

Regulations Division, Office of
General Counsel, Department of
Housing and Urban Development, 451
7th Street SW, Room 10276,
Washington, DC 20410–0500
Submitted via regulations.gov

June 29, 2026

Re: Equal Access to Housing in HUD Program Revisions (RIN 2501-AE12)

Thank you for the opportunity to comment on the Department of Housing and Urban Development’s (“HUD”) Proposed Rule regarding access to housing and other HUD programs for transgender and gender minority participants (“Proposed Rule”). See 91 Fed. Reg. 22779 (Apr. 28, 2026).

The undersigned are legal and social science scholars affiliated with the Williams Institute at the University of California, Los Angeles School of Law. The Williams Institute is dedicated to conducting rigorous and independent research on sexual orientation and gender identity law and public policy. Relevant to this comment, our portfolio of work includes extensive research and publications on transgender demographics, mental health, well-being, and poverty.¹

The 2016 Equal Access Rule requires that programs under HUD’s Community Planning and Development Programs permit transgender people and gender minorities to obtain housing and shelter in accordance with their gender identity.² In adopting this rule, HUD acknowledged that transgender and gender nonconforming people face barriers when accessing shelter, including violence, harassment, and discrimination.³ Despite this finding and HUD’s investigation of cases where transgender people were not provided access, the Proposed Rule seeks to overturn the current rule by replacing the term “gender identity” with “sex.”⁴ This change would require HUD’s Community Planning and Development programs to house transgender people and other gender minorities according to their sex assigned at birth.⁵

¹ JODY L. HERMAN & ANDREW R. FLORES, WILLIAMS INST., HOW MANY ADULTS AND YOUTH IDENTIFY AS TRANSGENDER IN THE UNITED STATES? (2025), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Aug-2025.pdf>; JODY L. HERMAN & KATHRYN K. O’NEILL, WILLIAMS INST., WELL-BEING AMONG TRANSGENDER PEOPLE DURING THE COVID-19 PANDEMIC (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pulse-Toplines-Nov-2022.pdf>; BRAD SEARS, NATHAN CISNEROS & JET HARBECK, WILLIAMS INST., FOOD INSECURITY AND RELIANCE ON SNAP AMONG LGBT ADULTS (2025), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/SNAP-Reliance-Jul-2025.pdf>.

² 24 C.F.R. § 5.106 (2016).

³ Equal Access in Accordance With an Individual’s Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64763, 64764 (Sept. 21, 2016).

⁴ Equal Access to Housing in HUD Programs Revisions, 91 Fed. Reg. 22779 (Apr. 28, 2026).

⁵ *Id.*

Research on gender minorities and housing access shows that transgender and nonbinary people across the country experience homelessness, seek shelter in HUD-funded facilities, and report experiences of harassment and violence during this process.⁶ This includes evidence that exclusion from shelter because of gender identity may result in harms to transgender and nonbinary individuals. Conversely, there is an absence of research demonstrating any unique risk of harm to cisgender women due to the inclusion of transgender women in women's shelters. Nor does HUD adequately demonstrate that changes are needed to relieve religious providers of the burden of nondiscriminatory shelter placement. For the reasons laid out in this comment, we believe the Proposed Rule is inconsistent with current evidence and may violate the Administrative Procedure Act, the Evidence Act, and the Equal Protection Clause of the Fifth Amendment to the U.S. Constitution.

I. The Proposed Rule Will Impact Transgender, Nonbinary, and Intersex People

a. There Are a Substantial Number of Transgender, Nonbinary, and Intersex People in the U.S.

President Trump's Executive Order 14168 declares that it is the policy of the U.S. federal government "to recognize two sexes, male and female."⁷ The order goes on to opine that "[t]hese sexes are not changeable and are grounded in fundamental and incontrovertible reality."⁸

Research indicates that reality is more complicated. Using federal government data sources, Williams Institute scholars estimated in 2025 that approximately 2.8 million people aged 13 or older identify as transgender, meaning they possess a gender identity that is different from the sex they were assigned at birth.⁹ Transgender people are spread throughout the country. Of transgender people 13 years or older, 721,000 live in the West, 611,300 live in the Midwest, 1,002,000 live in the South, and 525,500 live in the Northeast.¹⁰ Additionally, transgender people come from a diverse range of racial, ethnic, and cultural backgrounds. Approximately 44% of transgender adults and 48% of transgender youth aged 13-17 are people of color.¹¹

In addition to transgender people, other intersecting populations are affected by government policies regulating the legal recognition of sex. For example, Williams Institute scholars have estimated that there are approximately 1.2 million LGBTQ nonbinary people living in the U.S., using data from Generations and TransPop, two nationally representative

⁶ See *infra* § II.

⁷ Exec. Order No. 14168, 90. Fed. Reg. 8615 (Jan. 30, 2025).

⁸ *Id.*

⁹ HERMAN & FLORES, *supra* note 1, at 6.

¹⁰ *Id.* at 13, 14.

¹¹ *Id.* at 9.

research initiatives.¹² Nonbinary people are those who identify with a gender other than male or female.¹³ Although there is substantial overlap with transgender populations (42%), more than half of LGBTQ nonbinary people (58%) do not separately identify as transgender.¹⁴ Furthermore, the U.S. government estimated that there may be approximately 5.7 million intersex people in the U.S.¹⁵ “Intersex” is a term that describes people who are born with or develop objectively measurable sex characteristics that do not conform to traditional male-female categorization based on reproductive functions.¹⁶ Among respondents to the 2022 U.S. Transgender Survey (“USTS”), the largest survey of transgender people in the country, 5% reported that they are also intersex.¹⁷

As a threshold matter, evidence demonstrates substantial populations of transgender, nonbinary, and intersex people live in the United States, and for reasons described below, many will likely be subject to the Proposed Rule. Because there is limited data on intersex people and housing precarity, homelessness, and shelter utilization, this comment will primarily address impacts on transgender and nonbinary people.

b. Many Transgender and Nonbinary People Experience Housing Instability

Housing instability is characterized by a risk of losing one’s housing, often due to economic circumstances, such as difficulty paying rent, being “cost-burdened” (defined as spending more than 30% of household income on rent), having frequent moves, or living in overcrowded or unreliable conditions.¹⁸ Some transgender and nonbinary people may also experience housing instability due to family rejection or housing discrimination because of their transgender or nonbinary status.¹⁹ A substantial portion of transgender and nonbinary people

¹² BIANCA D.M. WILSON & ILAN H. MEYER, WILLIAMS INST., NONBINARY LGBTQ ADULTS IN THE UNITED STATES 6 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Nonbinary-LGBTQ-Adults-Jun-2021.pdf>.

¹³ *Id.* at 1.

¹⁴ *Id.* at 2-3.

¹⁵ U.S. DEP’T OF HEALTH & HUMAN SERVICES: OFFICE OF THE ASSISTANT SECRETARY FOR HEALTH, ADVANCING HEALTH EQUITY FOR INTERSEX INDIVIDUALS (2024), <https://interactadvocates.org/wp-content/uploads/2025/01/intersex-health-equity-report.pdf>.

¹⁶ See COMMITTEE ON MEASURING SEX, GENDER IDENTITY, AND SEXUAL ORIENTATION, MEASURING SEX, GENDER IDENTITY, AND SEXUAL ORIENTATION 40 (Nancy Bates, Marshall Chin & Tara Becker, eds., 2022); *Intersex Variations Glossary*, INTERACT: ADVOCATES TRANS YOUTH, <https://interactadvocates.org/intersex-definitions/> (last visited June 16, 2026).

¹⁷ SANDY E. JAMES ET AL., NAT’L CTR. TRANSGENDER EQUAL., EARLY INSIGHTS: A REPORT OF THE 2022 U.S. TRANSGENDER SURVEY 13 (2024), https://transequality.org/sites/default/files/2024-02/2022%20USTS%20Early%20Insights%20Report_FINAL.pdf.

