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SUBMITTED VIA REGULATIONS.GOV

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

Re: HUD's Equal Access to Housing in HUD Programs Revisions; Docket No. FR-6518-P-01 (RIN 2501-AE12)

To Whom It May Concern:

We write to you on behalf of the American Civil Liberties Union ("ACLU") to submit this comment in response to the above-docketed notice ("Proposed Rule") concerning the proposed revisions to the U.S. Department of Housing and Urban Development's ("HUD") existing Equal Access Rule and related protections, codified at 24 CFR §§ 5.100 *et seq.* ("Equal Access Rule" or "Current Rule").¹ The Current Rule is crucial to the ongoing fight for equal access to housing and shelter in the United States, particularly for LGBTQIA+ people. We strongly oppose the Proposed Rule and urge HUD to preserve the Current Rule and related protections against discrimination in HUD-funded programs.

For over 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the law of the United States guarantee to everyone in the country. With more than seven million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all fifty states, Puerto Rico, and Washington, D.C., for the right of every individual to access opportunity free of discrimination on the basis of race, color, religion, gender, sexual orientation, gender identity or expression, disability, national origin, citizenship status, familial or marital status, status as a recipient of public assistance, or record of arrest or conviction. The ACLU has advocated at the local, state, and federal levels for increased enforcement of fair housing and civil rights laws, elimination of barriers to emergency shelter and housing for survivors of domestic violence and sexual assault, and protections to ensure that

¹ The ACLU believes that the Proposed Rule should be withdrawn in its entirety for myriad reasons, many of which are addressed in this Comment. The fact that particular statements, proposals, reasoning, or other actions by HUD or the current administration are not addressed herein does not indicate or concede that the ACLU agrees with such statements, proposals, reasoning, actions, or particular aspects of the Proposed Rule. The ACLU further incorporates by reference the materials cited and arguments made in the ACLU's comments submitted in response to HUD's prior rulemakings related to its Equal Access Rule. *See* American Civil Liberties Union, Comment, *Re: Docket No. FR-6152-P-01, Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs* (Sept. 22, 2020).

LGBTQIA+ people can live openly without discrimination and enjoy equal rights, personal autonomy, and freedom of expression and association.

For over a decade, the Current Rule has guaranteed equal access to HUD-assisted and insured housing without regard to actual or perceived sexual orientation, gender identity, or marital status.² The Current Rule specifically protects transgender individuals' access to shelters and other programs funded by HUD's Office of Community Planning and Development ("CPD") by requiring that such access be made in accordance with an individual's gender identity—i.e., "the gender with which a person identifies, regardless of the sex assigned to that person at birth and regardless of the person's perceived gender identity"—and in a manner that affords equal access to the individual's family.³ The Current Rule further protects individuals from "intrusive questioning" or being "asked to provide anatomical information or documentary, physical, or medical evidence of" gender identity.⁴ These protections have helped to ensure equal access to critical shelter and housing programs for all families, and especially for transgender and gender nonconforming individuals.

The Proposed Rule is yet another attempt by the current administration to authorize, fund, and, in some cases, even require discrimination against transgender, non-binary, gender nonconforming, and intersex people. If allowed to go into effect, the Proposed Rule would require that providers of CPD-funded programs place, serve, and accommodate individuals "in accordance with [their] sex," which it narrowly defines as "an individual's immutable biological classification as either male or female" based on "a reproductive system with the biological function of (at maturity, absent disruption or congenital anomaly) producing eggs (ova) . . . [or] producing sperm."⁵ The Proposed Rule would also threaten the privacy and safety of all participants by allowing providers to "require reasonable assurances or evidence to establish a person's sex," without limitation.⁶ The Proposed Rule would further eliminate protections against discrimination based on actual or perceived sexual orientation or gender identity in HUD-subsidized and insured housing.⁷ Such changes not only undermine the congressionally established purposes of these programs and run afoul of the law, but also would inflict widespread and devastating harms, costs, and burdens on transgender and gender nonconforming individuals and their families, survivors of domestic violence and sexual assault, advocates, service providers, and surrounding communities. We urge HUD to withdraw its Proposed Rule and preserve the existing Equal Access Rule.

² 24 C.F.R. § 5.105(a). *See also* 24 C.F.R. §§ 5.403, 200.3, 570.3, 574.3, 891.105, 982.4(b).

³ 24 C.F.R. §§ 5.106, 5.100.

⁴ 24 C.F.R. § 5.106(b)(3).

⁵ 91 Fed. Reg. 22779, 22784 (hereinafter, "Proposed Rule").

⁶ *Id.*

⁷ *Id.* at 22784-87.

