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Equal Access to Housing in HUD Programs Revisions: Legal Analysis[1]

On April 28, 2026, the U.S. Department of Housing and Urban Development ("HUD") published a proposed rule titled Equal Access to Housing in HUD Programs Revisions, Docket No. FR-6518-P-01 ("EAR Revision").[2] The public has 60 days to provide comments to the rule, or until June 29, 2026. Then HUD will review the comments and publish a final rule that will likely take effect 30 days later.

The EAR Revision rolls back previous HUD rulemaking that protects LGBTQ+ families and individuals from discrimination in HUD-subsidized housing and shelter. It is a cruel attack on LGBTQ+ families, and in particular transgender[3] individuals experiencing homelessness. Of particular concern is a proposed mandate that shelters and facilities funded by HUD's Office of Community Planning and Development ("CPD") discriminate against transgender individuals seeking shelter and subject them to invasive questioning and potential harassment and abuse.[4]

I. History, Background, and Current Law

a. The 2012 and 2016 Equal Access Rules

In 2012, HUD published its final rule entitled Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity ("2012 EAR").[5] The 2012 EAR was promulgated to ensure that HUD's housing programs would be open to all eligible individuals and families regardless of sexual orientation, gender identity, or marital status. In 2016, HUD published a follow-up rule titled Equal Access in Accordance With an Individual's Gender Identity in Community Planning and Development Programs ("2016 EAR").[6] The 2016 EAR ensures equal access to HUD's Office of Community Planning and Development ("CPD") programs, specifically shelters, in accordance with a shelter seeker's self-identified gender identity. HUD's 2016 Equal Access Rule amendments constitute a crucial policy to improve the treatment of transgender and gender nonconforming individuals in securing emergency shelter.

As a result of the 2012 and 2016 rulemaking, existing regulations state that HUD-assisted and insured housing "shall be made available without regard to actual or perceived sexual orientation, gender identity, or marital status."[7] Housing providers may not consider "actual or perceived sexual orientation, gender identity, or marital status" in determining whether a group of people constitutes a "family" or "household" in public and multifamily housing, the voucher program, FHA programs, and certain CPD programs.[8] Currently, gender identity is defined as

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[1] Special thanks to Sasha Samberg-Champion, Anna Bailey, and Sonya Acosta for contributions to this analysis.
[2] 91 Fed. Reg. 22,779.
[3] "Transgender" is used in this document as an umbrella term that includes transgender, nonbinary, gender non-conforming, and other individuals whose gender identity and/or presentation does not align with the sex they were assigned at birth.
[4] Warning to the reader: this memorandum discusses HUD's justification for the proposed rule which include harmful and baseless stereotypes about transgender people.
[5] 77 Fed. Reg. 5662 (Feb. 3, 2012). This followed a proposed rule published for public comment on January 24, 2011 at 76 Fed. Reg. 4194.
[6] 81 Fed. Reg. 64,763 (Sep. 21, 2016). This followed a proposed rule published for public comment on November 20, 2015 at 80 Fed. Reg. 72,642.
[7] 24 C.F.R. § 5.105(a)(2).
[8] 24 C.F.R. §§ 5.403; 200.3; 570.3; 574.3; 891.105; 982.4(b).

> 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. Perceived gender identity means the gender with which a person is perceived to identify based on that person's appearance, behavior, expression, other gender related characteristics, or sex assigned to the individual at birth or identified in documents.[9]

Sexual orientation is defined as "one's emotional or physical attraction to the same and/or opposite sex (*e.g.,* homosexuality, heterosexuality, or bisexuality)."[10]

Finally, existing law contains a provision added by the 2016 rule which specifically protects transgender individuals' access to CPD-funded programs and facilities, including HOME, Housing Trust Fund, CDBG, HOPWA, ESG, CoC, and Rural Housing Stability Assistance Program.[11] Shelters and facilities funded by CPD must ensure that equal access to programs, shelters, facilities, benefits, services, and accommodations is provided in accordance with the individual's gender identity.[12] Placement and accommodation in temporary, emergency shelters or other facilities with shared sleeping or bathing facilities must be made in accordance with the individual's gender identity.[13] And individuals may not be subjected to intrusive questioning or asked to provide anatomical information or medical evidence of gender identity.[14] This part of the rule ensures that transgender people facing homelessness have access to shelters and services, and that they are assigned to accommodations that match their gender identity.

b. 2020 Proposed Rulemaking

On July 24, 2020, the first Trump Administration published a proposed rule titled Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs ("2020 Proposed Rule").[15] The proposed rule did not disturb the general prohibition against discrimination based on gender identity or sexual orientation in 24 C.F.R. § 5.105. Instead, it dismantled the protections for transgender people seeking shelter and other CPD-funded accommodations or services under § 5.106. It would have allowed HUD-funded shelters or facilities to make admission and accommodation decisions based on "its own policy for determining sex."[16] The proposed rule would have also allowed shelters with shared sleeping or bathing facilities to "request information or documentary evidence of the person's sex, except that the shelter may not request evidence which is unduly intrusive of privacy" where the shelter has a "good faith belief" that a person is not of the sex which the shelter accommodates.[17] Shelters that determined they could not

