



Petition of America First Legal Foundation for Rulemaking

Petition to Rescind Rule Requiring HUD-Assisted and HUD-Insured Housing Programs to Provide Equal Access Based on Gender Identity

SUMMARY OF PETITION

1. This petition for rulemaking is submitted pursuant to 5 U.S.C. § 553(e), which grants any interested person the right to petition a federal agency for the issuance, amendment, or repeal of a rule. America First Legal Foundation (“AFL”) respectfully requests that the Department of Housing and Urban Development (“HUD”) rescind 24 C.F.R. § 5.106, which requires recipients and subrecipients of HUD Community Planning and Development (“CPD”) program assistance, as well as owners, operators, and managers of shelters and buildings funded by CPD programs, to provide equal access to housing, services, and accommodations based on an individual’s self-identified gender identity rather than biological sex. The rule prevents single-sex emergency shelters from making placement and accommodation decisions based on biological sex and prohibits providers from inquiring about or requiring documentation of an individual’s biological sex. Prompt rescission of this rule is essential to restore lawful, sex-based protections for women in federally assisted housing and shelter programs, consistent with the current Administration’s policy and the plain meaning of federal law.

STATEMENT OF INTEREST

2. AFL is a national, 501(c)(3) nonprofit organization working to promote the rule of law, protect our citizens’ civil rights, and promote public understanding of the Constitution and the laws of the United States. Our mission is to promote government transparency and accountability by obtaining official information, analyzing it, and sharing our findings with the public through reports, press releases, and media, including social media platforms. Through this work, we aim to educate the public and ensure that government officials remain accountable for their duty to faithfully execute, protect, and defend the Constitution, the laws, and the citizens of the United States.

JURISDICTION & AUTHORITY

3. Congress established HUD through the Department of Housing and Urban Development Act¹ and authorized it to administer housing assistance and community development programs. Acting under its general program administration authority, HUD promulgated regulations in 24 C.F.R. pt. 5 governing general program requirements applicable across HUD programs.² One such provision, 24 C.F.R. § 5.106, requires covered CPD program recipients, subrecipients, and shelter operators to provide equal access to programs, facilities, and accommodations in accordance with an individual's self-identified gender identity.³
4. HUD promulgated section 5.106 pursuant to its general program administration authority under 42 U.S.C. § 3535(d), which authorizes the Secretary to make rules and regulations necessary to carry out HUD's functions, and did not identify any CPD program statute that expressly authorizes the gender-identity mandate.⁴ The rule mandates that placement and accommodation in temporary emergency shelters with shared sleeping or bathing facilities be made in accordance with the individual's gender identity and prohibits providers from asking about or requiring documentation of an individual's biological sex.⁵

BACKGROUND

5. 24 C.F.R. § 5.106 traces its origins to HUD's 2012 Equal Access Rule, which added general nondiscrimination protections at 24 C.F.R. § 5.105(a)(2). That rule requires that HUD-assisted and HUD-insured housing be made available without regard to sexual orientation, gender identity, or marital status.⁶ The 2012 rule did not establish the placement and accommodation mandates that now appear in section 5.106, and it did not prohibit single-sex shelter operations based on biological sex.
6. In November 2015, HUD proposed a second equal access rulemaking specifically targeting CPD programs.⁷ HUD concluded that the 2012 rule had not adequately addressed barriers faced by transgender individuals in accessing emergency shelters. The proposed rule would impose new gender-identity

¹ 42 U.S.C. § 3531.

² 42 U.S.C. § 3535(d).

³ 24 C.F.R. § 5.106.

⁴ See 81 Fed. Reg. 64763.

⁵ *Id.* § 5.106(b)–(c).

⁶ Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5,662 (proposed Feb. 3, 2012).

⁷ Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs, 80 Fed. Reg. 72,642 (proposed Nov. 20, 2015).

placement requirements by adding a new section 5.106 requiring CPD recipients and shelter operators to place individuals based on self-identified gender identity rather than biological sex.