I. Access to Safe Housing and Shelter Is Critical for LGBTQIA+ People—And Particularly Transgender and Gender Nonconforming People.

Access to housing and shelter is central to the safety and well-being of LGBTQIA+ people—and particularly for transgender and gender nonconforming people. Research has consistently shown that transgender and gender nonconforming people are more likely than cisgender people to experience homelessness, housing insecurity, and housing discrimination. In a 2022 survey of transgender people in the United States, nearly one-third (or 30 percent) of respondents reported that they had experienced homelessness in their lifetime—which is eight times the rate of the general population.⁸ In addition, over half (or 58 percent) of respondents reported that they had been denied access to shelter because of their gender, while 27 percent of respondents reported that they left shelter due to poor treatment.⁹

These disparities are especially staggering for transgender people who hold other intersecting marginalized identities. Transgender women of color are especially likely to experience homelessness in their lifetimes.¹⁰ In an earlier survey of transgender people in the United States, rates of housing discrimination and/or instability were particularly high among transgender women who are Indigenous (39 percent), Black (49 percent), multiracial (39 percent), Latina (37 percent), and Asian (33 percent).¹¹ The same survey found that transgender women of color were more likely to be denied access to shelter, with multiracial women (30 percent) being five times as likely and Black women (13 percent) being more than twice as likely.¹² Such disparities are also stark for transgender people with disabilities—particularly mental disabilities like post-traumatic stress disorder¹³ and chronic conditions like HIV¹⁴—and transgender young people.¹⁵

⁸ Sandy E. James et al., *Early Insights: A Report of the 2022 U.S. Transgender Survey*, Nat'l Center for Transgender Equality et al. (Feb. 2024), https://transequality.org/sites/default/files/2024-02/2022%20USTS%20Early%20Insights%20Report_FINAL.pdf.

⁹ Daniel Soucy, *Nationwide Survey Shows Widespread Discrimination Against Gender-Expansive People, Including in Emergency Shelters*, Nat'l Alliance to End Homelessness, 1, https://endhomelessness.org/wp-content/uploads/2026/05/US-Trans-Survey-Brief-V4_Working-File.pdf.

¹⁰ Jennifer L. Glick, Alex Lopez, Miranda Pollock & Katherine P. Theall, *Housing insecurity and intersecting social determinants of health among transgender people in the USA: A targeted ethnography*, 3 Int. J. Transgender Health 21, 337-49 (2020), <https://pmc.ncbi.nlm.nih.gov/articles/PMC8726680/>.

¹¹ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Center for Transgender Equality, 180 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

¹² *Id.* at 181.

¹³ Brodie Fraser et al., *LGBTIQ+ Homelessness: A Review of the Literature*, 16 Int'l. J. of Env'tl. Res. & Pub. Health 2677, 2680-2681 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6695950/>.

¹⁴ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>. See also Julie Walker, *State of Disabled LGBTQI+ People in 2024 Report Shows Higher Rates of Discrimination in Housing, Healthcare, Education, and Public Services*, Nat'l Low Income Housing Coalition (Aug. 4, 2025), <https://nlihc.org/resource/state-disabled-lgbtqi-people-2024-report-shows-higher-rates-discrimination-housing>.

¹⁵ Soon Kyu Choi et al., *Serving Our Youth 2015: The Needs and Experiences of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth Experiencing Homelessness*, The Williams Inst. et al., 4, 12-13 (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Serving-Our-Youth-Update-Jun-2015.pdf>. See also Jody L. Herman et al., *Age of Individuals Who Identify as Transgender in the United States*, The Williams Inst. 2 (2017), <https://williamsinstitute.law.ucla.edu/publications/age-trans-individuals-us/>.

Experiencing homelessness leads to many other devastating and lasting consequences, including disruptions to employment and education, financial hardship and instability, long-term housing insecurity, physical and mental health consequences, separation from family and community, and increased risk of violent victimization.¹⁶ Being unhoused also results in more frequent interactions with law enforcement and increased risk of arrest, incarceration, and involvement with the criminal legal system.¹⁷ These consequences are particularly concerning for LGBTQ+ people, who experience disproportionately higher rates of harassment, mistreatment, and even police violence than non-LGBTQ+ people.¹⁸

II. The Proposed Rule Will Result in Widespread Harms, Costs, and Burdens for Those Seeking Shelter, Service Providers, and Broader Communities.

a. Excluding Transgender and Gender Nonconforming People from Facilities Consistent with Their Gender Identity Will Inflict Significant Harms.

