisters* to reduce the risks associated with a court potentially rejecting HUD's good-cause determination.

²⁷ 5 U.S.C. § 553(b)(B).

²⁸ 24 C.F.R. § 10.1.

²⁹ 5 U.S.C. § 553(b)(B).

³⁰ *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001), in turn quoting *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992)).

³¹ In claiming good cause under this type of argument, HUD must be careful to provide a reasoned explanation why the Final Rule would, in fact, lead to increased homelessness, rather than merely allocating who stayed at which shelters. Such evidence is available, as described above.

³² Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292, 55296 (Sep. 4, 2020), <https://www.federalregister.gov/documents/2020/09/04/2020-19654/temporary-halt-in-residential-evictions-to-prevent-the-further-spread-of-covid-19>.

³³ This added legal risk is briefly explained in Section V, below.

Potential Litigation

If a Final Rule is issued before the end of the administration, litigation is possible, as described above. This may expand the options for a new administration, especially if a court issues a stay on the enforcement of the Final Rule.

In the face of litigation, an agency has a number of options beyond simply defending the case. It might make a motion to the court for a voluntary remand of the rule to the agency for reconsideration. HUD could also invoke a Section 705 stay if the effective date has not yet passed, or, if it has, seek to hold the litigation in abeyance while it reconsiders the rule. While the Final Rule would remain in effect, an abeyance would excuse HUD from defending the Final Rule and preserve judicial resources while the agency worked to revise or rescind the rule. However, none of these options remove the agency's obligations to meet the APA's requirements for rulemaking. Even if HUD were to settle the litigation, it could agree only to engage in new rulemaking on a certain timetable, not to any particular substantive outcomes of that rulemaking.

Litigation can provide an additional justification for regulatory action. Thus, pending litigation could be cited by HUD in any rulemaking documents related to repealing a Final Rule. However, HUD should be careful to not rely *only* on legal risk in justifying its actions. Doing so leaves the basis for HUD's actions as entirely a legal question. Many Trump-era regulatory actions have been overturned because they relied entirely on legal, rather than factual and policy, justifications, allowing courts to step in more aggressively.³⁴

Delaying the Effective Date of a Final Rule

If the Final Rule is published in the *Federal Register*, but not yet effective at the start of the new administration, the incoming HUD should consider delaying the rule's effective date in order to consider whether the rules are consistent with the new administration's understanding of the public interest. This delay would be subject to the same APA requirements as any other regulation. However, agencies have historically avoided going through the notice-and-comment process to delay rules' effective dates in similar circumstances. Here, HUD could likely rely on the APA's good-cause exception to skip notice and comment, particularly due to the urgency and severity of the COVID-19 pandemic and associated economic crisis.³⁵

³⁴ See, e.g., *Dep't of Homeland Security v. Regents of the University of California*, 591 U.S. __ (2020).

³⁵ The incoming Biden White House is likely to set an administration-wide policy towards the delay of effective dates via Executive Order. See Maeve P. Carey, *Midnight Rulemaking*, CONGRESSIONAL RESEARCH SERVICE (Jul. 18, 2012), <https://fas.org/sgp/crs/misc/R42612.pdf>.