¹⁸ *Housing Instability*, U.S. DEP’T HEALTH & HUM. SERVS.: OFF. DISEASE PREVENTION & HEALTH PROMOTION, <https://odphp.health.gov/healthypeople/priority-areas/social-determinants-health/literature-summaries/housing-instability> (last accessed June 17, 2026); *CHAS Background*, U.S. DEP’T HOUS.: OFF. POL’Y DEV. & RSCH., https://www.huduser.gov/portal/datasets/cp/CHAS/bg_chas.html (last visited June 17, 2026).

¹⁹ ADAM P. ROMERO, SHOSHANA K. GOLDBERG & LUIS A. VASQUEZ, WILLIAMS INST., LGBT PEOPLE AND HOUSING AFFORDABILITY, DISCRIMINATION, AND HOMELESSNESS 4 (2020), <https://williamsinstitute.law.ucla.edu/wp->

experience one or more of these circumstances, and are often more likely than cisgender peers to face housing instability.

The American Housing Survey (“AHS”), a nationally representative survey administered by HUD and the Census Bureau that collects data on the “size, composition, and quality of the nation’s housing,” is one of the most comprehensive sources of information on the U.S. housing supply.²⁰ In 2023, HUD included sexual orientation and gender identity questions in the AHS.²¹ These data showed that approximately 9% of transgender people had monthly housing costs that were 100% or more of their income.²² Another 28% had housing costs that were roughly 30%-99% of their income.²³ In total, 37% of transgender people in the U.S. were cost-burdened in 2023.²⁴ Other federal data sources have demonstrated high rates of housing instability among transgender youth: for example, an analysis of 2023 Youth Risk Behavior Survey data by the Centers for Disease Control and Prevention (“CDC”) found that within the past 30 days of responding to the survey, 10.7% of transgender students experienced unstable housing compared to 2.1% of cisgender male and 1.8% of cisgender female students.²⁵

Extensive evidence from regional research examining housing instability in both urban and rural areas demonstrates a similar pattern. For example, a study by Williams Institute scholars from 2024 found that 74% of transgender, nonbinary, and intersex respondents in Los Angeles County were cost-burdened.²⁶ Similarly, research published earlier this year using electronic health data from New York found transgender respondents were more than twice as likely to report housing instability, poor-quality housing, and high healthcare costs as cisgender

[content/uploads/LGBT-Housing-Apr-2020.pdf](#); see also DANIEL SOUCY, NAT’L ALL. END HOMELESSNESS, NATIONWIDE SURVEY SHOWS WIDESPREAD DISCRIMINATION AGAINST GENDER-EXPANSIVE PEOPLE, INCLUDING IN EMERGENCY SHELTERS 3 (2026), https://endhomelessness.org/wp-content/uploads/2026/05/US-Trans-Survey-Brief-V4_Working-File.pdf (finding that transgender respondents to the 2022 U.S. Transgender Survey who experienced family rejection were more likely to experience homelessness).

²⁰ *About the American Housing Survey (AHS)*, U.S. CENSUS BUREAU (May 20, 2026), <https://www.census.gov/programs-surveys/ahs/about.html>.

²¹ See *ICR Documents: Final - 2023 AHS – Supporting Statement A*, REGINFO (March 29, 2023), https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202211-2528-001.

²² *2023 National – Sexual Orientation and Gender Identity (SOGI) of Respondent – All Occupied Units*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html?tablename=TABLES19&bygroup1=COL_COST_PCT_INC (last visited June 16, 2026).

²³ *Id.*

²⁴ *Id.*

²⁵ Nicolas A. Suarez et al., *Disparities in School Connectedness, Unstable Housing, Experiences of Violence, Mental Health, and Suicidal Thoughts and Behaviors Among Transgender and Cisgender High School Students – Youth Risk Behavior Survey, United States, 2023*, CDC (Oct. 10, 2024), https://www.cdc.gov/mmwr/volumes/73/su/su7304a6.htm?ACSTrackingID=USCDC_921-DM138032&ACSTrackingLabel=MMWRSupplement%E2%80%9393Vol.73,October8,2024&deliveryName=USCDC_921-DM138032#F1 down.

²⁶ BRAD SEARS, WILLIAMS INST., HOUSING IS AN LGBTQ ISSUE (2024), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LA-County-Housing-Oct-2024.pdf>.

respondents.²⁷ Data from a 2025 community-based survey that assessed risk factors of homelessness among 427 transgender and nonbinary people living in the Southeastern U.S. found that past and current socioeconomic status can increase the risk of homelessness.²⁸

These studies illustrate a theme consistent with findings from a 2020 study by Williams Institute scholars examining research on LGBT housing affordability, discrimination, and homelessness: transgender and nonbinary people are impacted by multiple drivers of housing instability, including poverty and housing discrimination.²⁹ As the next sections show, research conducted since that 2020 study continues to document similar patterns.

i. Poverty

Poverty is a contributing factor to housing instability.³⁰ Research shows that transgender people are more likely than cisgender people to experience poverty. In a 2023 analysis of data from the Behavioral Risk Factor Surveillance System (“BRFSS”) and the U.S. Census Household Pulse Survey (“HPS”), Williams Institute scholars found that in 2020, 34.8% of transgender people were living in poverty compared to 15.5% of cisgender people.³¹ In 2021, 21.2% were living in poverty compared to 11.5% of cisgender people.³² Despite the decrease in poverty for all respondents, likely due to COVID economic relief programs during this time period, transgender people had the highest poverty rate compared to all other people across both reference years.³³ Data from the Household Pulse Survey analyzed in the same study showed that nearly one-third (30.6%) of transgender people lived with an income below the federal poverty level.³⁴ Among transgender people with children, data from the 2021 BRFSS showed that 25.5% lived in poverty, while the 2021-2022 HPS estimated that 31.4% lived in poverty.³⁵ Other studies using federal data have come to similar conclusions. For example, additional research using HPS data from 2021-2022 found that transgender people had lower rates of employment, lower

²⁷ Aaron S. Breslow et al., *Fewer Screens, Greater Needs: Housing Insecurity and Healthcare Costs for Transgender Patients in a Safety-Net System*, 4 HEALTH AFFS. SCHOLAR qxaf226 (2025), <https://academic.oup.com/healthaffairsscholar/article/4/1/qxaf226/8371030>.

²⁸ Amanda A. Draheim et al., *Risk Factors of Homelessness Among Sexual and Gender Minorities in the Southeastern U.S.*, 33 J. SOC. DISTRESS HOMELESSNESS 606 (2024).

²⁹ ROMERO, GOLDBERG & VASQUEZ, *supra* note 19.

³⁰ See e.g. *Housing Instability*, U.S. DEP’T HEALTH & HUM. SERVS, *supra* note 18; Draheim et al., *supra* note 28.

³¹ BIANCA D.M. WILSON ET AL., WILLIAMS INST., LGBT POVERTY IN THE UNITED STATES: TRENDS AT THE ONSET OF COVID-19 at 4, 7 (2023), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Poverty-COVID-Feb-2023.pdf>. Similarly, a 2022 analysis of BRFSS data from Washington state found that between 2016 and 2019, transgender adults were 2.5 times more likely to be living below 200% of the federal poverty level than cisgender adults. Karen I. Fredriksen Goldsen et al., *Health, Economic and Social Disparities Among Transgender Women, Transgender Men and Transgender Nonbinary Adults: Results from a Population-Based Study*, 156 PREVENTATIVE MED. 106988, 2, 4 (2022).

³² WILSON ET AL., *supra* note 31.

³³ *Id.* at 7. The overall decrease in poverty from 2020 to 2021 is likely due to a number of COVID-19 economic relief programs. *Id.* at 3.

³⁴ *Id.* at 8.