The Proposed Rule will harm LGBTQIA+ individuals, and particularly transgender and gender nonconforming people who will be denied critical shelter or placed against their will in facilities that do not align with their gender identity. HUD itself acknowledges that the Proposed Rule would result in discrimination against transgender and gender nonconforming people, noting “that this rulemaking would result in denying individuals who claim a different gender identity than their sex being denied access to their preferred single-sex shelters or their preferred accommodations in other shelters.”¹⁹ HUD further asserts that, as a result, “[t]hese individuals would need to find other shelter options that are not limited to a single sex or seek admission to a single-sex shelter consistent with their sex.”²⁰ Both outcomes jeopardize the safety and well-being of transgender and gender nonconforming people for the following reasons.

Excluding transgender and gender nonconforming people from spaces and facilities consistent with their gender identity leads to devastating consequences, including increased risks of mistreatment, harassment, and violence.²¹ Research has consistently shown that transgender and gender-diverse people, and especially transgender women, experience high rates of harassment, assaults, and even sexual violence when they are forced to stay in facilities that do not align with their gender identity.²² At the same time, facility staff sometimes blame

¹⁶ Hannah Chimowitz & Adam Ruege, *The Costs and Harms of Homelessness*, Community Solutions (Sept. 25, 2023).

¹⁷ *Id.*

¹⁸ Jordan Grasso, Stefan Vogler, Emily Greytak, Casey Kindall & Valerie Jenness, *Policing Progress: Findings from a National Survey of LGBTQ+ People’s Experiences with Law Enforcement*, ACLU (2024), <https://www.aclu.org/publications/policing-progress-findings-from-a-national-survey-of-lgbtq-peoples-experiences-with-law-enforcement>.

¹⁹ Proposed Rule, at 22782.

²⁰ *Id.*

²¹ Jennifer L. Glick et al., *Housing Insecurity and Intersecting Social Determinants of Health Among Transgender People in the USA: A Targeted Ethnography*, 21 Int’l J. Transgender Health, 337–349 (2020), <https://pmc.ncbi.nlm.nih.gov/articles/PMC8726680/>. See also *Farmer v. Brennan*, 511 U.S. 825, 848 (1994) (noting the high risk of rape for a transgender woman placed in a men’s prison).

²² Valerie Jenness et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault*, Criminology, Law and Society University of California, Irvine (2007) (59% of transgender women in men’s prisons had been sexually assaulted while there, compared with 4% of people in men’s prisons overall); U.S. Dep’t of Just., *PREA Data Collection Activities, 2015*, Bureau of Just. Stats. 2 (2015),

transgender people and gender-diverse people for the abuse and violence they experience in shelters.²³ In addition, requiring placement in facilities that are inconsistent with one's gender identity inflicts other harms, including by sending the message that discrimination against transgender and gender nonconforming people is permissible and that their gender identity is not valid or deserving of recognition. In a nationwide survey about discrimination against transgender people, 42 percent of transgender people who accessed homeless shelters reported that they were "forced to live as the wrong gender" – such as by altering gender presentation, make-up, or hairstyles – in order to be allowed to stay.²⁴ The invalidation of one's gender identity, in turn, can lead to significant emotional distress, depression, anxiety, and increased risk of self-harm or suicide.²⁵

Without access to safe or affirming options, many transgender and gender nonconforming people will forego shelter and other critical services altogether—forcing them to stay in dangerous or high-risk settings, or to stay in or return to abusive relationships and households. A prior report from the HHS Substance Abuse and Mental Health Services Administration found that requiring placement based on sex assigned at birth could lead "transgender youth to stay in spaces that may be inappropriate or unsafe," and that "hostile shelter situations lead many LGBT youth to life on the streets."²⁶ As discussed above, those who remain unhoused face significant risks and are more vulnerable to violence and harassment, exploitation, arrest and involvement in the criminal legal system, and health problems.²⁷ By further restricting the already-limited shelter options available to those experiencing homelessness, the Proposed Rule would further exacerbate existing rates of homelessness and related harms for transgender and gender nonconforming people.

<https://www.bjs.gov/content/pub/pdf/pdca15.pdf> (35% of incarcerated transgender people had been sexually assaulted while incarcerated within the last year); Fraser et al., *supra* note 13 at 2684 ("When transgender and gender-diverse people are admitted into shelters and assigned placement based on their anatomic sex, they are vulnerable to aggression and sexual assault.").

²³ The Welfare Warriors Research Collaborative, *A Fabulous Attitude: Low Income LGBTGNC People Surviving and Thriving on Love, Shelter and Knowledge*, Queers for Econ. Just. 23 (2010), <https://search.israelab.org/resource/a-fabulous-attitude-low-income-lgbtgnc-people-surviving-and-thriving-on-love-shelter-and-knowledge.html> ("For years, transgender shelter residents had been reporting regular violence as well as inappropriate and discriminatory treatment by shelter staff, especially when placed in the wrong shelter for their gender.").