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[9] 24 C.F.R. § 5.100. Note that the 2016 EAR expanded the definition from that in the 2012 EAR, which was "actual or perceived gender-related characteristics."
[10] 24 C.F.R. § 5.100. This definition was also expanded by the 2016 rule from the 2012 version.
[11] 24 C.F.R. § 5.106(a).
[12] 24 C.F.R. § 5.106(b).
[13] 24 C.F.R. § 5.106(c).
[14] 24 C.F.R. § 5.106(b).
[15] 85 Fed. Reg. 44,811.
[16] *Id*. at 44,818.
[17] *Id*.

accommodate an individual because of their gender identity would need to make a transfer recommendation.[18]

The 2020 Proposed Rule met a robustly organized opposition and received over 66,000 comments (the most ever received in response to HUD rulemaking at the time). The rule was never finalized and was withdrawn by the Biden Administration on April 27, 2021.[19]

II. Proposed Regulatory Changes and Justification

The newly proposed EAR Revision guts the protections from the 2012 and 2016 EARs and goes far beyond the changes proposed in 2020. First, and most critically, it amends 24 C.F.R. § 5.106 to remove any protections for transgender individuals seeking CPD-funded shelter or services. Unlike the 2020 Proposed Rule which was discretionary, the EAR Revision *mandates* that individuals be admitted and accommodated in facilities with shared sleeping or bathing facilities based on their "sex" (as defined below), rather than their gender identity (the "Shelter Discrimination Mandate"). It states that a provider may require "reasonable assurances or evidence to establish a person's sex."[20] Finally, it states that regardless of any conflict with state or local law, non-compliance with the rule's mandate could result in loss of federal funding.[21]

Second, the EAR Revision removes the definitions of "gender identity" and "sexual orientation" entirely, and replaces them with a definition of "sex" as "an individual's immutable biological classification as either male or female." "Female" and "male" are defined in terms of whether the reproductive system produces eggs or sperm. The EAR Revision also adds definitions of "woman," "man," "boy," "girl," "mother," and "father."[22]

Third, the EAR Revision removes the protection against discrimination based on actual or perceived sexual orientation or gender identity in HUD subsidized or insured housing. Instead, the proposed regulation prohibits discrimination based on "sex" and marital status.[23]

Fourth, the EAR Revision removes the word "gender" everywhere it appears in HUD regulations and replaces it with "sex." It also removes the language in the definition of "family" and "household" that protects LGBTQ+ families by prohibiting housing providers from considering sexual orientation or gender identity in their determinations.[24]

HUD's justification for the rule change is scant, taking up less than two pages. HUD cites Executive Order 14168, titled ''Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government" which specifically directed HUD to rescind the 2016 EAR and to amend agency regulations to substitute the word "sex" for "gender" or "gender identity."[25] HUD also argues that it now believes the 2016 rulemaking exceeded its statutory authority.[26]

HUD also justifies the rule's Shelter Discrimination Mandate by explaining that the 2012 and 2016 EAR interfere with the right of faith-based homeless shelters and providers to "conduct their

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[18] *Id*.
[19] Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs; Withdrawal; Regulatory Review, 86 Fed. Reg. 22,125 (April 27, 2021).
[20] 91 Fed. Reg. at 22,784.
[21] *Id*.
[22] *Id*.
[23] *Id*. The administration seems to have chosen not to remove protections against discrimination based on marital status.
[24] *Id*. at 22,784-22,787.
[25] *Id*. at 22,782.
[26] *Id*. at 22,781.

ministries in ways that are consistent with [their] fundamental belief" that "sex is an immutable characteristic."[27] HUD cites one faith-based homeless shelter in Alaska that sued the local government of Anchorage over the city's anti-discrimination ordinance. It is not clear if this shelter receives any federal funding from HUD,[28] or if any HUD-funded shelter has ever voiced this issue. HUD also does not explain why it issued a mandatory rather than discretionary rule if the issue is a small number of faith-based shelters' religious objections.

Finally, HUD suggests, without evidence, that transgender women present a physical threat to the safety of cisgender women in shelters. HUD posits, outrageously, that "biological men may exploit the process of self-identification under the current rule to gain access to women's shelters."[29] The agency cites to a 2006 paper for the premise that "[h]omeless women are at increased risk of sexual assault by biological males compared to other women."[30] However the cited research paper, published a decade before shelters were required to accept and accommodate transgender women by the 2016 EAR, does not mention "biological males" (or even "males") at all.[31] Nor does it include any research or conclusions about transgender women. HUD also cites the United Kingdom's recent decision to stop housing transgender women with cisgender women in prisons and presents a response to a question from Parliament by the United Kingdom's Minister for Prisons stating that "62 percent of males identifying as females in UK prisons had committed at least one sexual offense."[32] The statement contains no underlying data or detail regarding what crimes are included.[33] Nor does HUD explain how conviction rates in prison populations have any relevance or application to populations of unhoused or unstably housed individuals seeking shelter. In fact, HUD presents no data showing that cisgender women experience assault by transgender woman in shelters. On the contrary, hundreds of anti-sexual assault and domestic violence organizations have signed a national consensus statement calling "claims that allowing transgender people to access sex-separated spaces aligning with their gender identity threatens the safety or privacy of women and girls" patently "false."[34] HUD's justification based on the

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[27] *Id*.