³⁵ *Id.*

incomes, and higher rates of poverty compared to cisgender people, and a separate study comparing data on gender minority people from the 2015 U.S. Transgender Survey (“2015 USTS”) to data from the American Community Survey found several economic indicators, such as unemployment and lower incomes, to be worse among all gender minority groups when compared to cisgender men.³⁶

ii. Housing Discrimination

Housing discrimination is another known driver of housing instability among transgender and nonbinary people.³⁷ Evidence of discrimination dates back almost two decades. For example, Williams Institute scholars analyzed reports of housing discrimination filed with state civil rights agencies during the period of 2008-2014 and found that such complaints were filed at a comparable rate by LGBTQ adults to complaints of racial discrimination in housing filed by people of color.³⁸ In one well-known 2017 study by the Urban Institute using matched pairs (n=204) to evaluate potential discrimination in rental offers, researchers found that housing providers told transgender testers about fewer rentals than cisgender testers.³⁹ Survey data provides support for the direct relationship between housing discrimination and homelessness: in the 2015 USTS, 12% of respondents reported that they experienced homelessness due to anti-transgender bias.⁴⁰

More recent research shows that transgender people continue to report housing discrimination in various contexts. For example, in a 2024 Williams Institute study of transgender people living in Los Angeles, over one in five transgender people surveyed (21%) said they were denied housing because of their gender identity, and one in eight reported being unfairly treated by a landlord or realtor.⁴¹ A 2019 study that surveyed almost 630 transgender women in the San Francisco Bay Area found that not only is anti-transgender discrimination a contributing factor to housing instability among transgender women, but almost 80% of women in the sample had experienced at least one instance of anti-transgender discrimination, much of

³⁶ Christopher S. Carpenter, Maxine J. Lee & Laura Nettuno, *Economic Outcomes for Transgender People and Other Gender Minorities in the United States: First Estimates from a Nationally Representative Sample* (2022); Matthew Shannon, *The Labor Market Outcomes of Transgender Individuals*, 77 LABOUR ECON. 102006 (2022); see also Stephanie M. Hernandez, Carolyn T. Halpern & Kerith J. Conron, *Sexual Orientation, Gender Expression and Socioeconomic Status in the National Longitudinal Study of Adolescent to Adult Health*, 78 J. EPIDEMIOLOGY & CMTY. HEALTH 121, 121, 122, 127 (2024).

³⁷ See generally ROMERO, GOLDBERG & VASQUEZ, *supra* note 19.

³⁸ CHRISTY MALLORY & BRAD SEARS, WILLIAMS INST., EVIDENCE OF HOUSING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY 1 (2016), <https://williamsinstitute.law.ucla.edu/publications/lgbt-housing-discrimination-us/>.

³⁹ DIANE K. LEVY ET AL., URB. INST., A PAIRED-TESTING PILOT STUDY OF HOUSING DISCRIMINATION AGAINST SAME-SEX COUPLES AND TRANSGENDER INDIVIDUALS (2017), https://www.urban.org/sites/default/files/publication/91486/2017.06.27_hds_lgt_final_report_report_finalized.pdf.

⁴⁰ SANDY E. JAMES ET AL., NAT’L CTR. TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 178 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

⁴¹ SEARS, *supra* note 26.

which occurred during their search for housing (21.4%).⁴² Furthermore, a 2022 study by AARP surveying LGBTQ+ U.S. residents aged 45 and older found that almost half of transgender respondents expressed fear of discrimination during the rental (46%) and home buying process (47%).⁴³

c. A Substantial Number of Transgender and Nonbinary Individuals Experience Homelessness

In 2025, HUD removed gender identity data from its Homelessness Management Information System, used to track and manage case information for individuals participating in HUD-funded homeless services, in compliance with Executive Order 14168.⁴⁴ This action effectively erases the ability of homeless service providers, and HUD, to make a contemporaneous estimate of how many transgender or nonbinary people are documented in the system as homeless. Prior to this removal, HUD administrative data documented the population of transgender and nonbinary individuals experiencing homelessness and accessing HUD-funded facilities.⁴⁵

One publication using HUD administrative data is HUD's yearly report estimating the number of homeless individuals, including how many of them are sheltered and unsheltered.⁴⁶ In 2024, HUD data showed that at least 2,500 transgender people and nearly 2,000 nonbinary people were experiencing homelessness.⁴⁷ HUD researchers calculated that 58.6% of transgender people experiencing homelessness were sheltered and 41.4% were unsheltered.⁴⁸ About half of nonbinary people (50.6%) were sheltered and 49.4% were unsheltered.⁴⁹ Out of unaccompanied youth experiencing homelessness, 551 were transgender and 530 were nonbinary.⁵⁰

⁴² Theo Beltran et al., *Intersectional Discrimination Is Associated with Housing Instability Among Trans Women Living in the San Francisco Bay Area*, 16 INT'L J. ENV'T RSCH. & PUB. HEALTH 4521 (2019).

⁴³ AARP, DIGNITY 2022: THE EXPERIENCE OF LGBTQ OLDER ADULTS (2022), https://www.aarp.org/content/dam/aarp/research/surveys_statistics/life-leisure/2022/lgbtq-community-dignity-2022-report.doi.10.26419-2Fres.00549.001.pdf.

⁴⁴ LAUREN BOUTON & ELANA REDFIELD, WILLIAMS INST., REMOVAL OF SEXUAL ORIENTATION AND GENDER IDENTITY FROM FEDERAL DATA COLLECTIONS: JANUARY 2025 TO JANUARY 2026 at 26 (2026), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Federal-SOGI-Data-Collection-Feb-2026.pdf>.

⁴⁵ *Annual Homelessness Assessment Reports (AHAR)*, U.S. DEP'T HOUS. & URB. DEV.: OFF. POL'Y DEV. & RSCH., <https://www.huduser.gov/portal/datasets/ahar.html> (last visited June 22, 2026). Data on transgender people has been collected yearly since 2015 and on nonbinary people since 2024. *Id.*

⁴⁶ See OFF. POL'Y DEV. & RSCH., *supra* note 45.

⁴⁷ TANYA DE SOUSA & MEGHAN HENRY, THE 2024 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS: PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 5 (2024), <https://www.huduser.gov/portal/sites/default/files/pdf/2024-AHAR-Part-1.pdf>. HUD also documents homelessness among people who are gender questioning, have a culturally specific identity, have a different identity than the available options, or identify as more than one gender. Because these labels may fall under the transgender or nonbinary umbrella, the numbers presented here may be more conservative than reality. *Id.*

⁴⁸ DE SOUSA & HENRY, *supra* note 47.

⁴⁹ *Id.*

⁵⁰ *Id.* at 39.

Approximately one in three transgender youth experiencing homelessness were unsheltered (30.7%) while 69.3% were sheltered.⁵¹ These numbers mirrored the number of nonbinary youth experiencing homelessness who were unsheltered (31.7%) and sheltered (68.3%).⁵²

HUD also gathers the demographics of veterans experiencing homelessness. In 2024, HUD found that 110 transgender and 105 nonbinary veterans were homeless.⁵³ Out of the veterans identifying as transgender, 46.4% were sheltered and 53.6% were unsheltered.⁵⁴ Out of those identifying as nonbinary, only 25.7% were sheltered while 74.3% were unsheltered.⁵⁵ Generally, HUD found that veterans who identified with a gender identity outside of woman or man were less likely to report being sheltered.⁵⁶

Additionally, non-government sources have shown that transgender and nonbinary people report experiencing homelessness at rates that are higher than cisgender, binary-gender people. For example, using data from the Generations and TransPop studies mentioned above, scholars at the Williams Institute determined that 8.3% of transgender adults reported experiencing homelessness in the 12 months prior to taking the survey.⁵⁷ Comparatively, researchers found that 2.5% of sexual minority adults and 1.4% of cisgender straight adults reported the same.⁵⁸

Similarly, in a 2026 study analyzing data from the 2022 U.S. Transgender Survey, the National Alliance to End Homelessness and Advocates for Trans Equality (“NAEH report”) concluded that adult transgender survey respondents were eight times more likely to experience lifetime homelessness compared to the general U.S. population.⁵⁹ Specifically, 30% of adult respondents reported experiencing homelessness at some point during their lifetime compared to 4% of the general U.S. population.⁶⁰ In the 12 months prior to taking the survey, 7% of adult participants reported experiencing homelessness compared to 1.5% of the overall U.S. population.⁶¹ Notably, these findings from the 2022 USTS were consistent with findings from the earlier 2015 USTS; in that survey, 30% of transgender respondents reported homelessness at some point in their lifetime.⁶² The NAEH Report also highlighted differences in outcomes across

⁵¹ *Id.* at 40.