²⁴ Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, Nat'l Ctr. for Transgender Equal. and Nat'l Gay & Lesbian Task Force 117-118 (2011), https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf.

²⁵ Greta R. Bauer et al., *Intervenable factors associated with suicide risk in transgender persons: a respondent driven sampling study in Ontario, Canada*, 15 BMC Pub. Health 525 (2015), <https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-015-1867-2>; Halley Sutton, *Transgender college students more at risk for suicide when denied bathroom, housing rights*, 13 Campus Sec. Rep. (2016), <https://doi.org/10.1002/casr.30167>.

²⁶ U.S. Dep't of Health and Human Svcs., *Learning from the Field: Programs Serving Youth Who are LGBTQI2-S and Experiencing Homelessness*, The Substance Abuse and Mental Health Svcs. Admin. 21-22, 7 (2010), https://homelesshub.ca/wp-content/uploads/2023/12/lgbt_listening_tour_report_v3.6.pdf.

²⁷ Nat'l All. To End Homelessness, *Transgender Homeless Adults & Unsheltered Homelessness: What the Data Tell Us* 1 (July 2020), <https://endhomelessness.org/wp-content/uploads/2020/07/Trans-Homelessness-Brief-July-2020.pdf>.

b. The Proposed Rule Will Result in Harmful Gender Policing for All People Accessing CPD-Funded Shelters and Programs.

By requiring CPD-funded programs to engage in gender policing to determine placement and accommodation, the Proposed Rule would subject all individuals seeking such programs and services to harmful scrutiny, regardless of whether they are transgender. Moreover, the Proposed Rule jeopardizes the privacy interests of all those seeking shelter by removing protections against “intrusive questioning” and requirements for “anatomical information or documentary, physical, or medical evidence” related to gender identity.

The Proposed Rule requires CPD-funded programs to determine placement and accommodations based on an individual’s so-called “sex” as characterized by “reproductive system[s],” and permits programs to require “reasonable assurances” and “evidence” to make such determinations.²⁸ The Proposed Rule’s requirements for providers leave individuals and their families vulnerable to judgment and scrutiny based on sex stereotypes and societal expectations about what is considered “typical” for cisgender women and men, such as height, weight, voice pitch, hair length, and facial hair. As a result, the Proposed Rule would likely result in arbitrary and inconsistent enforcement and exclude cisgender people who do not conform to sex stereotypes, with disparate impacts on people who are intersex,²⁹ elderly people,³⁰ people of color,³¹ and people with disabilities and chronic illnesses.³²

The Proposed Rule will likely have a chilling effect on all people, regardless of gender identity or sexual orientation, from seeking shelter out of fear that they or their children may be subjected to invasive questioning, requests for so-called “evidence,” or other scrutiny to verify their sex assigned at birth. This is especially true for survivors of domestic violence and sexual assault, many of whom are parents attempting to secure safety not only for themselves, but also for their children. Survivors who have children who are LGBTQIA+ may reasonably fear that

²⁸ Proposed Rule, at 22784.

²⁹ See, e.g., Caroline Medina & Lindsay Mahowald, *Key Issues Facing People With Intersex Traits*, Center for American Progress (Oct. 26, 2021), <https://www.americanprogress.org/article/key-issues-facing-people-intersex-traits/>.

³⁰ See, e.g., *De Veloz v. Miami-Dade Cnty.*, 756 F. App’x 869, 872 (11th Cir. 2018), *cert. denied sub nom.*, *Rodriguez-Garcia v. de Veloz*, 589 U.S. 924, (2019) (cisgender woman past menopause classified as male and placed in men’s jail because, like many transgender women, she took prescription estrogen); Macarena Alpañés et al., *Management of Postmenopausal Virilization*, 97 *The J. of Clinical Endocrinology & Metabolism* 2584 (2012) (noting that increased facial and body hair growth is common during menopause).

³¹ Hannah Eko, *As A Black Woman, I’m Tired Of Having To Prove My Womanhood*, BuzzFeed News (Feb. 27, 2018), <https://www.buzzfeednews.com/article/hannaheko/aint-i-a-woman> (describing stereotyped misperceptions of Black women as nonfeminine, emasculating, or male, with heightened vulnerability among Black women who are tall, dark-skinned, fat, butch, or trans); Matthew Van Atta, *Lesbian Sues NYC Restaurant Over Bathroom Incident*, *The Advocate* (Oct. 10, 2007), <https://www.advocate.com/news/2007/10/10/lesbian-sues-nyc-restaurant-over-bathroom-incident> (Black cisgender woman with short hair ejected from restaurant for using women’s restroom); Michael Park, *Asian American Masculinity Eclipsed: A Legal and Historical Perspective of Emasculation Through U.S. Immigration Practice*, 8 *The Modern American* 5 (2013) (describing pervasive stereotypes of Asian men as feminine, passive, and asexual).