[28] The fact that the shelter sued the local government, and not HUD, suggests it was subject only to the local anti-discrimination ordinance and not the 2016 EAR. See The Downtown Soup Kitchen d/b/a Downtown Hope Center v. Municipality of Anchorage, et al, 3:18-cv-00190-SLG (Filed 08/16/2018), *available at* https://storage.courtlistener.com/recap/gov.uscourts.akd.60575/gov.uscourts.akd.60575.1.0.pdf.

[29] 91 Fed. Reg. at 22,781.

[30] *Id*.

[31] Lisa Goodman, Katya Fels, and Catherine Glenn, *No Safe Place: Sexual Assault in the Lives of Homeless Women*, Applied Research Forum (Sept. 2006), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_SAHomelessness.pdf.

[32] 91 Fed. Reg. at 22,781; Sir Nicholas Dakin, Minister for Prisons, Written Answer to Question 20298, Prisoners: Transgender People (Dec. 23, 2024), https://questions-statements.parliament.uk/written-questions/detail/2024-12-16/20298.

[33] Importantly, transgender women are disproportionately targeted and profiled by law enforcement for "offenses tied to suspicions of prostitution" which may be considered sex offenses in some jurisdictions. See Leonore F. Carpenter and R. Barrett Marshall, *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof*, 24 WM. & MARY J. WOMEN & L. 5 (2017), https://scholarship.law.wm.edu/wmjowl/vol24/iss1/3.

[34] National Statement in Support of Full and Equal Access for the Transgender Communtiy from Anti-Sexual Assault and Domestic Violence Organizations (Oct. 30, 2024), https://endsexualviolence.org/wp-content/uploads/2025/09/NTF-Statement-in-Support-of-Transgender-Community-Anti-SV-and-DV-Orgs.pdf; *see also* National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community (Apr. 13, 2018), https://www.4vawa.org/ntf-action-alerts-and-

alleged threat posed by transgender women is based solely on damaging stereotypes that lack any evidentiary foundation.

HUD provides no explanation for its removal of protections from discrimination based on gender identity across HUD programs outside of CPD-funded shelters, other than compliance with the Trump EO and the administration's belief that sex is an immutable biological characteristic. HUD also provides no cogent explanation or justification for its removal of protections from discrimination based on sexual orientation, which is wholly separate and distinct from gender identity.[35]

III. Intersection with Federal, State and Local Fair Housing Laws

The federal Fair Housing Act ("FHA"), as amended, protects individuals from discrimination based on race, color, religion, sex, national origin, family status, and disability in the housing market. Specifically, the FHA prohibits housing providers from "refus[ing] to sell or rent . . . or otherwise make unavailable or deny, a dwelling . . . ."[36] It also prohibits discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling . . . ."[37]

a. Application of FHA to shelters

Contrary to the proposed rule's assertion,[38] courts have held that whether the FHA applies to temporary shelters for unhoused individuals depends on a number of factors. For a detailed analysis of caselaw interpreting the definition of "dwelling" under the FHA, see NHLP's 2013 Housing Law Bulletin article on this topic.[39] Many courts have used a two part test developed by the Third Circuit assessing (1) whether the facility is meant to house occupants who intend to remain for a substantial period of time, and (2) whether occupants view the facility as a place to which they can return.[40] One court found that a shelter with dormitory-style sleeping arrangements where individuals were not permitted to remain during the day or store belongings, and were limited to 17 consecutive nights of accommodation, was not a dwelling for the purpose of the FHA.[41] Another court found that a domestic violence shelter with a

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news/2018/4/12/national-consensus-statement-of-anti-sexual-assault-and-domestic-violence-organizations-in-support-of-full-and-equal-access-for-the-transgender-community.

[35] HUD's only explanation for removing references to sexual orientation is found in a footnote: "This proposed rule also proposes to revise joint references to 'actual or perceived sexual orientation, gender identity' to 'sex' to avoid the confusion of prohibiting discrimination based both on 'sex' and 'sexual orientation,' since the latter is often considered a subset of the former." *See* 91 Fed. Reg. at 22,782, fn. 22. It is unclear what HUD means by this statement, other than a possible admission that discrimination based on sexual orientation is a type of sex discrimination.

[36] 42 U.S.C. § 3604(a).

[37] 42 U.S.C. § 3605(b).

[38] 91 Fed. Reg. at 22,781 (incorrectly stating, without citation, that the Fair Housing Act "does not apply to emergency shelters.")

[39] Renee Williams, *Shelters and the Definition of "Dwelling" Under the Fair Housing Act*, 43 HOUS. L. BULL. 225, 230-233 (Nov. Dec. 2013), *available at* https://www.nhlp.org/wp-content/uploads/Shelters-and-the-Definition-of-Dwelling-43-Hous.-L.-Bull.-225-230-31-Nov-Dec-2013.pdf.