⁵² *Id.*

⁵³ *Id.* at 51.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* The other options were “transgender”, “gender questioning”, “culturally specific identity”, “different identity”, “non-binary”, and “more than one gender.” *Id.*

⁵⁷ BIANCA D.M. WILSON ET AL., WILLIAMS INST., HOMELESSNESS AMONG LGBT ADULTS IN THE U.S. 3, 7 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Homelessness-May-2020.pdf>

⁵⁸ *Id.* at 3.

⁵⁹ SOUCY, *supra* note 19, at 1-2.

⁶⁰ *Id.*; JAMES ET AL., *supra* note 17; additional analysis of USTS data conducted by authors.

⁶¹ SOUCY, *supra* note 19, at 2; independent analysis of USTS data by authors resulted in a similar finding (6.8%). JAMES ET AL., *supra* note 17; additional analysis of USTS data conducted by authors.

⁶² JAMES ET AL., *supra* note 40.

race/ethnicity: half of indigenous respondents (50%) and 39% of Black respondents reported experiencing homelessness in their lifetime compared with 30% of respondents of all races and 4% of the general U.S. population.⁶³

II. Transgender and Nonbinary People Experience Harms Due to Shelter Exclusion and Discrimination

HUD acknowledges that [the Proposed Rule] 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.⁶⁴

As stated explicitly in the preamble to the rule, HUD expects that the Proposed Rule would result in the exclusion of transgender and nonbinary people from shelters because of their gender identity. We agree; research shows that many transgender and nonbinary people already experience shelter exclusion because of their gender identity. Fifty-eight percent of respondents (58%) to the 2022 USTS who had experienced homelessness in the past year and were denied access to a shelter said they were denied due to their transgender status or gender identity.⁶⁵ Similarly, in a 2024 Williams Institute study conducted in Los Angeles County, 28% of transgender respondents said they had been denied access to shelters because of their gender identity.⁶⁶ About a quarter of 2022 USTS respondents (26%) who stayed at a homeless shelter in the past year left a shelter due to poor treatment.⁶⁷

Unsheltered homelessness has been associated with increased vulnerabilities. For example, a 2022 literature review examining 42 studies comparing outcomes between sheltered and unsheltered homeless individuals in general found “a consistent and strong relationship between unsheltered homelessness and high rates of chronic disease, serious mental illness, and substance abuse when compared with sheltered populations.”⁶⁸ While more research is needed to fully understand the relationship between shelter status and health or safety disparities, including among transgender populations, at least one study examining HUD data has found similar patterns.⁶⁹ Some research suggests that homelessness in general may also contribute to secondary

⁶³ SOUCY, *supra* note 19, at 5; independent analysis of USTS data by authors found that 48% of American Indian & Alaska Native respondents reported lifetime homelessness. JAMES ET AL., *supra* note 17; additional analysis of USTS data conducted by authors.

⁶⁴ Equal Access to Housing in HUD Programs Revisions, 91 Fed. Reg. at 22782.

⁶⁵ JAMES ET AL., *supra* note 17; additional analysis of USTS data conducted by authors. Of the 6.8% adult 2022 USTS respondents who experienced homelessness in the last 12 months, 3.7% were denied access to a shelter. Of those, 58% said they were denied access because of their transgender status or gender identity. *Id.*

⁶⁶ SEARS, *supra* note 26.

⁶⁷ JAMES ET AL., *supra* note 17; additional analysis of USTS data conducted by authors.

⁶⁸ Jessica Richards & Randall Kuhn, *Unsheltered Homelessness and Health: A Literature Review*, 2 AJPM FOCUS 100043, 8 (2022).

⁶⁹ See *Transgender Homeless Adults & Unsheltered Homelessness: What the Data Tell Us*, NAT’L ALL. END HOMELESSNESS (July 24, 2020), <https://endhomelessness.org/resources/research-and-analysis/transgender-homeless->

vulnerabilities among transgender populations: in a 2024 study using federal HIV surveillance data, CDC researchers found that almost half of transgender women respondents who experienced intimate partner violence or forced sex had been homeless for 30-365 nights.⁷⁰

Research has shown that homelessness and unstable housing are correlated with increased risk of suicidality among transgender and nonbinary people. New research from the Williams Institute using the 2022 USTS to study suicidal risk factors among transgender youth and adults found that 59.4% of respondents who had experienced homelessness within the past year had suicide thoughts and 12.1% experienced a suicide attempt within the last year.⁷¹ Comparatively, 5.2% of the general population of U.S. adults reported a suicide thought and .6% reported a suicide attempt in the past year.⁷² The study also found that respondents who had been evicted (57%) or denied (50%) housing because of their transgender status were more likely to have had suicidal thoughts in the past 12 months compared to those who did not have such experiences (36% and 39%, respectively).⁷³

Many transgender people have experienced denial of admission to gender-affirming shelters and discrimination at while in shelters at some point in their lifetimes. By providing a federal baseline of inclusion, the Equal Access Rule has likely prevented many more transgender people from being turned away and established a baseline commitment to addressing harms that may occur when experiencing homelessness or accessing emergency shelter. This may also have the effect of helping some transgender and nonbinary people avoid harms associated with unsheltered homelessness. By contrast, the Proposed Rule fails to address these known risks to transgender and nonbinary people demonstrated by the relevant research and instead stands to implement practices that are likely to exacerbate them.

III. The Proposed Rule is Unsupported by Evidence

HUD justifies its Proposed Rule by citing a need to conform with Executive Order 14168; by asserting that the rule is necessary to protect cisgender women; and arguing that the rule protects religious providers of shelter.⁷⁴ While the legal question of compliance with the executive order is discussed below, here we discuss the factual assertions made by HUD in

[adults-unsheltered-homelessness-what-the-data-tell-us/](#) (the report notes that it is difficult to separate cause and effect when examining many of these characteristics, in the sense that substance abuse, for example, could be a reason for homeless as well as a response to homelessness).

⁷⁰ Ruthanne Marcus et al., *Transgender Women Experiencing Homelessness — National HIV Behavioral Surveillance Among Transgender Women, Seven Urban Areas, United States, 2019–2020*, 73 MORBIDITY & MORTALITY WKLY. REP. 40 (2024).

⁷¹ JODY L. HERMAN, RAKSHA KOPPARAM & AYDEN SCHEIM, WILLIAMS INST., SUICIDE THOUGHTS AND ATTEMPTS AMONG TRANSGENDER PEOPLE 10 (2026), <https://williamsinstitute.law.ucla.edu/publications/suicidality-transgender-adults/>.

⁷² *Id.* at 4.

⁷³ *Id.* at 26.

⁷⁴ Equal Access to Housing in HUD Programs Revisions, 91 Fed. Reg. at 22781-82.

support of the Proposed Rule. We find that the two primary factual arguments made by HUD – that the rule is needed to protect cisgender women, and that the rule is needed to relieve burdens on religious shelter providers – are unsupported by any relevant, probative, or otherwise meaningful evidence.

a. HUD’s Assertion that Cisgender Women Experience Violence Uniquely Attributable to Inclusion of Transgender Women Is Unsupported by Evidence

HUD justifies the Proposed Rule by stating that it is necessary to keep cisgender women safe in shelters.⁷⁵ HUD does not present any evidence that transgender women or nonbinary people are a danger to cisgender women in shelters. Instead, HUD references a single data point shared by a Minister of Justice in the United Kingdom regarding the number of incarcerated transgender people who were convicted of sexual offenses in that country,⁷⁶ and testimony from a homeless woman in Alaska that she did not want to sleep in an area with a “biological man.”⁷⁷ Given that HUD operates on U.S. soil and does not concern itself with prisons, the U.K. data point is of little relevance or utility on the subject of the rulemaking. Similarly, anecdotal evidence, which may reflect individual fears, discomfort, or bias, is insufficient to justify a national policy change affecting an entire class of individuals.