³² See, e.g., Mayo Clinic, *Hirsutism*, <https://www.mayoclinic.org/diseases-conditions/hirsutism/symptoms-causes/syc-20354935> (noting that, in addition to intersex traits, certain types of tumors and medications for treating endometriosis and other conditions can cause increased facial hair growth in cisgender women).

their child will face discrimination, invasive questioning, or exclusion in shelter settings as a result of the Proposed Rule. Faced with these concerns, some survivors may decide not to seek shelter at all rather than risk subjecting their child to stigma, mistreatment, or separation from family members during an already traumatic time. For a parent fleeing abuse, the decision to leave an unsafe situation is often shaped by concerns about their children’s wellbeing. Any policy that creates uncertainty about whether all members of a family will be treated with dignity and respect in shelter settings undermines survivors’ ability to access safety. Rather than expanding pathways to protection, the Proposed Rule risks creating additional barriers that could prevent survivors and their children from obtaining life-saving shelter and services.

c. The Proposed Rule Will Result in Significant Costs and Burdens for Service Providers and Advocates.

The Proposed Rule will impose increased administrative costs and burdens on shelters, service providers, and other organizations and advocates who have long relied on the Current Rule in carrying out their programs and activities, and who will now be forced to review and change their existing policies and practices or face the loss of federal funding. This is particularly true for providers who have conflicting missions and values and/or are subject to conflicting requirements under other federally funded programs, such as programs subject to the Violence Against Women Act’s (“VAWA”) statutory protections against discrimination based on actual or perceived gender identity or sexual orientation, as discussed further below. Such providers will be forced to expend significant resources to navigate these conflicting obligations or even be chilled from certain funding opportunities. In fact, HUD recognizes that the Proposed Rule “would require some organizations to follow rules inconsistent with their beliefs regarding gender and sex, if they continue to use federal funds.”³³ The loss of funding opportunities is devastating for any non-profit organization, and especially for homelessness programs and gender-based violence programs that are chronically underfunded.³⁴

Moreover, the Proposed Rule will likely result in increased administrative burdens for providers who may feel pressured to request identity documents that do not reflect a person’s gender identity (or that clients may not have because of their circumstances), ask invasive questions about an individual’s body or medical history, or rely on subjective assumptions and stereotypes based on appearance, voice, mannerisms, or stereotypes about how different genders “should” look, speak, or behave. Notably, such practices are fundamentally inconsistent with best practices for many service providers – and especially trauma-informed, survivor-centered approaches to service delivery by domestic violence and sexual assault service providers—and risk causing additional harm to survivors seeking safety.

³³ Proposed Rule, at 22782.

³⁴ Tom Murphy, *Long-Awaited Federal Data Shows the First Overall Reduction in Homelessness Since 2016*, Nat’l Alliance to End Homelessness (May 29, 2026) <https://endhomelessness.org/media/news-releases/long-awaited-federal-data-shows-the-first-overall-reduction-in-homelessness-since-2016/>. See also Mel Leonor Barclay & Jasmine Mithani, *Without the federal government, almost no money exists to fight domestic violence*, The 19th (Oct. 31, 2025), <https://19thnews.org/2025/10/domestic-violence-protections-federal-funding/>.

III. The Proposed Rule Rests on a Pretextual Basis.

While HUD attempts to justify the exclusion of transgender people from gender-affirming shelter by claiming that the Proposed Rule is necessary to protect “the privacy and safety of homeless women,” the Proposed Rule would do the opposite by jeopardizing women’s privacy and safety.³⁵ In addition to being entirely unsupported, HUD’s claim that the Proposed Rule will “protect” women relies on the same pretextual rationales that have long been used to justify discrimination—and that have been repeatedly rejected by courts for reinforcing “an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.” *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

Throughout this country’s history, policymakers have weaponized “women’s safety” as a pretextual basis for adopting harmful and discriminatory policies, including those that relegated women to an inferior legal status based on harmful and invidious sex stereotypes about their appropriate role in society. *See id.* at 685. (“As a result of [paternalistic] notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes . . .”). For example, government officials invoked the pretext of “protecting women” to maintain sex-based workplace restrictions on the number of hours that women could work, as well as state laws prohibiting women from bartending or owning a bar unless they are the “wife or daughter” of a male owner. *See Muller v. Oregon*, 208 U.S. 412, 421 (1908) (recognizing state interest in sex-based work restrictions because “continuance for a long time on her feet at work . . . tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care”); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948), *abrogated by Craig v. Boren*, 429 U.S. 190 (1976) (holding state’s view that “the oversight assured through ownership of a bar by a barmaid’s husband or father minimizes hazards that may confront a barmaid without such protecting oversight” was “entertainable”).