[40] *See, e.g.*, Lakeside Resort Enterprises, LP v. Board of Sup'rs of Palmyra Twp., 455 F.3d 154, 158 (3d Cir. 2006) (finding facility where individuals stayed for slightly more than two weeks on average and treated as a home was a dwelling).

[41] Intermountain Fair Housing Council v. Boise Rescue Mission Ministries, 717 F. Supp. 2d 1101, 1109-12 (D. Idaho 2010).

120-day limit on accommodations was a dwelling.[42]

More recently published federal court decisions examine the same or similar factors. A court found that a Washington D.C. shelter without a time limit on accommodations, where families are provided with their own rooms where they can store belongings and remain during the day, is a dwelling under the FHA.[43] Another court found that an emergency shelter where participants are required to attend group meetings, do not have their own rooms, and are not permitted to personalize their sleeping space, was nonetheless a dwelling under the FHA.[44] A third court found that a planned facility for patients with mental illness that would provide supportive housing, rental office space, and mental health support services, was a dwelling.[45]

In sum, there is no bright line rule as to whether the FHA's protections apply to shelters; rather the inquiry is fact-specific. Generally, courts will look at the intended length of stay and whether occupants treat the shelter as home while they are staying there. This means that in some cases the proposed EAR revision's Shelter Discrimination Mandate might run afoul of the Fair Housing Act's protection from discrimination on the basis of sex, as explained in the next section.

b. Application of FHA to gender identity and sexual orientation discrimination

Distinct from the question of whether the FHA applies to shelters is the question of whether the FHA's protection against discrimination based on "sex" also protects individuals from discrimination on the basis of gender identity and sexual orientation. Even before the 2012 EAR, HUD issued guidance suggesting the FHA may protect some LGBTQ+ individuals from discrimination based on sexual orientation and gender identity.[46]

A seminal 2020 Supreme Court decision on employment discrimination supports the argument that "sex" discrimination necessarily includes discrimination on the basis of gender identity and sexual orientation under the FHA.[47] In *Bostock v. Clayton Cnty., Georgia*, the U.S. Supreme Court held that discrimination against an individual on the basis of sexual orientation or gender identity is discrimination, at least in part, "because of sex" in violation of Title VII.[48] Courts frequently apply Title VII jurisprudence to Title VIII, which contains identical language regarding discrimination "because of sex."[49] Accordingly, courts have begun to apply *Bostock* to cases under the FHA.[50] However, as of the date of

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[42] Woods v. Foster, 884 F. Supp. 1169, 1173-74 (N.D. Ill. 1995).

[43] Hunter on behalf of A.H. v. D.C., 64 F. Supp. 3d 158, 175 (D.D.C. 2014).

[44] Defiore v. City Rescue Mission of New Castle, 995 F. Supp. 2d 413, 419 (W.D. Pa. 2013).

[45] Step By Step, Inc. v. City of Ogdensburg, 176 F. Supp. 3d 112, 126 (N.D.N.Y. 2016).

[46] 77 Fed. Reg. at 5,662; archived HUD webpage available at https://web.archive.org/web/20101227233925/http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination. This guidance was based on an older "sex-stereotyping" theory developed in the Title VII context that argued that discrimination against a person for being gay or transgender is really discrimination based on the person's failure to conform with sex stereotypes, and therefore constitutes sex discrimination. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 228, 109 S. Ct. 1775, 1778, 104 L. Ed. 2d 268 (1989).

[47] *See, generally*, Brief of Amicus Curiae National Fair Housing Alliance in Support of Respondent, State of West Virginia, et al v. B.P.J., No. 24-43 (U.S. Nov. 17, 2025), https://www.supremecourt.gov/DocketPDF/24/24-43/384875/20251117182936095_No.%2024-43%20NFHA%20Amicus%20Brief%202025.11.17.pdf.

[48] 590 U.S. 644, 662, 140 S. Ct. 1731, 1743, 207 L. Ed. 2d 218 (2020).

[49] Gamble v. City of Escondido, 104 F.3d 300, 304 (9th Cir. 1997); Larkin v. Michigan Dep't of Social Servs., 89 F.3d 285, 289 (6th Cir.1996).

[50] *See* Walsh v. Friendship Vill. of S. Cnty., No. 19-1395, 2020 WL 5361010, at *1 (8th Cir. July 2, 2020) (where lesbian couple sued senior living community claiming discrimination on the basis of sex, and district court ruled in favor of landlord claiming sexual orientation was not protected under the FHA; Court of Appeals vacated and

this writing, the U.S. Supreme Court has declined to address whether *Bostock* applies outside of the Title VII context.[51]

HUD announced in response to *Bostock* that it would be henceforth interpreting the FHA to cover sexual orientation and gender identity discrimination, and would conduct enforcement actions accordingly.[52] HUD rolled back this commitment in 2025, announcing that it will not enforce the Fair Housing Act with respect to claims of gender identity discrimination, based on its purported authority to prioritize some claims over others.[53]

The proposed EAR Revision does not explicitly mention *Bostock* or address its implications.[54] However HUD repeatedly justifies its rulemaking based on Executive Order 14168, which did explicitly address *Bostock*, arguing that Bostock's holding has been misapplied to "gender identity-based access to single-sex spaces" under other civil rights laws like Title IX.[55] And HUD claims that it was incorrect in

