

June 29, 2026

Via Federal eRulemaking Portal

Scott Turner
Secretary
U.S. Department of Housing and Urban Development
451 7th Street SW
Washington, DC 20410-0500

RE: HUD Proposed Rule “Equal Access to Housing in HUD Programs Revisions” (RIN 2501-AE12)

Dear Secretary Turner:

I am a Fellow at the Ethics and Public Policy Center (EPPC), director of EPPC’s Administrative State Accountability Project, and a former attorney with the Equal Employment Opportunity Commission. I write to offer public comment on the Department of Housing and Urban Development’s (HUD) proposed rule “Equal Access to Housing in HUD Programs Revisions.”¹

As HUD explains, this rule would “harmonize” HUD’s Equal Access regulations with President Trump’s Executive Order 14168, “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government.”² The President’s order rightly recognizes that there are “two sexes, male and female,” “these sexes are not changeable,” and the sexes are “grounded in fundamental and incontrovertible reality.”³ The order also directs agencies, including HUD, to “enforce all sex-protective laws to promote this reality.”⁴

Consistent with the executive order, the rule would define “sex”; remove references to “gender,” “gender identity,” and “sexual orientation” in all of HUD’s regulations; and replace such references with “sex.”⁵ These revisions would “ensure equal access to qualifying facilities would be provided in accordance with the sex of an individual based on his or her immutable biological classification as either male or female rather than the ever-shifting concept of self-assessed gender identity.”⁶ The rule would also allow those that have single-sex or sex-specific facilities (such as

¹ 91 Fed. Reg. 22779 (Apr. 28, 2026), <https://www.federalregister.gov/d/2026-08244>.

² *Id.* at 22779.

³ Exec. Order 14168, Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, 90 Fed. Reg. 8615 (Jan. 20, 2025), <https://www.federalregister.gov/d/2025-02090>.

⁴ *Id.*

⁵ 91 Fed. Reg. at 22780.

⁶ *Id.* at 22779.

temporary, emergency shelters) under HUD programs “the ability to require reasonable assurances and evidence to confirm the sex of an individual seeking service in order to protect the safety of other individuals in the facility.”⁷

The rule explains that HUD’s current Equal Access regulations exceed the agency’s statutory authority by prohibiting discrimination in housing based on gender identity and sexual orientation and by requiring access to single-sex or sex-specific spaces to be based on self-proclaimed gender identity, not sex.⁸ To the extent HUD’s 2016 Rule requiring access to emergency shelters based on gender identity was permissible under HUD’s statutory rulemaking authority, the proposed rule states that HUD “now has serious doubts” about the rationale underlying the 2016 Rule and is proposing to exercise its authority to rescind the harmful requirement.⁹

I applaud HUD for opposing gender ideology, recognizing biological truth, and addressing safety and privacy concerns in single-sex and sex-specific housing, especially emergency shelters. For the reasons below, I support HUD’s proposals and urge HUD to finalize the rule promptly.

I. HUD should adopt its proposal to define “sex”; remove references to “gender,” “gender identity,” and “sexual orientation” in all of HUD’s regulations; and replace such references with “sex.”

I support the rule’s proposed removal of the terms “gender,” “gender identity,” and “sexual orientation” and replacement of those terms with “sex” in *all* of HUD’s regulations. In my April 2025 comment on HUD’s interim final rule “Affirmatively Furthering Fair Housing Revisions,” I urged HUD to “closely review *all* relevant FHA regulations still in effect for references to ‘gender’ that should be replaced with ‘sex.’”¹⁰ I am pleased to see HUD has done just that.

There are two sexes—male and female. Biology is not bigotry. As Supreme Court Justice Ruth Bader Ginsburg recognized, “Physical differences between men and women ... are enduring,” “inherent,” and “remain cause for celebration”: “[T]he two sexes are not fungible.”¹¹

While “gender” is sometimes used as a synonym for “sex,” the term is now often used to mean something other than binary, biological sex, requiring precision and clarity in agency regulations. As I told the *Washington Times*, “Using the term ‘sex’ instead of ‘gender’ provides clarity, improves the quality and utility of information collected, protects sex-based rights, and

⁷ *Id.*

⁸ *Id.* at 22781.