The pretext of “protecting women”—and specifically, white women—was also used by policymakers to advance laws banning interracial marriage and to justify racial segregation in schools, restrooms, and other facilities.³⁶ In fact, following the Supreme Court’s decision in *Brown v. Board of Education*, segregationists mobilized opposition against school integration through false claims that integrated schools would put white families’ daughters at greater risk of being sexually assaulted³⁷ and contracting venereal diseases.³⁸ Policymakers also relied on these baseless claims to advocate for sex segregation in schools, arguing that sex-segregated schools were a necessary “safety valve” to protect white girls from the so-called threats of racial integration.³⁹ In addition, segregationists invoked the need to “protect women” from sexual predation to support racial segregation in swimming pools, relying on racist claims that Black

³⁵ Proposed Rule, at 22781.

³⁶ Reginald Oh, *Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination*, 39 U.C. Davis L. Rev. 1321 (2006).

³⁷ Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 Yale J.L. & Human. 187, 194-95 (2006).

³⁸ Phoebe Godfrey, *Bayonets, Brainwashing, and Bathrooms: The Discourse of Race, Gender, and Sexuality in the Desegregation of Little Rock’s Central High*, 62 Ark. Hist. Q. 42, 52 (2003).

³⁹ Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 Yale J.L. & Human. 187, 197-98 (2006).

men “would act upon their supposedly untamed sexual desire for white women by touching them in the water and assaulting them with romantic advances.”⁴⁰ See, e.g., *Palmer v. Thompson*, 403 U.S. 217, 226-27 (1971); *Lonesome v. Maxwell*, 123 F. Supp. 193, 202 (D. Md. 1954), *rev’d sub nom.*, *Dawson v. Mayor & City Council of Baltimore City*, 220 F.2d 386 (4th Cir. 1955), *aff’d*, 350 U.S. 877 (1955).

The Supreme Court has since recognized that the pretext of “protecting women” does not justify discriminatory policies and practices. See *Frontiero*, 411 U.S. at 685. See also *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) (holding that an employer’s proffered protective rationale was not a legitimate basis for discriminatory job restrictions, noting that “[c]oncern for a woman’s existing or potential offspring historically has been the excuse for denying women equal employment opportunities”). Moreover, as discussed further below, the Proposed Rule jeopardizes the safety and privacy interests of all people, including cisgender women, by requiring many programs to police the gender identities of prospective clients and removing protections against invasive questioning. Accordingly, HUD’s purported rationale concerning “women’s safety” is not only unfounded but also cannot justify discrimination.

IV. The Proposed Rule Conflicts with Constitutional and Statutory Protections.

Contrary to HUD’s mission and statutory mandate to advance access to housing in the United States, the Proposed Rule seeks to dismantle longstanding protections against discrimination in HUD-funded programs in violation of federal constitutional and statutory law, including, but not limited to, the Fair Housing Act (“FHA”), the Violence Against Women Reauthorization Act (“VAWA”) and related protections, and the U.S. Constitution.

a. The Proposed Rule Runs Afoul of the Federal Fair Housing Act.

The federal Fair Housing Act (“FHA”) prohibits discrimination in housing based on sex (including gender identity and sexual orientation), as well as other protected characteristics.⁴¹ The Proposed Rule conflicts with the FHA, including by attempting to authorize, fund, and, in some cases, require recipients of HUD funding to discriminate based on actual or perceived sexual orientation and gender identity.

As an initial matter, HUD’s blanket assertion that the FHA “does not apply to emergency shelters” is incorrect.⁴² To the contrary, the FHA applies to “dwellings,” which include “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families.”⁴³ Courts have repeatedly found that the

⁴⁰ See, e.g., Jeff Wiltse, *Contested Waters: A Social History of Swimming Pools in America* 2-4, 89 (2007).

⁴¹ See 42 U.S.C. § 3602. See also *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 659 (2020). HUD itself previously recognized that the FHA’s protections against sex-based discrimination include discrimination based on actual or perceived gender identity and sexual orientation. See, e.g., Jeanine M. Worden, Office of Fair Housing & Equal Opportunity, *Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act*, Feb. 11, 2021, <https://www.fairhousingnc.org/wp-content/uploads/2021/02/Worden-Memo-EO13988-FHAct-Implementation-2-11-21-signed-final.pdf>.

⁴² Proposed Rule, at 22781.

⁴³ 42 U.S.C. § 3602(b).