7. HUD finalized section 5.106 on September 21, 2016.⁸ The final rule requires covered providers to: (1) provide equal access to programs and accommodations in accordance with an individual’s gender identity; (2) place and serve individuals in accordance with their gender identity; (3) refrain from asking individuals to provide anatomical information or documentary, physical, or medical evidence of gender identity; and (4) make placements in shared sleeping and bathing facilities in accordance with gender identity.⁹ The final rule removed a proposed exception that would have permitted providers to make alternative accommodations for health and safety reasons, eliminating any provider discretion even in congregate-living settings with shared facilities.¹⁰
8. The rule closely tracked the Obama administration’s broader agenda of redefining “sex” in federal programs and statutes to encompass gender identity. It was promulgated without any clear congressional authorization to redefine the term “sex” in CPD program statutes. As the Supreme Court recently explained, “Agencies have only those powers given to them by Congress, and enabling legislation is generally not an “open book to which the agency [may] add pages and change the plot line. We presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies.”¹¹ Section 5.5106 must be rescinded because it usurps major policy decisions that Congress has not made and for which authority Congress has not delegated to HUD.

THE RULE CONFLICTS WITH CURRENT EXECUTIVE POLICY

9. Furthermore, 24 C.F.R. § 5.106 is fundamentally at odds with President Trump’s express directives.
10. On January 20, 2025, President Trump signed Executive Order 14,168, *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*.¹² That Order recognized that “sex” refers to an individual’s immutable biological classification as either male or female. It also made clear that “[s]ex is not a synonym for and does not include the concept of ‘gender identity.’”¹³ The Order directed that federal funds shall not be used to promote gender ideology, and it specifically directed the Secretary of

⁸ Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64,763 (issued Sept. 21, 2016).

⁹ 24 C.F.R. § 5.106(b)–(c).

¹⁰ 81 Fed. Reg. at 64,775 (explaining removal of case-by-case exception).

¹¹ See, e.g., *West Virginia v. E.P.A.*, 597 U.S. 697, 721–24 (2022).

¹² Exec. Order No. 14,168, 90 Fed. Reg. 8,615 (Jan. 30, 2025).

¹³ *Id.* § 2(a).

Housing and Urban Development to “prepare and submit for notice and comment rulemaking a policy to rescind the final rule entitled ‘Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs’ of September 21, 2016, 81 FR 64763.”¹⁴

11. HUD has recognized that Executive Order 14,168 requires rescission of section 5.106. On February 10, 2025, HUD announced that it would stop enforcing the 2016 rule.¹⁵ But that enforcement suspension is not a formal rescission, and section 5.106 remains on the books. Maintaining this provision in the Code of Federal Regulations, even while HUD has suspended its enforcement, prolongs uncertainty for grantees, shelter operators, and the women they serve, and creates an open invitation for a future administration to resume enforcement of this unlawful requirement.
12. Pursuant to the Administrative Procedure Act and governing Supreme Court precedent, HUD may rescind or revise a prior rule when it concludes the rule is unlawful, no longer justified, or inconsistent with current policy, so long as it provides a reasoned explanation and complies with the APA’s procedural requirements.¹⁶ Formal rescission through notice-and-comment rulemaking is the necessary and appropriate next step.

THE RULE EXCEEDS HUD’S STATUTORY AUTHORITY

13. Section 5.106’s mandate to place individuals in single-sex emergency shelters based on self-identified gender identity rather than biological sex rests entirely on HUD’s interpretation that the term “sex” in CPD program statutes encompasses “gender identity.” That interpretation is not compelled by statute, is contrary to the ordinary meaning of “sex,” and cannot be sustained under current administrative law.
14. In *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Supreme Court overruled *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and held that courts must exercise independent judgment in determining what the law means. In other words, courts no longer defer to an agency’s interpretation of an ambiguous statute.¹⁷ Under *Loper Bright*, HUD’s interpretation of “sex” to encompass “gender identity” in CPD program statutes is a legal question for the courts to resolve based on the statute’s text, structure, and history, not by deferring to HUD’s preferred reading.