⁹ *Id.*

¹⁰ Rachel N. Morrison, EPPC Comment on HUD Interim Final Rule, “Affirmatively Furthering Fair Housing,” RIN 2529-AB08 (Apr. 28, 2025), <https://media.eppc.org/2025/04/EPPC-Comment-HUD-AFFH-IFR.pdf> [hereinafter “April 2025 Comment”] (flagging certain HUD regulations that contain references to “gender”). I am especially pleased to see that HUD has proposed revisions to all the regulations I flagged in my comment (along with other HUD regulations) that contain “gender” and “gender identity” language. *Id.* at 2-3 (flagging 24 CFR § 5.100; 24 CFR § 5.655(c)(1)(4); 24 CFR § 570.506(c)(g)(2) ; 24 CFR § 570.506(c)(g)(4); 24 CFR § 570.506(c)(g)(6); 24 CFR § 570.904(b)(1) ; 24 CFR § 570.904(b)(2); 24 CFR § 570.904(d); 24 CFR § 92.508(a)(7)(i)(A); 24 CFR § 92.508(a)(7)(ii)(B)).

¹¹ *United States v. Virginia*, 518 U.S. 515, 533 (1996) (second alteration in original) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)).

reflects biological reality, not subjective self-perception.”¹² By using and defining “sex” and eliminating references to “gender,” “gender identity,” and “sexual orientation,” HUD will likewise provide clarity, protect sex-based rights, and reflect biological reality, not subjective self-perception.

In addition to harmonizing HUD regulations with EO 14168, using “sex” in HUD regulations complies with federal law and Supreme Court precedent. As I pointed out in my April 2025 comment, the Fair Housing Act (FHA) uses the term “sex,” not “gender,” “gender identity,” or “sexual orientation,” and any FHA-related regulations should accurately reflect the statutory text.¹³ Further, ensuring that HUD regulations reflect the FHA’s prohibition against sex (not gender, gender identity, or sexual orientation) discrimination complies with HUD’s obligations under *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which requires agencies to adhere to the “single, best meaning” of the relevant statute. And not extending the FHA’s prohibition against discrimination to gender, gender identity, or sexual orientation—an important issue of vast political significance that Congress should decide—avoids violating the Major Questions Doctrine under *West Virginia v. EPA*, 597 U.S. 697 (2022).

One point of clarification. Footnote 22 explains that it “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,’” and because discrimination on the basis of sexual orientation “is often considered a subset” of discrimination on the basis of sex. This statement is misleading. While some, like the Biden administration, have sought to incorporate sexual orientation *and* gender identity as a subset of sex in all laws prohibiting sex discrimination, neither sexual orientation nor gender identity is a subset of sex.

This consistent with *Bostock*. There, the Supreme Court held that under Title VII “an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual ‘because of such individual’s sex.’”¹⁴ This holding was not because sexual orientation or gender identity was a subset of sex. Rather, it was because in that case the employers’ decisions to terminate the employees based on sexual orientation and gender identity were based on the employees’ *sex*. Put differently, Title VII was violated because changing the employees’ sex “would have yielded a different choice by the employer.”¹⁵ If sexual orientation and gender identity were merely a subset of sex, then further analysis of the employees’ sex would be unnecessary.

Rather than viewing sexual orientation as a subset of sex and removing references because they are redundant and potentially confusing, sexual orientation should be removed because—like the inclusion of gender and gender identity—it exceeds Congressional authorization.

In sum, I support HUD’s proposal to define sex in **§ 5.100** and use the term “sex” not “gender,” “gender identity,” or “sexual orientation” throughout HUD regulations.

¹² Stephen Dinan, *Trump’s First Year Has Changed the Way Government Speaks*, Wash. Times (Dec. 24, 2025), <https://www.washingtontimes.com/news/2025/dec/24/trumps-first-year-changed-way-government-speaks/>.

¹³ April 2025 Comment, *supra* note 10, at 2.

¹⁴ *Bostock v. Clayton Cnty.*, 590 U.S. 644, 681 (2020).

¹⁵ *Id.* at 659-60.

II. HUD should adopt its proposed regulations to protect safety and privacy interests in single-sex and sex-specific spaces.

The proposed rule would make two key changes in § 5.106(b) and (c). First, it would reverse the 2016 Rule’s single-sex shelter mandate, which required people be placed in single-sex shelters according to their gender identity rather than their biological sex. Second, it would permit providers to require “reasonable assurances and evidence” to confirm the sex of an individual seeking service in order to protect the safety of other individuals in the facility. Footnote 10 explains that HUD wants to “provide maximum deference to grantees” as some will be more flexible or stringent on what it considers reasonable assurance of sex.