FHA applies to individuals living in temporary, emergency shelters.⁴⁴ In doing so, courts engage in a case-specific analysis of various factors, including the extent to which the occupants treat the facility as a home (e.g., cooking their meals, doing laundry, cleaning their rooms, or socializing in common areas), the length of time the occupants remain in the facility, and whether the occupants have another place to go.⁴⁵ As one court recognized: “Although the Shelter is not designed to be a place of permanent residence, it cannot be said that the people who live there do not intend to return. . . . Because the people who live in the Shelter have nowhere else to ‘return to,’ the Shelter is their residence in the sense that they live there and not in any other place.”⁴⁶ Thus, HUD’s attempt to sweep all emergency shelters outside of the FHA’s scope is not only improper but also unjustified and unsupported by legal precedent.

The Proposed Rule runs afoul of the FHA by permitting and, in some cases, requiring HUD-funded programs to engage in sex-based discrimination against those seeking assistance. In addition to removing protections based on actual or perceived sexual orientation or gender identity, the Proposed Rule mandates that CPD-funded shelters with shared sleeping or bathing facilities must determine an individual’s placement based on their “sex”—i.e., their “immutable biological classification as either male or female rather than the ever-shifting concept of self-assessed gender identity.”⁴⁷ To do so, providers are permitted to require “reasonable assurances” and even “evidence to establish a person’s sex.”⁴⁸ In other words, CPD-funded providers with sex-specific or sex-segregated facilities would be forced to not only police the gender identities of all potential clients who seek services, but also discriminate against transgender and gender nonconforming individuals—either by placing individuals in facilities that do not align with their gender identities or by refusing services altogether.

By expressly mandating discrimination in CPD-funded programs based on gender identity, the Proposed Rule conflicts with the FHA’s protections against sex-based discrimination in housing. As the Supreme Court recognized, “it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.”⁴⁹ Indeed, HUD itself acknowledges that the Proposed Rule would result in sex-based discrimination, noting “that this rulemaking would result in denying individuals who claim a different gender identity than their sex being denied access to their preferred single-sex shelters or their preferred accommodations in other shelters.”⁵⁰ As a result, “[t]hese individuals would need to find other shelter options that are not limited to a single sex or seek admission to a single-sex shelter consistent with their sex”⁵¹—neither of which remedies the discriminatory impact of the Proposed Rule. Excluding transgender and gender nonconforming people from spaces consistent with their gender identity leads to devastating harms and increased risks of mistreatment,

⁴⁴ See, e.g., *Lakeside Resort Enters., LP v. Bd. of Sup’rs of Palmyra Twp.*, 455 F.3d 154, 158 (3d Cir. 2006); *Jenkins v. New York City Dep’t of Homeless Servs.*, 643 F. Supp. 2d 507, 518 (S.D.N.Y. 2009), *aff’d on other grounds*, 391 F. App’x 81 (2d Cir. 2010); *Woods v. Foster*, 884 F. Supp. 1169, 1173 (N.D. Ill. 1995).

⁴⁵ See, e.g., *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1214-16 (11th Cir. 2008); *Woods v. Foster*, 884 F. Supp. 1169, 1173 (N.D. Ill. 1995).

⁴⁶ *Woods*, 884 F. Supp. at 1173-74.

⁴⁷ Proposed Rule, at 22779.

⁴⁸ *Id.* at 22780.

⁴⁹ *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 660 (2020).

⁵⁰ Proposed Rule, at 22782.

⁵¹ *Id.*

harassment, and even violence.⁵² Moreover, discrimination cannot be cured by telling the person who was discriminated against that they can go elsewhere, particularly when there are already too few shelter options for unhoused people across the country.⁵³

b. The Proposed Rule Runs Afoul of the Violence Against Women Reauthorization Act and Related Protections.

Since 2013, VAWA has prohibited discrimination “on the basis of actual or perceived... sex, gender identity, [or] sexual orientation.”⁵⁴ Although it permits the consideration of an individual’s sex in the limited circumstances that sex segregation or sex-specific programming is “necessary to the essential operation of a program,” VAWA nonetheless requires that individuals who are denied access to sex-segregated facilities or programming must be provided with “comparable services” in order for the grantee to maintain compliance with VAWA’s nondiscrimination mandate.⁵⁵ The Proposed Rule – including its requirement to determine placement in CPD-funded programs based on so-called “sex” and its removal of “gender identity” and “sexual orientation” from its regulations governing “Protection for Victims of Domestic Violence, Sexual Assault, or Stalking” – would conflict with VAWA’s statutory language and force providers to navigate conflicting obligations and even chill them from pursuing certain funding opportunities.

