



June 26, 2026

VIA REGULATIONS.GOV

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

Re: Comment on Notice of Proposed Rulemaking: Equal Access to Housing in HUD Programs Revisions, 91 Fed. Reg. 22779 (proposed Apr. 28, 2026); Docket No. FR-6518-P-01

Dear Secretary Turner,

Alliance Defending Freedom (ADF) submits the following comment on the above-referenced proposed rule regarding equal access to housing in HUD programs. ADF supports HUD's proposal to remove gender identity from the Equal Access Rule and to permit HUD-funded shelters to make admission and placement decisions based on biological sex. The proposed rule is critical for faith-based organizations, which operate approximately sixty percent of emergency shelter beds in the United States. ADF is particularly well-equipped to comment on this proposed rule, as it has represented women's shelters such as the Downtown Hope Center in Anchorage, Alaska, that have been negatively affected by gender-identity provisions similar to the one at issue here.

By way of background, ADF is the world's largest legal organization committed to protecting religious freedom, free speech, and the sanctity of life. It has played various roles in 85 Supreme Court victories. Since 2011, ADF has represented parties in 18 victories at the Supreme Court.

I. HUD Lacked Statutory Authority to Enact the 2012 and 2016 Rules that Added Gender Identity.

In 2012, HUD promulgated its initial Equal Access Rule, which prohibited discrimination on the basis of sexual orientation, gender identity, or marital status in HUD programs. 77 Fed. Reg. 5662 (Feb. 3, 2012). In 2016, HUD issued a subsequent rule that specifically required that shelters and other HUD-funded facilities admit individuals based on their self-identified gender identity rather than their biological sex. 81 Fed. Reg. 64763 (Sept. 21, 2016). For both rules, HUD relied not on the Fair Housing Act (FHA) or any other civil rights statute, but solely on the

Secretary's general rulemaking authority. *See* 91 Fed. Reg. at 22780 (“HUD relied on the Secretary’s general rulemaking authority . . . rather than the Fair Housing Act or other civil rights and nondiscrimination authorities.”).

HUD’s reliance on this general housekeeping provision was legally insufficient to support the sweeping substantive obligations the 2012 and 2016 Rules imposed. The Secretary’s “general rulemaking authority” extends only to “rules and regulations as may be necessary to carry out his functions, powers, and duties.” 42 U.S.C. § 3535(d). While the Secretary is responsible for enforcing both the FHA and Title VI, neither law authorizes HUD to create a gender-identity nondiscrimination mandate for temporary or emergency shelters.

The FHA, codified at 42 U.S.C. § 3604, makes it unlawful to discriminate in the sale or rental of housing “because of race, color, religion, sex, familial status, or national origin.” Congress has amended the FHA multiple times—adding handicap and familial status as protected classes—but has never added gender identity. This statutory silence is significant: when Congress wishes to expand protected classes, it does so expressly. Title VI of the Civil Rights Act of 1964 prohibits discrimination based on “race, color, and national origin” in programs receiving federal financial assistance. 42 U.S.C. § 2000d. Title VI is entirely silent as to sex, gender, and gender identity. By treating gender identity as a protected status, the 2016 Rule effectively amended federal nondiscrimination laws, a power reserved to Congress.

HUD’s proposed rule correctly acknowledges the lack of congressional enactment supporting the prior rules. 91 Fed. Reg. at 22781. ADF supports rescission on this basis. HUD may rescind those rules under its general rulemaking power to realign program regulations with statutes Congress actually enacted. 42 U.S.C. § 3535(d). The power to make rules inherently includes the power to unmake them through the same process. *See Tunik v. Merit Sys. Prot. Bd.*, 407 F.3d 1326, 1342 (Fed. Cir. 2005) (holding that the APA’s requirements for rulemaking also apply to repealing those rules).

II. The Proposed Rule Avoids Constitutional and Statutory Infringement.

In addition to exceeding HUD’s statutory authority, the 2016 Rule violated the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, and the First Amendment of the United States Constitution by substantially burdening the religious exercise of faith-based shelter providers without compelling justification.

Many faith-based shelters maintain sex-specific policies rooted in sincere religious convictions about human sexuality, bodily integrity, and the duty to protect vulnerable women. Requiring providers to admit biological males into women's intimate spaces forces an impossible choice: abandon sincere religious exercise or forfeit federal funding. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017).

The 2016 Rule also excluded faith-based shelters from an otherwise available public benefit. Shelters that could comply with the gender-identity mandate could participate in HUD programs, while religious shelters whose beliefs required sex-specific spaces faced exclusion unless they surrendered those beliefs. That is precisely the kind of religious condition on a public benefit that the Supreme Court has rejected. *See Carson v. Makin*, 596 U.S. 767, 778-79 (2022); *see also Trinity Lutheran*, 582 U.S. at 462; *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 477-78 (2020).