These changes are welcome and necessary to protect safety and privacy interests, especially for women and girls, in single-sex and sex-specific spaces—spaces where women and girls engage in stages of undress, intimate personal hygiene, and sleeping, among other private acts.¹⁶ By requiring that access to single-sex and sex-specific spaces be based on biology, not subjective self-asserted identity, HUD’s rule helps promote human dignity and individual freedom by supporting bodily privacy.¹⁷ Maintaining sex-separate bathrooms and locker rooms has long been recognized as consistent with the Equal Protection Clause of the Fourteenth Amendment and federal sex discrimination laws.¹⁸ Indeed, Title IX explicitly recognizes the need and appropriateness of having sex-specific living facilities.¹⁹

Allowing men to enter women-only spaces endangers women’s safety and violates their right to bodily privacy. These concerns are particularly acute for emergency shelters and transitional housing programs that serve women in vulnerable situations who often not have alternative safe housing options. Many of these women are victims of physical and sexual abuse, assault, and violence. Letting men access women-only spaces undermines women’s safety and privacy and can lead to re-traumatization. Allowing access to such spaces based on self-asserted

¹⁶ See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 633 (4th Cir. 2020) (Niemeyer, J., dissenting) (“An individual has a legitimate and important interest in bodily privacy that is implicated when his or her nude or partially nude body is exposed to others. And this privacy interest is significantly heightened when persons of the opposite biological sex are present.”).

¹⁷ See *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 824 F.3d 450, 452 (4th Cir. 2016) (Niemeyer, J., dissenting from the denial of rehearing en banc) (“Bodily privacy is historically one of the most basic elements of human dignity and individual freedom. And forcing a person of one biological sex to be exposed to persons of the opposite biological sex profoundly offends this dignity and freedom.”).

¹⁸ See *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996) (noting that admitting women to a previously all-male military academy “would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements”) (Equal Protection Clause); *Adams ex rel. Kasper v. School Board of St. Johns County, Florida*, 57 F.4th 791, 796 (11th Cir. 2022) (en banc) (“[S]eparating school bathrooms based on biological sex passes constitutional muster and comports with Title IX.”) (Equal Protection Clause and Title IX); *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010) (“[T]he law tolerates same-sex restrooms or same-sex dressing rooms, but not white-only rooms, to accommodate privacy needs.”) (Title VII); *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) (“[Society has given its] undisputed approval of separate public rest rooms for men and women based on privacy concerns.”) (Equal Protection Clause); *Selina S. v. Driscoll*, EEOC Appeal No. 2025003976 (EEOC Feb. 26, 2026), <https://www.eeoc.gov/sites/default/files/2026-02/2025003976.pdf> (establishing that “under Title VII employers may in general maintain single-sex bathrooms and similar intimate spaces” and exceptions for “trans-identifying employees” are not “compelled” by the statute). Cf. *Bostock v. Clayton County*, 590 U.S. 644, 681 (2020) (declining to address “bathrooms, locker rooms, or anything else of the kind”) (Title VII).

¹⁹ 20 U.S.C. § 1686 (“[N]othing contained herein shall be construed to prohibit any educational institution receiving funds under [Title IX], from maintaining separate living facilities for the different sexes.”).

identity instead of biology also opens the door for men to exploit the system to gain access to women, including men who may have a prior relationship with the women seeking protection of an emergency shelter or transitional housing program.²⁰ As the proposed rule correctly points out, even the possibility of men being permitted in women-only spaces can be enough to dissuade women from accessing the housing services.²¹ These concerns are not hypothetical.²²

HUD regulations prioritizing gender ideology over women’s safety and privacy interests have real consequences for women who are homeless and who have suffered sexual abuse or domestic violence. I applaud HUD for taking action to reverse these harms.

Further, as the proposed rule states, “requiring homeless shelters and other facilities to house individuals inconsistent with their sex reduces the amount of help available to homeless individuals because it imposes an unacceptable and potentially illegal burden on the religious exercise of many faith-based facilities.”²³ HUD is right to eliminate the existing regulatory barriers that target religious exercise and exclude faith-based housing providers. Legal uncertainty and the threat of litigation costs for faith-based ministries chills provider participation and harms those that receive their services.

In addition to the cases HUD cited in support (*Trinity Lutheran*, *Carson*, *Espinoza*, and *Tandon*²⁴), *Fulton v. City of Philadelphia* is also instructive.²⁵ In *Fulton*, the City of Philadelphia sought to exclude foster parents who partnered with Catholic Social Services—“one of the most successful foster agencies in Philadelphia”—based on their religious beliefs about marriage.²⁶ The Supreme Court said such a policy violates the Free Exercise Clause of the First Amendment. The net result of the city’s policy was to exclude willing foster families from serving children in foster care and keeping foster children from being placed in loving homes. The same is true here: eliminating faith-based housing programs based on their religious beliefs about biological reality not only violates the Free Exercise Clause, but it also reduces available housing and resources for those in need.

HUD’s proposal comports with the agency’s obligations under the First Amendment and the Religious Freedom Restoration Act (RFRA) to respect religious exercise. It is also consistent with President Trump’s priorities to promote religious liberty and eliminate anti-Christian bias.²⁷

²⁰ 91 Fed. Reg. at 22781.