We were unable to find any credible research demonstrating that transgender women pose a categorical risk to cisgender women in homeless shelters, nor are we aware of any comprehensive analysis of shelter violence which has come to that conclusion. Anecdotal reports of violence allegedly perpetrated by transgender women in shelters are exceedingly rare.⁷⁸ The solution proposed by HUD – excluding transgender people from shelters that align with their gender identity – does not address genuine sources of harm for cisgender women that are well

⁷⁵ Equal Access to Housing in HUD Programs Revisions, 91 Fed. Reg. at 22781.

⁷⁶ *Id.*; *Prisoners: Transgender People: Question for Ministry of Justice*, UK PARLIAMENT (Dec. 16, 2024), <https://questions-statements.parliament.uk/written-questions/detail/2024-12-16/20298>.

⁷⁷ Equal Access to Housing in HUD Programs Revisions, 91 Fed. Reg. at 22781 fn. 15.

⁷⁸ A Google search by the authors of this comment under the news section for the terms “transgender”, “homeless”, and “shelter” along with the terms “attack”, “assault”, “harass”, or “rape” yielded two U.S. news stories: one about a transgender woman from South Carolina who was alleged to have attacked a shelter worker after being asked to leave the shelter and another concerning a lawsuit against a homeless shelter in Fresno that was alleged to not have protected residents when a person identifying as a transgender woman allegedly made lewd comments, peeked at them in the shower/restroom, and showed them lewd videos. See *Sword-Wielding Trans Woman Allegedly Stabs South Carolina Shelter Employee, Now Being Held in Men’s Jail: Cops*, INSIDE ED. (July 22, 2024, 12:08 PM), <https://www.insideedition.com/sword-wielding-trans-woman-allegedly-stabs-south-carolina-shelter-employee-now-being-held-in-mens>; Rory Appleton, *Women Accuse Poverello House of Allowing Transgender Resident to Sexually Harass Them*, FRESNO BEE (Oct. 12, 2018, 12:03 PM), <https://www.fresnobee.com/news/local/article219560720.html>.

documented in research,⁷⁹ and ignores non-discriminatory and evidence-based solutions that may be more likely to reduce violence in shelters overall.⁸⁰

b. HUD's Assertion That Religious Providers Would Be Unlawfully Burdened Is Unsupported by Evidence

HUD further justifies the Proposed Rule by claiming it would benefit religious providers by relieving them of the potential religious burden it asserts could be caused by providing shelter to transgender people according to gender identity.⁸¹ Religious providers are an essential component of the national infrastructure for homeless response – the National Alliance to End Homelessness estimates that faith-based providers account for at least 30% of all emergency shelter capacity.⁸² Current regulations allow HUD to grant religious accommodations to shelter providers on a case-by-case basis.⁸³ However, in its justification for the Proposed Rule, HUD does not present any evidence of religious accommodation requests based on the 2016 Equal Access Rule. In fact, in support of its claim that the 2016 Equal Access Rule might offend or burden religious shelter providers, HUD cites only one piece of anecdotal evidence – a lawsuit filed by a single religiously-affiliated shelter provider in Alaska challenging a local law, which resulted in preliminary ruling from a lower court and a case settlement.⁸⁴ HUD does not provide any other evidence in support of its position that religious shelter providers oppose the inclusive placement of transgender people in emergency shelters under the 2016 Equal Access Rule.⁸⁵

While the Constitution, statutes, and existing regulations already offer extensive religious protections for shelter providers, HUD may determine that compliance with their policies as a condition of participating in a federally funded program is necessary to fulfill its mission and purposes. The Religious Freedom Restoration Act explicitly allows the federal government to “substantially burden a person’s exercise of religion ... if it...(1) is in furtherance of a compelling governmental interest[] and (2) is the least restrictive means of furthering that

⁷⁹ One example is abuse from staff. See Lauren Hepler, ‘A Volunteer Jail’: Inside the Scandals and Abuse Pushing California’s Homeless Out of Shelters, CALMATTERS (Feb. 26, 2025), <https://calmatters.org/housing/2025/02/california-homeless-shelters-purgatory/>.

⁸⁰ See Nick Kerman et al., *Victimization, Safety, and Overdose in Homeless Shelters: A Systematic Review and Narrative Synthesis*, 83 HEALTH & PLACE 103092 (2023).

⁸¹ Equal Access to Housing in HUD Programs Revisions, 91 Fed. Reg. at 22781-82.

⁸² NAT’L ALL. END HOMELESSNESS, FAITH-BASED ORGANIZATIONS: FUNDAMENTAL PARTNERS IN ENDING HOMELESSNESS (2017), https://endhomelessness.org/wp-content/uploads/2017/06/05-04-2017_Faith-Based.pdf.

⁸³ 24 C.F.R. § 5.109 (2024).

⁸⁴ Equal Access to Housing in HUD Programs Revisions, 91 Fed. Reg. at 22781; *Downtown Soup Kitchen v. Anchorage*, 406 F. Supp. 3d 776, 799 (D. Alaska 2019) (notably, HUD cites the same solitary case to support its position that cisgender women could be harmed by the inclusion of transgender people).

⁸⁵ Equal Access to Housing in HUD Programs Revisions, 91 Fed. Reg. at 22781-82. Instead of evidence that the Alaska shelter’s position on the bed assignment of transgender homeless individuals is representative of other shelter providers, HUD offers polling and statements from religious individuals and groups about their positions on transgender people in general. *Id.* at fn. 18

compelling governmental interest.”⁸⁶ Relevant here is HUD’s mission to “create strong, sustainable, inclusive communities” and provide “decent housing and a suitable living environment for all,”⁸⁷ which the agency does by “build[ing] inclusive and sustainable communities free from discrimination.”⁸⁸ In light of HUD’s responsibility to provide a solution to address homelessness among transgender people, the prevalence of homelessness among transgender and nonbinary people, and the known harms of exclusion and discrimination described above, the need for a policy requiring shelters to accommodate transgender people according to gender identity could be quite compelling to a court.

The Proposed Rule is not the first time HUD has considered the question of potential religious burdens on shelter providers due to accommodating transgender individuals. The preamble to the 2016 Equal Access Rule, which allows transgender people to be housed according to gender identity, addressed the concern of religious objections head-on. Just as HUD does not allow shelters to deny access on the basis of race or disability to accommodate the religious views of others, HUD reasoned, to permit shelters to deny access on the basis of gender identity would be equally inappropriate.⁸⁹ The preamble continued:

The exclusion of an individual or family from CPD-funded shelter because the individual is transgender or the family has one or more transgender members is inconsistent with HUD’s mission to ensure decent housing and a suitable living environment for all. It is equally inappropriate to isolate or ostracize individuals because their gender identity is not the same as their sex assigned at birth. It is incumbent on HUD to ensure that the regulations governing its housing programs make clear that such arbitrary exclusion, isolation, and ostracism will not be tolerated in HUD-assisted housing and shelters.⁹⁰

IV. The Proposed Rule Is Likely to Increase Costs to the Federal Government and State and Local Affiliates

In considering whether to implement a Proposed Rule, HUD must consider factors that may increase costs or create burdens. Under the Regulatory Flexibility Act, agencies must consider the economic impact of their regulations on participating entities.⁹¹ HUD acknowledges in the Proposed Rule that:

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits

⁸⁶ See 42 U.S.C. § 2000bb-1.

⁸⁷ Equal Access in Accordance With an Individual’s Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. at 64773.