The Proposed Rule may also conflict with requirements under the Family Violence Prevention and Services Act (“FVPSA”), which requires that services provided by FVPSA-funded programs be voluntary. Under FVPSA, programs may not place conditions on a survivor’s receipt of shelter or supportive services beyond those permitted by law. By authorizing providers to require “reasonable assurances or evidence” to establish a person’s sex before permitting access to shelter, the Proposed Rule creates a significant risk that providers will interpret these provisions as allowing them to impose additional prerequisites for admission. Such requirements could function as conditions on access to emergency shelter and services, creating confusion regarding providers’ obligations under federal law and potentially placing FVPSA-funded programs in the untenable position of attempting to reconcile conflicting requirements. Survivors should not be forced to satisfy invasive or burdensome demands in order to access safety, and providers should not be required to navigate inconsistent federal directives when responding to individuals in crisis.

c. The Proposed Rule Runs Afoul of the U.S. Constitution.

The Proposed Rule runs afoul of a myriad of constitutional protections, including, but not limited to, the U.S. Constitution’s guarantee of equal protection under law, due process, and Establishment Clause.

⁵² Jody L. Herman, Andrew R. Flores & Elana Redfield, *Safety and Privacy in Public Restrooms and Other Gendered Facilities*, Feb. 2025, <https://williamsinstitute.law.ucla.edu/publications/safety-in-restrooms-and-facilities/>; James Esseks, *Transgender People and Single-Sex Spaces*, ACLU News and Commentary (June 2, 2016), <https://www.aclu.org/news/lgbtq-rights/transgender-people-and-single-sex-spaces>.

⁵³ See, e.g., Nat’l Alliance to End Homelessness, *Trans and Gender Non-Conforming Homelessness*, July 13, 2020, <https://endhomelessness.org/resources/research-and-analysis/trans-and-gender-non-conforming-homelessness/>.

⁵⁴ 34 U.S.C. § 12291(b)(13)(A).

⁵⁵ 34 U.S.C. § 12291(b)(13)(B).

The Proposed Rule runs afoul of the Constitution’s guarantee of equal protection. By design and intent, the Proposed Rule discriminates based on transgender status by explicitly excluding consideration of gender identity with the stated purpose and effect of preventing transgender women from accessing the same emergency shelters as cisgender women.⁵⁶ Applying heightened scrutiny, the Proposed Rule’s vague and sweeping restrictions on the consideration of gender identity and removal of nondiscrimination protections are not substantially related to HUD’s purported interests in protecting “the privacy and safety of homeless women and the religious liberty of many faith-based service providers.”⁵⁷ As discussed above, the Proposed Rule would undermine the privacy and safety of all unhoused women, including cisgender women, by requiring increased policing and scrutiny by providers and by chilling many women from seeking shelter altogether out of fear of subjecting themselves or their families to intrusive screening requirements and discriminatory treatment.

The Proposed Rule also raises significant concerns of vagueness. A law is impermissibly vague if it either “fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits” or “authorize[s] and even encourage[s] arbitrary and discriminatory enforcement.” *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). The Proposed Rule’s vague and sweeping restrictions, including its requirement that placement and accommodations in CPD programs are determined based on “sex” as characterized by “reproductive system[s],” fail to provide adequate notice of its requirements and encourage arbitrary and discriminatory enforcement under the threat of loss of federal funding.

In addition, the Proposed Rule may run afoul of the Establishment Clause by imposing a requirement that all providers deny access to facilities consistent with gender identity to transgender and gender nonconforming people based on certain religious views about sex. Indeed, HUD Secretary Scott Turner’s own statements confirm this purpose, including his statements that the Proposed Rule would “restore biological truth” and “get[] government out of the way of what the Lord established from the beginning when he created man in His own image.”⁵⁸ In light of these legal issues, the Proposed Rule should be withdrawn in its entirety.

V. Conclusion

The Current Rule has been critical to ensuring equal access to essential shelter and housing programs, especially for transgender and gender nonconforming people. We urge HUD to withdraw its Proposed Rule and preserve HUD’s Current Rule. If you have any questions, please contact Linda Morris at the ACLU Women’s Rights Project at LindaM1@aclu.org.

Sincerely,

The American Civil Liberties Union

⁵⁶ Proposed Rule, at 22781 (reasoning that the Proposed Rule is necessary because “it is not beneficial to institute a national policy that forces homeless women to choose between sleeping alongside and interacting with men in other intimate settings or refusing emergency shelter or other facilities”).

⁵⁷ *Id.*

⁵⁸ *Secretary Scott Turner Halts Enforcement Actions of HUD’s Gender Identity Rule*, U.S. Department of Housing and Urban Development, <https://www.hud.gov/news/hud-no-25-026>.