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remanded on the basis of *Bostock*; case then settled); Larocque v. Spring Green Corp., No. 22-CV-00249-MSM-PAS, 2024 WL 4198607, at *4 (D.R.I. Sept. 16, 2024) (finding "*Bostock*'s reasoning about Title VII compels the same result for the FHA" but granting summary judgment for the landlord on other grounds); Petricca v. Saxony Condo. Ass'n, Inc., No. 23-CV-81581, 2024 WL 5683535, at *2 (S.D. Fla. Sept. 25, 2024) (assuming "[f]or purposes of this statute, the term "sex" includes sexual orientation" based on *Bostock*, but nonetheless dismissing claim on other grounds); Petricca v. Saxony Condo. Ass'n, Inc., No. 23-CV-81581, 2024 WL 3345516, at *2 n.2 (S.D. Fla. Apr. 15, 2024), report and recommendation adopted, No. 23-81581-CIV, 2024 WL 3338808 (S.D. Fla. July 8, 2024) (same); Birdo v. Duluky, No. 20-CV-1108 (SRN/HB), 2020 WL 5549115, at *3 (D. Minn. Aug. 27, 2020), report and recommendation adopted, No. 20-CV-1108 (SRN/HB), 2020 WL 5545271 (D. Minn. Sept. 16, 2020) (assuming without deciding that sexual orientation discrimination is covered under the FHA based on *Bostock*); Levy v. Lawrence Gardens Apartments Del, LLC, No. 21CV1415FBSJB, 2023 WL 2667045, at *5 n.1 (E.D.N.Y. Mar. 28, 2023) (applying *Bostock* but finding the alleged conduct did not rise to the level of illegal harassment based on sexual orientation under the FHA); Kummerow v. Ohawcha.org, No. 21-CV-635-WMC, 2022 WL 873599, at *4 (W.D. Wis. Mar. 24, 2022) (noting that "plaintiff identifies as LGBT, which the court will presume falls within the FHA's sex discrimination provisions" citing *Bostock*, but ruling against Plaintiff on other grounds); Johnson v. Connecticut Coal. Against Domestic Violence, No. 3:23-CV-1133 (SVN), 2024 WL 1000730, at *6 (D. Conn. Mar. 8, 2024) (unpublished decision applying the FHA to discrimination on the basis of transgender status though not citing Bostock directly); United States v. SSM Props., LLC, 619 F. Supp. 3d 602, 606 (S.D. Miss. 2022) (stating without analysis that sex discrimination under the FHA includes sexual orientation and gender identity); Scutt v. Dorris, No. CV 20-00333 JMS-WRP, 2021 WL 206356, at *5 (D. Haw. Jan. 20, 2021) (assuming without analysis that the FHA applies to discrimination based on transgender status).

[51] In 2025, the Supreme Court expressly declined to address whether *Bostock* applies beyond Title VII context, specifically to Equal Protection Clause. United States v. Skrmetti, 605 U.S. 495, 520, 145 S. Ct. 1816, 1834, 222 L. Ed. 2d 136 (2025). In *Skrmetti*, the Court sidestepped the question of whether transgender status is a quasi-suspect class by determining that the ban on gender affirming care at issue did not discriminate based on transgender status, but rather based on medical diagnosis. Currently pending before the Supreme Court is another case, State of West Virginia v. B.P.J., Docket No. 24-43 (argued January 13), which asks whether discrimination against transgender people in sports violates Title IX or the Equal Protection Clause.

[52] News Release, Dep't Hous. & Urb. Dev't, No. 21-021, HUD to Enforce Fair Housing Act to Prohibit Discrimination on the Basis of Sexual Orientation and Gender Identity (Feb. 11, 2021), https://archives.hud.gov/news/2021/pr21-021.cfm.

[53] Memorandum from John Gibbs, Principal Deputy Assistant Sec'y for Fair Hous. & Equal Opportunity, Fair Housing Act Enforcement and Prioritization of Resources, 3 (Sept. 16, 2025), https://www.hud.gov/sites/dfiles/Main/documents/Fair-Housing-Act-Enforcement-Prioritization-Resources.pdf.

[54] HUD does seem to implicitly affirm *Bostock*'s holding as pertains to sexual orientation when it states that sexual orientation is "often considered a subset of" sex. See 91 Fed. Reg. at 22,782, fn. 22.

[55] Executive Order 14168—Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government (Jan. 20, 2025), https://www.govinfo.gov/content/pkg/DCPD-202500135/pdf/DCPD-

2016 when the agency stated that "discrimination because of gender identity is covered within the Fair Housing Act's prohibition of sex discrimination."[56]

Due to *Bostock*, it is likely that the rule's Shelter Discrimination Mandate violates the FHA as applied to covered dwellings. And families in non-CPD, HUD-subsidized housing may be protected from discrimination on the basis of sexual orientation and gender identity under the FHA notwithstanding HUD's proposed removal of protective language from federal regulations. However, the current administration's refusal to enforce the FHA could impede use of the FHA to protect tenants outside of private litigation.

c. State and Local Law

State fair housing statutes expressly cover sexual orientation, gender identity, or both, in 26 states or territories, including the District of Columbia.[57] Regulators in eight other states have interpreted their state fair housing statutes to prevent discrimination based on sexual orientation or gender identity in some circumstances.[58] In addition, tenants and/or unhoused LGBTQ+ people seeking shelter may be protected from discrimination by local law. These protections continue to apply notwithstanding HUD's withdrawal of protections for LGBTQ+ families.