⁸⁸ See *Multifamily Residents*, U.S. DEP’T HOUS. & URB. DEV., <https://www.hud.gov/hud-partners/multifamily-residents> (last visited June 16, 2026).

⁸⁹ Equal Access in Accordance With an Individual’s Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. at 64773.

⁹⁰ *Id.*

⁹¹ 5 U.S.C. §§ 601-612.

(including potential economic, environmental, public health, and safety effects; distributive impacts; and equity).⁹²

Evidence suggests that the Proposed Rule may result in increased costs for local, state, and federal governments, in addition to the potential harms to transgender and nonbinary individuals described above.

Primarily, the Proposed Rule may generate costs because it is likely to drive an increase in unsheltered homelessness. This is because the rule does not offer viable alternatives for transgender people who may lose access to shelter. HUD explains that transgender individuals who are denied access to their preferred shelter or shelter accommodations “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.”⁹³ However, available research on experiences of transgender people denied gender-affirming shelter suggests that transgender and nonbinary people may be unable to find workable alternatives. For example, a nationally representative survey from the Center for American Progress found that 87% of “transgender, nonbinary, agender, genderqueer, or gender nonconforming” adults who used shelter services said it would be somewhat difficult, very difficult, or impossible to find other shelter if they were denied access at a shelter.⁹⁴ When evaluating nonbinary, gender nonconforming, genderqueer, or agender people (essentially, those who do not conform to a typical male/female binary), 91% of those who used shelter services said it would be at the very least somewhat difficult to find other shelter.⁹⁵ This evidence suggests that the Proposed Rule could result in the exclusion or expulsion of a substantial number of homeless transgender and nonbinary people from shelter bed placements, without alternative accommodations.

The practical result of this policy could therefore be a need to expend additional resources to compensate for the shelter capacity taken offline by the Proposed Rule. By removing shelter options for transgender people, this rule effectively reduces available beds in a region or Continuum of Care for a needy population.⁹⁶ Given that HUD’s mission is to “create strong, sustainable, inclusive communities” and that the agency works to “build inclusive and sustainable communities free from discrimination,” HUD has a duty to ensure that transgender people in need of shelter are able to access such shelter in a non-discriminatory manner.⁹⁷ HUD

⁹² Equal Access to Housing in HUD Programs Revisions, 91 Fed. Reg. 22782; see Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993); Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

⁹³ Equal Access to Housing in HUD Programs Revisions, 91 Fed. Reg. at 22782.

⁹⁴ Thee Santos, Lindsay Mahowald & Sharita Gruberg, *The Trump Administration’s Latest Attack on Transgender People Facing Homelessness*, CTR. AM. PROGRESS (Sept. 3, 2020), <https://www.americanprogress.org/article/trump-administrations-latest-attack-transgender-people-facing-homelessness/>.

⁹⁵ *Id.*

⁹⁶ Under HUD’s Continuum of Care program, nonprofits, states, and local governments can receive funding from the federal government in order to “rehouse homeless individuals...while minimizing the trauma and dislocation” caused by homelessness. 24 C.F.R. § 578.1 (2012).

⁹⁷ See U.S. DEP’T HOUS. & URB. DEV., *supra* note 88.

may need to develop alternatives to satisfy its responsibilities, such as: building new shelters specifically for transgender and nonbinary people; expediting housing placement for transgender people through unique voucher programs; or budgeting for additional services to ensure newly unsheltered transgender people are safe from extreme weather, are able to maintain hygiene, and are protected from violence.

All of these interventions are likely to increase agency costs. Current homelessness interventions already cost federal, state, and local stakeholders billions of dollars annually. For example, the federal government proposed a budget of more than \$10 billion in homelessness assistance for the 2025 fiscal year.⁹⁸ This figure does not include the costs each state, city, and county also contribute. Nor does this figure include the costs to other systems such as healthcare, law enforcement, and emergency response that are known to be incurred by supporting unsheltered homeless individuals.⁹⁹ HUD estimates that 1,501 transgender people and 1,001 nonbinary people are currently placed in shelters nationally.¹⁰⁰ If the Proposed Rule is enacted, HUD may need to develop alternative shelter options for a substantial number of these individuals. Creating new shelter capacity is costly: for example, a recent study examining the costs of building and operating various forms of homeless intervention in Portland, Oregon found that median capital costs alone for congregate shelters to be \$43,692 per unit; for “villages” (small clusters of individual pods for homeless individuals) to be \$99,630 per unit; and for motel structures to be \$88,462 per unit.¹⁰¹

If the Proposed Rule is enacted, it is likely that expenses to all stakeholders will increase. Conversely, the 2016 Equal Access Rule maximizes resources by ensuring that transgender and nonbinary people can be accommodated by using already-existing spaces. Because the Proposed Rule would constructively reduce shelter capacity and generate a need for increases in shelter beds, response services, and collateral services for transgender and nonbinary individuals, HUD

⁹⁸ U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, TARGETED FEDERAL HOMELESSNESS FUNDING: HOW THE PRESIDENT’S 2025 BUDGET COMPARES, <https://www.usich.gov/sites/default/files/document/FY%202025%20Proposed%20Federal%20Budget%20for%20Homelessness.pdf> (last visited June 16, 2026).

⁹⁹ See *Transgender Homeless Adults & Unsheltered Homelessness: What the Data Tell Us*, NAT’L ALL. END HOMELESSNESS (July 24, 2020), <https://endhomelessness.org/resources/research-and-analysis/transgender-homeless-adults-unsheltered-homelessness-what-the-data-tell-us/> (finding unsheltered transgender people have a significantly increased number of ambulance rides, emergency room visits, police contacts, and stays at correctional facilities compared to sheltered transgender people); Hannah Chimowitz & Adam Ruege, *The Costs and Harms of Homelessness*, COMM’Y SOLUTIONS (Sept. 25, 2023), <https://community.solutions/research-posts/the-costs-and-harms-of-homelessness/> (citing that homelessness has impacts on healthcare costs and that unsheltered homelessness results in costs for enforcing laws and for responding to fires started by unsheltered individuals).

¹⁰⁰ DE SOUSA & HENRY, *supra* note 47, at 5.

¹⁰¹ Jacen Greene et al., *Cost Comparison of Congregate, Motel, and Village-Type Shelters for People Experiencing Homelessness*, 35 J. SOC. DISTRESS & HOMELESSNESS 95, 97(2025); see also A-MARK FOUNDATION, WHAT ARE THE COSTS OF BUILDING TINY HOME VILLAGES TO DECREASE HOMELESSNESS? (2023), <https://amarkfoundation.org/reports/tiny-home-villages/>.

must conduct a full and proper economic analysis to understand the magnitude of costs that could be generated by implementation of the rule.

V. The Proposed Rule Likely Violates Multiple Provisions of Law

HUD rulemaking is subject to numerous procedural and substantive constraints. Given that the Proposed Rule is not supported by evidence and is contradicted by relevant research, it is likely to run afoul of the “reasoned decision-making” requirement of the Administrative Procedure Act and policymaking provisions of the Evidence Act. Furthermore, given that the primary motivation for the Proposed Rule was the desire to deny a right or benefit to transgender people, as evidenced by HUD’s reliance on Executive Order 14168, it may also violate the Equal Protection Clause of the Fifth Amendment to the United States Constitution.

a. The Proposed Rule Is Not a Product of “Reasoned Decision-Making”

The Administrative Procedure Act (“APA”) governs the rule-making procedures that federal agencies must follow, and grants federal courts oversight over all agency actions.¹⁰² The APA’s provisions are designed to ensure due deliberation and fairness in agency actions.¹⁰³ Described by the senator who co-sponsored the bill as “a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated,” the APA ensures public transparency, input, and accountability in the rulemaking process.¹⁰⁴ Courts reviewing agency actions under the APA will examine the agency’s justification to ensure it is not, *inter alia*, “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁰⁵

The touchstone of “arbitrary and capricious” review is whether the action was the product of “reasoned decision-making.”¹⁰⁶ To meet this threshold, agencies must “examine the relevant data and articulate a satisfactory explanation for its action, including a ‘rational connection between the facts found and the choices made.’”¹⁰⁷ A reviewing court must “consider whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment.”¹⁰⁸ Although “a court may not set aside an agency’s policymaking decision solely because it might have been influenced by political considerations or prompted by

¹⁰² 5 U.S.C. §§ 551-559; *see also Summary of the Administrative Procedure Act*, U.S. ENV’T PROT. AGENCY (last updated July 9, 2025), <https://www.epa.gov/laws-regulations/summary-administrative-procedure-act>.