Those burdens trigger strict scrutiny under both RFRA and the Free Exercise Clause. Under RFRA, the federal government "shall not substantially burden a person's exercise of religion" unless it demonstrates that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b). Applying the same test, the government also violates the Free Exercise Clause of the First Amendment when it excludes a religious organization from an otherwise available public benefit based on its religious character or religious exercise. *Carson v. Makin*, 596 U.S. 767, 778 (2022); *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017); *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464 (2020). The 2016 Rule satisfied neither prong.

The 2016 Rule was not the least restrictive means of advancing any government interest. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014) ("The least-restrictive-means standard is exceptionally demanding."). Indeed, HUD could have (and now proposes to) accommodate religious liberty by permitting sex-specific facilities. That readily available alternative demonstrates that a blanket mandate was never the least restrictive means.

The proposed rule avoids these serious statutory and constitutional problems by allowing faith-based providers to maintain sex-specific facilities consistent with their religious beliefs. The proposed rule achieves that harmony by accommodating both shelter access and the free exercise of religion. This approach reflects the principle that "[t]he Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously." *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 38 (2019).

III. The Proposed Rule Protects Women and Maximizes Shelter Availability.

The proposed rule advances two critical interests: (a) the physical safety and bodily privacy of women in shelter settings, and (b) the continued participation of faith-based providers in HUD programs.

a. Protecting Women (Downtown Hope Center)

The importance of HUD's proposed rule is highlighted by ADF's prior representation of the Downtown Hope Center, a faith-based homeless shelter, soup kitchen, and community resource center in Anchorage, Alaska. Downtown Hope Center exists to serve the city's homeless population: it provides daily meals, laundry and shower services, job skills training, and clothing to all men and women who need those resources. But at night, the center becomes a women-only shelter, providing a safe overnight sleeping environment for women experiencing homelessness—many of whom are survivors of domestic violence, sexual assault, and sex trafficking.

In 2018, an inebriated and injured male, dressed in a pink nightgown, came to the women's shelter. The shelter sent the individual to the hospital and paid for the taxi ride there. The individual then filed a complaint with the Anchorage Equal Rights Commission, alleging that a city ordinance prohibiting gender-identity discrimination required Downtown Hope Center to allow men to sleep next to abused women. Downtown Hope Center filed a lawsuit to stop the City from prosecuting the complaint.

The Downtown Hope Center fought back and won twice in federal court. Despite the City's repeated attempts to force compliance—including amending its ordinance to target the center specifically—the court held that the City could not enforce its gender-identity mandate against Downtown Hope Center. *See Downtown Soup Kitchen v. Municipality of Anchorage*, 406 F. Supp. 3d 776 (D. Alaska 2019); *Downtown Soup Kitchen v. Municipality of Anchorage*, 576 F. Supp. 3d 636 (D. Alaska 2021).

From the complaint filed in 2018 through two rounds of federal litigation, a small faith-based ministry faced years of legal uncertainty and expense simply for maintaining a women-only overnight policy consistent with its religious mission. For a shelter operating on limited resources, the cost of defending against the City's repeated attempts to force compliance—in time, money, and diverted energy—is itself a form of harm that chills provider participation in government programs.

The Downtown Hope Center’s case is directly relevant to HUD’s rulemaking. The proposed rule would harmonize federal regulations with the practical realities of sex-specific shelters and the safety and privacy needs of vulnerable women. It would also help ensure that what happened in Anchorage cannot be replicated with federal dollars across the nation’s shelter system.

b. Maximizing Provider Participation

Faith-based organizations operate a significant share of the nation’s emergency shelters. Approximately sixty percent of emergency shelter beds in the United States are provided by faith-based organizations.¹ These providers serve vulnerable populations as an expression of religious conviction, as demonstrated in Downtown Hope Center’s case. These organizations often maintain sex-specific policies rooted in sincere religious beliefs. Forced to choose between those convictions and a gender-identity mandate, many will withdraw from HUD programs rather than compromise core doctrinal commitments—resulting in fewer shelter beds for the populations that need them most.

The loss of faith-based providers would be particularly acute for women. Many of the shelters most likely to exit HUD programs over a gender-identity mandate are those that serve women. Driving these organizations from the system does not advance the interests of women experiencing homelessness; it eliminates the shelters specifically designed to serve them.

The proposed rule maximizes provider participation by permitting sex-specific facilities and respecting the religious character and missions of faith-based organizations. Rather than imposing a mandate that forces providers from the system, HUD’s proposed approach preserves the broadest possible coalition of shelters serving those experiencing homelessness.

A regulatory framework that reduces shelter capacity in pursuit of an obligation that Congress never enacted is neither reasonable nor consistent with HUD’s core mission.

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ADF is grateful for the opportunity to comment on the proposed regulation. We support HUD’s determination that the 2012 and 2016 Rules exceeded the agency’s statutory authority, violated the religious liberty of faith-based providers,

¹ B. Johnson, W.H. Wubbenhorst & A. Alvarez, *Assessing the Faith-Based Response to Homelessness in America: Findings from Eleven Cities* 7 (Baylor Inst. for Studies of Religion 2017).

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and undermined the safety and privacy of women in shelter settings. The proposed rule is a necessary correction. Please let us know if we can be of further assistance.

Respectfully Submitted,

s/Mikayla Douglas

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