With regard to the Shelter Discrimination Mandate, the EAR Revision states that, "[N]on-compliance with these regulations by state and local entities due to conflicting local laws or policies may be considered a violation of federal requirements, subject to appropriate enforcement actions, including but not limited to withholding or revocation of federal funds . . . ."[59] This provision puts CPD-funded facilities in jurisdictions with protections in an untenable position- in order to preserve their federal funding they will be required to violate state or local law.

The Shelter Discrimination Mandate and its funding threat also raise significant preemption issues. "[W]hether federal regulations preempt state law depends on whether the agency that prescribed the regulations 'meant to pre-empt [state] law, and, if so, whether that action is within the scope of the [agency's] delegated authority.'"[60] The "critical question is whether Congress intended that federal regulations supersede state law."[61]

Here, HUD does not explicitly add the word "preemption" to 24 C.F.R. § 5.106 (the proposed Shelter Discrimination Mandate), but in its preamble it explains that the intent of § 5.106(e) is to preempt conflicting state and local law.[62] Confusingly, HUD then states that it has no consultation obligations under Executive Order 13132 because the rule "would not have federalism implications and would not . . . preempt state law . . . ."[63] Executive Order 13132 requires that agencies restrict preemption of state law "to the minimum level necessary to achieve the objectives of the statute

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202500135.pdf. *See also* Memorandum from the Acting Associate Attorney General to the Civil Rights Division (Feb. 12, 2025), https://www.justice.gov/crt/media/1389946/dl?inline.

[56] 91 Fed. Reg. at 22,781, fn.11.

[57] Movement Advancement Project, *Equality Maps: Housing Nondiscrimination Laws* (2026), https://mapresearch.org/equality-map/nondiscrimination-laws/#housing (Data as of May 11, 2026).

[58] *Id*.

[59] 91 Fed. Reg. at 22,784.

[60] Drake v. Lab'y Corp. of Am. Holdings, 458 F.3d 48, 56 (2d Cir. 2006) (quoting Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 154, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982)).

[61] United Transp. Union v. Foster, 205 F.3d 851, 859 (5th Cir. 2000) (quoting Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 369, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986)).

[62] 91 Fed. Reg. 22,780 ("these requirements preempt any conflicting state or local laws . . . .").

[63] *Id*. at 22,782.

pursuant to which the regulations are promulgated" and requires that the agency consult with state and local officials.[64] Thus the EAR Revision is internally inconsistent as to whether HUD's intent is to preempt state law, and if so, the proposed rule may violate the requirements in Executive Order 13132.

As for the second prong of the preemption analysis related to statutory authority, HUD does not explain its statutory authority for the Shelter Discrimination Mandate or its preemption component anywhere in the proposed rule. It only explains that it now believes the agency exceeded its plenary Congressional authority in promulgating the 2016 EAR, and "proposes to exercise its authority to rescind it."[65] But HUD is not simply "rescinding" the 2016 EAR; it is proposing to replace the 2016 EAR with a new rule that *affirmatively mandates* discrimination and expressly preempts state and local civil rights laws. Arguably, HUD's general rulemaking authority[66] does not permit the agency to require that shelters exclude and police the "sex" of transgender people, let alone to preempt more protective state and local laws. Indeed this rulemaking runs directly counter to Congress's mandate for HUD to provide a "suitable living environment for every American family"[67] and to "ensure that every resident of the United States has access to decent shelter or assistance in avoiding homelessness."[68] Thus the Shelter Discrimination Mandate and its preemption component in the EAR Revision likely exceed HUD's statutory authority.

In sum, whether HUD can preempt state and local law with its Shelter Discrimination Mandate is an open question that will likely be decided by the courts based on factors described here.

IV. Intersection with the Violence Against Women Act ("VAWA")

The Violence Against Women Reauthorization Act of 2022 (VAWA) provides protections for survivors of domestic violence, dating violence, sexual assault, and stalking who seek to access or maintain federally-assisted housing.[69] VAWA covers HUD subsidized housing, shelters and other facilities.[70]

In addition to enforcing VAWA's broad protections for survivors, the Department of Justice's Office on Violence Against Women ("OVW") administers grants to organizations, local government entities, and tribes to fund supportive services for survivors. Shelters and services for survivors who are unhoused may, in some cases, receive OVW funding. Since 2013, VAWA has included a statutory provision prohibiting discrimination by grantees on the basis of gender identity or sexual orientation.[71]

The proposed EAR Revision runs afoul of VAWA in two respects. First, the EAR Revision proposes to change the VAWA rule promulgated to implement Congress's antidiscrimination requirements. Currently, the regulation, which has not yet been revised to reflect changes made in 2022, clarifies that "[n]otwithstanding the title of the statute, protections are not limited to women but cover victims of domestic violence, dating violence, sexual assault, and stalking, regardless of sex, gender identity, or sexual orientation."[72] However, the proposed revision would remove gender identity and sexual