¹⁰³ *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (quoting *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 741 (1996)).

¹⁰⁴ Virginia Huth, *Celebrating the 75th anniversary of the Administrative Procedure Act*, U.S. GEN. SERV. ADMIN. (June 11, 2021), <https://www.gsa.gov/blog/2021/06/11/celebrating-the-75th-anniversary-of-the-administrative-procedure-act>.

¹⁰⁵ 5 U.S.C. § 706(2)(A).

¹⁰⁶ *Altera Corp. & Subsidiaries v. Cmm’r.*, 926 F.3d 1061, 1081 (9th Cir. 2019) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) [hereinafter *State Farm*]).

¹⁰⁷ 5 U.S.C. § 706; *State Farm*, 463 U.S. at 43 [internal citations omitted].

¹⁰⁸ *State Farm*, 463 U.S. at 43 [internal citations omitted].

an Administration’s priorities,”¹⁰⁹ agencies are nonetheless expected to “examine the relevant data,”¹¹⁰ must act in good faith,¹¹¹ and – crucially for HUD’s Proposed Rule – must not ignore evidence simply just because it runs counter to their position.¹¹²

Additionally, federal agencies, including HHS, are subject to the Foundations for Evidence-Based Policymaking Act of 2018 (the “Evidence Act”), signed by President Trump in 2019.¹¹³ Designed to remedy the problem federal agencies face when they “lack the data and evidence necessary to make critical decisions about program operations, policy, and regulations,” the law builds on existing federal policy and infrastructure to “advance data and evidence-building functions in the Federal Government by statutorily mandating Federal evidence-building activities, open government data, and confidential information protection and statistical efficiency.”¹¹⁴

HUD justifies this Proposed Rule by arguing that it will ensure safe shelter for cisgender women and will reduce the burden on religious providers.¹¹⁵ However, HUD provides no credible evidence that adopting the Proposed Rule would mitigate risks for cisgender people. Nor does HUD provide evidence that the Proposed Rule is necessary to protect the religious exercise of shelter providers. Conversely, a well-established body of research demonstrates that the Proposed Rule could result in serious harms for transgender and nonbinary people, which HUD

¹⁰⁹ See generally *DOC v. New York*, 588 U.S. 752, 756 (2019) (Regarding efforts to add a citizenship question to the Decennial Census: “It is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and work with staff attorneys to substantiate the legal basis for a preferred policy. Yet viewing the evidence as a whole, this Court shares the District Court’s conviction that the decision to reinstate a citizenship question cannot adequately be explained in terms of DOJ’s request for improved citizenship data to better enforce the Voting Rights Act”).

¹¹⁰ See, e.g., *State Farm*, 463 U.S. at 43 (“Normally, an agency rule would be arbitrary and capricious if the agency...entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before it, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” [emphasis added])

¹¹¹ See *DOC v. New York*, 588 U.S. at 75 (“[a court] may inquire into the ‘mental processes of administrative decisionmakers’ upon a ‘strong showing of bad faith or improper behavior.’” [internal citations omitted]).

¹¹² *State Farm*, 463 U.S. at 43; see also *Genuine Parts C. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018) (when considering a claim under 5 U.S.C. § 706(2)(A), “in their application to the requirement of factual support, the substantial evidence test and the arbitrary and capricious test are one and the same...an agency action is arbitrary and capricious if it rests upon a factual premise that is unsupported by substantial evidence...an agency cannot ignore evidence contradictory to its position”[internal citations omitted]); *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000) (resolving a dispute under the “substantial evidence” standard, “it is well established that the substantial evidence rule requires consideration of the evidence on *both* sides; evidence that is substantial viewed in isolation may become insubstantial when contradictory evidence is taken into account.”)

¹¹³ *Implementing the Foundations for Evidence-Based Policymaking Act at the U.S. Department of Health & Human Services*, OFF. ASSISTANT SEC’Y PLAN. & EVALUATION, <https://aspe.hhs.gov/topics/data/evidence-act-0> (last visited Feb. 10, 2026).

¹¹⁴ Memorandum from Russel T. Vought to Heads of Executive Departments and Agents (July 10, 2019) (<https://www.whitehouse.gov/wp-content/uploads/2019/07/M-19-23.pdf>).

¹¹⁵ Equal Access to Housing in HUD Programs Revisions, 91 Fed. Reg. at 22781.

disregards.¹¹⁶ Therefore, the Proposed Rule appears to be in direct conflict with the statutory requirements that agency actions will be rational, reasoned, and evidence based.

By contrast, the Evidence Act provides a clear blueprint for an alternative approach to understand and remediate any sex-based shelter placement concerns. First, the Administration would need to reinstate data collection on gender identity among sheltered and unsheltered homeless individuals to be able to accurately categorize and quantify the populations. With this information, the agency could evaluate shelter experiences and case dispositions among a test sample of transgender and cisgender people over time, identify specific problems that may emerge, design a solution to those problems that is grounded in the best available evidence, prototype and test the alternative solutions, and, if found to improve upon outcomes, propose a new rule to implement those changes across HUD funded programs.

b. The Proposed Rule Likely Violates the Equal Protection Clause

Executive actions like HUD’s Proposed Rule are subject to the Equal Protection Clause of the Fifth Amendment (“EPC”).¹¹⁷ Under the EPC, the Supreme Court reviews government actions under different tiers of scrutiny, depending on the type of classification being made.¹¹⁸ Classifications based on race, ethnicity and national origin, for example, are subject to strict scrutiny – the most exacting standard.¹¹⁹ Classifications based on sex are subject to what is known as “intermediate scrutiny,” under which the government must offer an “exceedingly persuasive” justification.¹²⁰ The government’s action, in these instances, must be substantially related to an important government interest.¹²¹ Classifications not found to merit strict or intermediate scrutiny are subject to “rational basis” review, under which a government actor must merely show that a policy is rationally related to a legitimate government interest.¹²²

Even if the Supreme Court were to review the Proposed Rule under the lenient and deferential standard of rational basis,¹²³ there is reason to believe that the rule could be struck down due to its openly discriminatory nature. Under rational basis review, courts still consider whether the decision was motivated by “discriminatory animus” or “bare... desire to harm a politically unpopular group.”¹²⁴ While there is no definitive legal standard for identifying animus,

¹¹⁶ *Id.* at 22782.

¹¹⁷ U.S. CONST. amend V; *Bolling v. Sharpe*, 347 U.S. 497 (1954) (incorporating the Fourteenth Amendment’s Equal Protection principles against the Federal Government via the Due Process Clause of the Fifth Amendment).

¹¹⁸ See, e.g., *Equal Protection Supreme Court Cases*, JUSTIA, <https://supreme.justia.com/cases-by-topic/equal-protection/> (last visited June 17, 2026).

¹¹⁹ *Id.*

¹²⁰ *Id.*; see *U.S. v. Virginia*, 518 U.S. 515 (1996).

¹²¹ *Id.*

¹²² *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

¹²³ *Id.* at 440-42.

¹²⁴ *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *Romer v. Evans*, 517 U.S. 620, 632 (1996).

courts have generally set aside policies when animus is the sole reason for the policy.¹²⁵ Here, HUD justifies its Proposed Rule by citing Executive Order 14168; by asserting that the rule is necessary to protect cisgender women; and arguing that the rule protects religious providers of shelter.¹²⁶ Each of these justifications may be found insufficient in light of the substantial evidence – and acknowledgment by HUD – that the rule intentionally discriminates against transgender and nonbinary people and will result in harm to them.