²¹ *See id.*

²² *See, e.g., Downtown Hope Center v. Municipality of Anchorage I*, Alliance Defending Freedom, <https://adfmedia.org/case/downtown-hope-center-v-municipality-anchorage-i/> (last visited June 29, 2026).

²³ 91 Fed. Reg. at 22781.

²⁴ *Id.* at 22781 n.17 (citing *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, (2017); *Carson as next friend of O.C. v. Makin*, 596 U.S. 767, (2022); *Espinoza v. Montana Dept. of Revenue*, 591 U.S. 464 (2020); *Tandon v. Newsom*, 593 U.S. 61, (2021)).

²⁵ 593 U.S. 522 (2021).

²⁶ *Sharonell Fulton, et al. v. City of Philadelphia*, Becket, <https://becketfund.org/case/sharonell-fulton-et-al-v-city-philadelphia/> (last visited June 29, 2026).

²⁷ *See, e.g., Exec. Order 14190*, Eradicating Anti-Christian Bias, 90 Fed. Reg. 9365 (Feb. 6, 2025), <https://www.federalregister.gov/d/2025-02611>; *Exec. Order 14205*, Establishment of the White House Faith Office, 90 Fed. Reg. 9499 (Feb. 12, 2025), <https://www.federalregister.gov/d/2025-02635>; DOJ, Eradicating Anti-Christian Bias within the Federal Government (Apr. 30, 2026), <https://www.justice.gov/opa/media/1438506/dl?inline>.

III. HUD should provide some additional clarity and guidance.

Below I provide several suggestions of ways that additional clarity and guidance by HUD would be helpful.

First, I urge HUD to provide more guidance around what “reasonable assurances and evidence” means for verifying a person’s sex. Additional guidance giving housing providers more direction would give them confidence that they are acting within the scope of HUD’s directive, neither unduly invading individual’s privacy nor failing to adequately protect women’s rights. Model policies and procedures around verifying a person’s sex would be helpful, especially for smaller providers who may not have adequate resources or staff to develop these policies and procedures from scratch.

Second, Proposed § 5.106(e) would clarify that HUD’s regulations would preempt any conflicting state or local laws and that violations of HUD requirements will be subject to all applicable penalties, including loss of Community Planning & Development federal funding. I agree with HUD that this provision would ensure “maximum uniformity and compliance.”²⁸ Preemption of state and local laws are especially important where such laws prohibit limiting single-sex and sex-specific spaces to members of one sex or require providers to defer to a person’s self-asserted “gender identity.” However, because the proposed regulation involves potential preemption of state and local law, HUD should consider whether it needs to revise the rule’s EO 13132 federalism analysis, which currently affirms that the rule “would not preempt ... state law.”²⁹

Third, I urge HUD to provide more clear guidance on religious exemptions to HUD regulations for religious organizations, schools, and universities. This is especially important for religious schools and universities that do not limit admission to those who share their faith but still desire to live out their faith in their school-provided housing. HUD could recognize the need and availability for religious exemptions to HUD regulations based on the agency’s obligation under RFRA, which prohibits the government from substantially burden religious exercise absent a compelling government interest that cannot be achieved by any lesser means.

Finally, I applaud HUD for withdrawing its February 2021 Fair Housing Act memo, which imposed gender identity and sexual orientation nondiscrimination obligations on religious colleges and was the subject of a legal challenge in *College of the Ozarks v. Biden*.³⁰ I urge HUD to formally repudiate and rescind this memo so that it cannot easily be revived by a future administration. This could be done similar to how the Department of Health and Human Services’ Office for Civil Rights issued formal notices in the federal register repudiating and rescinding various Biden-era policy documents.³¹

²⁸ 91 Fed. Reg. at 22781.

²⁹ *Id.* at 22782.

³⁰ See *College of the Ozarks v. Biden*, Alliance Defending Freedom, <https://adflegal.org/case/college-ozarks-v-biden/> (last visited June 29, 2026).

³¹ See HHS, Fact Sheet: HHS Takes Comprehensive Action to Enforce Conscience Rights and Protect Human Life, <https://www.hhs.gov/press-room/fact-sheet-announcements-on-conscience-and-life.html> (last reviewed Jan. 21, 2026) (summarizing three notices repudiating or rescinding eight previously issued HHS documents that “no longer represent the views of HHS, the Administration, or are otherwise no longer applicable”).

Conclusion

For the reasons above, HUD should finalize the rule and consider ways it can provide additional clarity and guidance.

Sincerely,

Rachel N. Morrison, J.D.
Fellow and Director
Administrative State Accountability Project
Ethics & Public Policy Center