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[64] Federalism, 64 Fed. Reg. 43,255, 43,257 (Aug. 10, 1999).
[65] 91 Fed. Reg. at 22,781.
[66] *See* 42 U.S.C. § 3535(d) ("The secretary . . . may make such rules and regulations as may be necessary to carry out its functions, powers, and duties.")
[67] 42 U.S.C. § 1441; 12 U.S.C. § 1701t; 42 U.S.C. § 1701; 42 U.S.C. § 5301(c).
[68] 42 U.S.C. § 1702.
[69] Consolidated Appropriations Act of 2022, Pub. L. 117-103, 136 Stat. 49 (March 15, 2022), codified at 34 U.S.C. § 12491, et seq.
[70] 34 U.S.C. §12491(a)(3).
[71] 34 U.S.C. § 12291(b)(13)(A)).
[72] 24 C.F.R. § 5.2001(a).

orientation from the list of examples of protected classes of survivors. As applied to CPD funded shelters and facilities that receive OVW funding , the proposed change runs directly counter to statutory language prohibiting VAWA grantees from discriminating on these bases. (Of course, this also means that survivors continue to be protected by the statutory language even if HUD removes protection from the implementing regulation).

Second, the EAR Revision's Shelter Discrimination Mandate violates VAWA as applied to CPD funded shelters that also receive OVW funds. While VAWA expressly protects individuals from discrimination based on sexual orientation and gender identity, it contains an exception stating that a covered program or activity may consider an individual's "sex" in the case of "sex segregation or sex-specific programming . . . necessary to the essential operation of the program."[73] However, permitting consideration of sex is a far cry from mandating discrimination based on transgender status. In VAWA, Congress did not authorize HUD to require that shelters exclude transgender survivors from services and accommodations. Moreover, in legislating the aforementioned exception, Congress also required that individuals who are denied access to sex segregated facilities or sex-specific programming must be provided with "comparable services" in order for the grantee to maintain compliance with VAWA's nondiscrimination mandate.[74] The EAR Revision contains no such language.

Notably, prior to the EAR being finalized in 2016, the Department of Justice issued an FAQ in 2014 that provides additional guidance on how VAWA grantees can operate sex-specific or sex-segregated programming without engaging in prohibited discrimination. The 2014 FAQ is consistent with the 2016 EAR in that program beneficiaries should be assigned consistent with their gender identity, with considerations made for that individual beneficiary's health and safety.[75] The DOJ FAQ also cautions against "ask[ing] questions about the beneficiary's anatomy or medical history or make burdensome demands for identity documents."[76]

To the extent that the EAR Revision requires discrimination against survivors in OVW-funded shelters based on their actual or perceived sexual orientation or gender identity, it violates VAWA.

V. Impact of Proposed Rule

a. Transgender people seeking shelter

The most severe impacts of the proposed rule will undoubtedly be felt by unhoused transgender people who will lose access to HUD CPD-funded shelters. Indeed, HUD acknowledges 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."[77]

The 2016 EAR met a desperate need that remains critical. Nearly one-third of transgender

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[73] 34 U.S.C. § 12291(b)(13)(B).
[74] *Id*.
[75] U.S. Department of Justice, Frequently Asked Questions, Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013, at Question 14 (Apr. 9, 2014), https://www.justice.gov/archive/ovw/docs/faqs-ngc-vawa.pdf.
[76] *Id*.
[77] 91 Fed. Reg. at 22,782.

individuals have experienced homelessness.[78] But a national study from before the 2016 EAR went into effect found that of transgender survey respondents who had attempted to access shelters, 29 percent were turned away, 42 percent were forced to stay in facilities designated for the wrong gender, 55 percent experienced harassment, 25 percent were physically assaulted, and 22 percent were sexually assaulted.[79] In 2015, a national survey of transgender individuals found that 26 percent of the homeless transgender population avoided staying in a shelter out of fear of facing discrimination due to being transgender.[80] The safety of shelter is of particular concern to survivors of domestic violence who are transgender. Transgender individuals, in particular those of color, are at higher risk of experiencing domestic violence and sexual assault.[81]

Rescission of the 2016 EAR, and replacement with the proposed Shelter Discrimination Mandate, will cause increased numbers of transgender people to experience harassment, invasive questioning and violation of privacy, or even physical violence when seeking shelter. One can only imagine what types of "reasonable assurances or evidence" a facility could require as proof that a person is of a particular sex, as defined by HUD. Will shelters require applicants to strip, or submit to a medical examination to identify their reproductive physiology? Will shelters make such invasive inquiries on all applicants, or only ones staff believes might be transgender? On what basis will staff make the determination that someone's gender may not conform with their sex as defined by HUD? Setting aside the fact that such an examination would be a gross invasion of privacy by any standard, it would also likely be humiliating, stressful, and traumatic.