The action that provided foundation for the Proposed Rule was Executive Order 14168, titled “Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government.”¹²⁷ This executive order declared that the executive branch would adopt definitions of sex and gender that reflect a person’s “immutable biological classification as either male or female” and that “gender ideology” – the belief that gender identity may differ from sex and there may be more than two genders – was prohibited for federal agencies, programs, and services.¹²⁸ Agencies, including HUD, were required to promulgate rules and revise policies using the definitions of sex in the executive order when interpreting statutes, regulations, or guidance.¹²⁹ In essence, the order directs agencies not to acknowledge the existence (or, by extension, rights or protections) of transgender and nonbinary people.

That HUD was directed to implement Executive Order 14168 is not alone a sufficient justification for upholding the Proposed Rule. For example, when the State Department issued new rules based on Executive Order 14168 that required the passports of transgender people to reflect only the sex they were assigned at birth,¹³⁰ a Massachusetts District Court judge stated that precedent requires that discriminatory policies be justified by something other than a desire for uniformity across agencies.¹³¹

Evidence suggests that the current administration’s policies, including the Proposed Rule, are motivated primarily by a desire to prevent legal recognition of gender identity and thereby prevent transgender people from full participation in federal programs and services. Since January 20, 2025, the administration has issued eight executive orders and numerous proposed rules requiring agencies to cease acknowledging the gender identities of transgender people and begin leveraging resources to prevent transgender people from accessing services and participating in federally funded programs.¹³² The administration has also taken actions to erase

¹²⁵ *Trump v. Hawai’i*, 585 U.S. 667, 705-06 (2018).

¹²⁶ *Equal Access to Housing in HUD Programs Revisions*, 91 Fed. Reg. at 22781-82.

¹²⁷ *Id.* at 22782; Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 30, 2025).

¹²⁸ Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 30, 2025).

¹²⁹ *Id.*

¹³⁰ *See* 90 Fed. Reg. 9652 (Feb. 14, 2025) (changing passport applications to replace “gender” with “sex”);

¹³¹ *Orr v. Trump*, 778 F. Supp. 3d 394, 413 (Mass. Dist. Ct. 2025).

¹³² *See, e.g.*, Exec. Order No. 14148, 90 Fed. Reg. 8237 (Jan. 28, 2025); Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 30, 2025); Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 31, 2025); Exec. Order No. 14151, 90 Fed. Reg.

evidence of transgender and nonbinary people from federal surveys, programs, and services. For example, it rescinded the LGBTQ+ Evidence Agenda (requiring agencies to acknowledge and account for LGBTQ+ people in programs and services), removed data on transgender and nonbinary people from nearly all federally administered surveys and administrative data collections, terminated grants to researchers studying transgender people, and promulgated a proposed rule prohibiting any federal funding recipient from the recognition or study of transgender people.¹³³ Taken together, these actions demonstrate not just an indifference to transgender and nonbinary people, but a clear and intentional effort to deny dignity, rights, and participation in federal programs and services solely *because* they are transgender or nonbinary. In a case considering the administration’s new policy of excluding transgender people from military service pursuant to related Executive Order 14183, a district court – later upheld by the D.C. Circuit Court – found the Administration’s rationale for exclusion to be “soaked in animus and dripping with pretext.”¹³⁴ One of the factors the court considered was that the administration has “targeted transgender persons writ large.”¹³⁵

As described above, the other rationales provided by HUD are not supported by evidence. Rather, the evidence of potential harm of the Proposed Rule to transgender persons is substantial, whereas evidence offered by HUD of a need for the rule or potential harms of preserving the status quo is scant or nonexistent. If challenged in a court under the Equal Protection Clause, these justifications may be found insufficient to overcome the evidence of the administration’s desire to harm transgender persons by depriving them of participation in federally funded programs and services, expressed explicitly in the executive orders and demonstrated by the wide range of actions already undertaken, including this Proposed Rule.

8339 (Jan. 29, 2025); Exec. Order No. 14190, 90 Fed. Reg. 8853 (Jan. 29, 2025); Exec. Order No. 14201, 90 Fed. Reg. 9279 (Feb. 11, 2025); Exec. Order No. 14183, 90 Fed. Reg. 8757 (Feb. 3, 2025); Exec. Order No. 14187, 90 Fed. Reg. 8771 (Jan. 28, 2025); 30-Day Notice of Proposed Information Collection: Application for a U.S. Passport, 90 Fed. Reg. 9652 (Feb. 14, 2025); Agency Information Collection Request: Federal Employees Dental and Vision Insurance Program Enrollment System, 90 Fed. Reg. 17471 (Apr. 25, 2025); Patient Protection and Affordable Care Act; Marketplace Integrity and Affordability, 90 Fed. Reg. 12942 (Mar. 19, 2025); William D. Ford Federal Direct Loan (Direct Loan) Program, 90 Fed. Reg. 48966 (Oct. 31, 2025); Medicaid Program; Prohibition on Federal Medicaid and Children’s Health Insurance Program Funding for Sex-Rejecting Procedures Furnished to Children, 90 Fed. Reg. 59441 (Dec. 19, 2025); Medicare and Medicaid Programs; Hospital Condition of Participation: Prohibiting Sex-Rejecting Procedures for Children, 90 Fed. Reg. 59463 (Dec. 19, 2025).

¹³³ Regulation for Federal Financial Assistance, 91 Fed. Reg. 32198 (May 29, 2026); Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 30, 2025); Exec. Order No. 14148, 90 Fed. Reg. 8237 (Jan. 28, 2025); Angela Watercutter, *Researchers Rush to Save US Government Data on Trans Youth—Before It Disappears*, WIRED (Mar. 21, 2025, 5:30 AM), <https://www.wired.com/story/researchers-rush-to-save-data-on-trans-youth-before-it-disappears/>; Theresa Gaffney, *CDC Will No Longer Process Transgender Data*, STAT NEWS (Feb. 25, 2025), <https://www.statnews.com/2025/02/25/cdc-will-no-longer-process-transgender-data/>; Sara Reardon, *New NIH Grant Terminations Target Transgender Studies—Even in Mice*, SCI. (Mar. 6, 2025, 2:30 PM), <https://www.science.org/content/article/new-nih-grant-terminations-target-transgender-studies-even-mice>.

¹³⁴ *Talbott v. U.S.*, 775 F. Supp. 3d 283, 326 (D.C. Dist. Ct., Mar. 18, 2025) (upheld on appeal by *Talbott v. U.S.*, 2026 U.S. App. LEXIS 15605 (D.C. Cir. Ct. of Appeals, June 1, 2026).

¹³⁵ *Id.* at 330.

With these considerations in mind, HUD must consider the possibility that a court would find the Proposed Rule in violation of the Equal Protection Clause.

VI. Conclusion

Federal policymaking must follow rules to ensure that it is consistent with constitutional and statutory obligations. This is part of the greater system of checks and balances that ensures democratic governance. At the core of HUD's mission and purpose is the fundamental human need for housing, and the government's responsibility to ensure it is abundant, fair, and accessible. The Proposed Rule does nothing to advance these purposes. It does not leverage evidence to determine policies that will meet the needs of homeless and unstably housed Americans, nor does it improve their conditions and outcomes. It does just the opposite: it disrupts an evidence-based solution that has been working for a decade, if not longer. Instead, the Proposed Rule disregards a substantial body of research and inserts a new policy that is explicitly intended to exact harm on a vulnerable group, not because evidence demands it, but solely because the group is politically disfavored by the current administration.

We urge the administration to take a different tack: study the experiences of transgender, nonbinary, and cisgender people experiencing homelessness; engage meaningfully with the evidence; consider the needs of all stakeholders (including religious shelter providers), and if it is deemed necessary to develop new solutions, ensure they are fair, equitable, nondiscriminatory, and above all, rationally related to the purposes of shelter safety, rehousing, and housing security.

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