Rather than be subjected to these shelter conditions, many unhoused people will choose to live on the street or remain in an abusive home. The personal and societal costs of unsheltered homelessness are well documented. Sixty percent of unsheltered transgender people experience tri-morbidities (co-occurring physical, mental, and substance use disorders), compared to only three percent of sheltered transgender people.[82] Increased street homelessness also results in costs for state and local government and the medical establishment. The harmful impact of the Shelter Discrimination Mandate in the EAR Revision cannot be overstated.

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[78] Sandy E. James, Jody L. Herman, Laura E. Durso, and Rodrigo Heng-Lehtinen, *Early Insights: A Report of the 2022 U.S. Transgender Survey*, NATIONAL CTR. FOR TRANSGENDER EQUALITY 21 (Feb. 2024), https://transequality.org/sites/default/files/2024-02/2022%20USTS%20Early%20Insights%20Report_FINAL.pdf.

[79] Jaime M. Grant, Lisa A. Mottet, and Justin Tanis, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NATIONAL CTR. FOR TRANSGENDER EQUALITY 106 (2011), https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf.

[80] S.E. James, J.L. Herman, S. Rankin, M. Keisling, L. Mottet, and M. Anafi, *The Report of the 2015 U.S. Transgender Survey*, NATIONAL CTR. FOR TRANSGENDER EQUALITY 13 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.

[81] Sarah Peitzmeier, Mannat Malik, Shanna Kattari, Elliot Marrow, Rob Stephenson, Madina Agenor, and Sari Reisner, *Intimate Partner Violence in Transgender Populations: Systematic Review and Meta-analysis of Prevalence and Correlates*, 110 AM. J. PUBLIC HEALTH e1, e1-e2, https://pmc.ncbi.nlm.nih.gov/articles/PMC7427218/; Andrew Flores, Ilan Meyer, Lynn Langton and Jody Herman, *Gender Identity Disparities in Criminal Victimization: National Crime Victimization Survey, 2017-2018*, 111 AM. J. PUBLIC HEALTH 726, 727 (Apr. 2021), https://pubmed.ncbi.nlm.nih.gov/33600251/.

[82] National Alliance to End Homelessness, *Transgender Homeless Adults & Unsheltered Homelessness: What the Data Tell Us*, 2 (July 2020), https://endhomelessness.org/wp-content/uploads/2024/10/Trans-Homelessness-Brief-July-2020.pdf.

b. LGBTQ+ families in HUD-subsidized and insured housing

The proposed EAR Revision would also impact both applicants and participants of HUD-subsidized housing and in particular, LGBTQ+ families. As previously discussed, the proposed rule removes language in 24 C.F.R. § 5.105 requiring that HUD-assisted and insured housing "shall be made available without regard to actual or perceived sexual orientation, [or] gender identity . . . .". The proposed rule also removes language in the definitions of "family" and "household" throughout HUD regulations that currently prohibits consideration of actual or perceived sexual orientation and gender identity when PHAs or owners are determining whether a group of people constitutes a family or household for the purpose of program admission or ongoing occupancy. Though these families likely have legal protection under local, state, and federal fair housing laws as discussed above, the proposed rule change could create confusion about people's rights, reduce families' avenues for asserting their rights, and signal that discrimination is permissible or will be tolerated. The following are examples of potential implications:

- A PHA or HUD-assisted owner could refuse to allow a transgender, lesbian, gay, or bisexual person to rent an apartment or receive a housing voucher;
- A PHA or owner could refuse to allow a same-sex couple to live together in a one-bedroom unit;
- A PHA or owner that permits children of different genders to have separate bedrooms could now mandate that a transgender boy share a room with a cisgender girl, meaning the family would have to move to a smaller unit; similarly, the PHA or owner could refuse to allow a transgender girl to share a room with a cisgender girl, which would force the family to find a larger unit which is difficult in many markets;
- A PHA or owner could require an applicant to provide proof of identity that conflicts with their gender identity before approving an application for assistance;
- A PHA or owner could justify its refusal to use the correct name or pronouns when referring to a program participant; or
- A PHA or owner could evict a family after learning that a family member is transgender or gay.

These changes in 24 C.F.R. § 5.105 could also affect the important data that PHAs, owners, and operators of other HUD programs collect about who applies for and receives HUD-funded assistance, and the outcomes they experience. This could lead to even less readily available data about the inequities experienced by LGBTQ+ people in applying for and receiving HUD assistance, which could hinder a community's ability to affirmatively further fair housing, identify barriers to housing stability, and assess their local and regional fair housing needs.

VI. Conclusion

The EAR Revision guts fifteen years of progress at HUD in protecting LGBTQ+ families from housing discrimination. By removing protections for tenants in HUD-subsidized housing and mandating that CPD-funded shelters discriminate against transgender people, the proposed rule seems designed to inflict maximum harm based on harmful stereotypes. In particular, the proposed rule's requirement that shelters accommodate individuals based on a determination of their "sex," as defined by HUD, will cause more transgender people to experience harassment, violence, including domestic violence, and street homelessness. The consequences will be costly for individuals and society as a whole. The Shelter Discrimination Mandate also runs afoul of the FHA and VAWA.

If you have questions about the proposed rule or how to comment, please contact Hannah Adams, Senior Attorney at NHLP, at hadams@nhlp.org.