¹⁴ *Id.* § 3(b).

¹⁵ U.S. DEPT OF HOUS. & URBAN DEV., *Secretary Scott Turner Halts Enforcement Actions of HUD’s Gender Identity Rule* (Feb. 10, 2025), <https://perma.cc/4LN6-DLWH>.

¹⁶ See 5 U.S.C. §§ 553(b)–(c), 706(2)(A); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–16 (2009); *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 29–34 (2020).

¹⁷ *Loper Bright Enters.*, 603 U.S. at 412.

15. The ordinary meaning of “sex” at the time the relevant CPD statutes were enacted referred to biological sex: the binary classification of individuals as male or female.¹⁸ Congress used the term in this sense and did not authorize HUD to redefine “sex.” Where Congress intends to protect gender identity in housing statutes, it does so expressly. For example, the Violence Against Women Act expressly addresses gender identity.¹⁹ Where Congress includes a term in one federal program statute but omits it in another, it is presumed to have acted intentionally.²⁰ Congress's express inclusion of gender identity as a protected characteristic in VAWA, but not in the CPD program statutes, demonstrates that HUD's regulatory extension of that term into the CPD context exceeds its statutory authority. HUD's extension of “sex” to encompass “gender identity” in section 5.106 rewrites HUD's statutory authority rather than faithfully applies it.
16. The rule also implicates the Major Questions Doctrine articulated in *West Virginia v. EPA*, 597 U.S. 697 (2022). Whether federal housing and shelter programs must ignore biological sex entirely—eliminating single-sex shelter operations that exist specifically to protect women from male violence—is a question of vast political and social significance. Such a consequential policy choice requires clear congressional authorization; none exists here. CPD program statutes contain no such mandate, and HUD may not fill that gap by regulatory fiat.

THE RULE IMPOSES REGULATORY BURDENS THAT HARM WOMEN AND SHELTER PROVIDERS

17. Requiring shelter operators to place individuals based on self-identified gender identity in shared sleeping and bathing facilities and prohibiting providers from making any inquiry about biological sex eliminates single-sex emergency shelter operations that exist specifically to provide women with a safe, sex-segregated environment. Many women seeking emergency shelter are survivors of domestic violence, sexual assault, and trafficking. The populations these shelters serve have acute needs for safety and privacy from biological

¹⁸ See *Bostock v. Clayton Cty.*, 590 U.S. 644, 655 (2020) (“[S]ex’ ... refer[s] only to biological distinctions between male and female.”); *Neese v. Becerra*, 640 F. Supp. 3d 668, 683 n.6 (N.D. Tex. 2022) (“[S]ex’ was commonly understood to refer to physiological differences between men and women—particularly with respect to reproductive functions.”).

¹⁹ See Violence Against Women Act, 34 U.S.C. § 12291(a)(46) (defining “underserved populations” to include individuals facing discrimination based on gender identity); see also 34 U.S.C. § 12291(b)(13)(A) (expressly and separately prohibiting discrimination on the basis of “sex” and “gender identity” in programs funded under VAWA and defining the term by cross-reference to 18 U.S.C. § 249(c)(4)).

²⁰ See *Russello v. United States*, 464 U.S. 16, 23 (1983).

males. Section 5.106 deprives operators of the tools needed to provide such protection.

18. The rule's prohibition on asking individuals to provide information about biological sex is also unworkable and imposes compliance burdens on shelter operators with no countervailing benefit. Providers cannot manage housing placement, roommate assignments, or shared-facility logistics without the ability to make sex-based determinations where legally appropriate. The rule leaves providers without meaningful guidance on how to comply while also protecting occupant safety and privacy, and it exposes providers to potential liability for placement decisions regardless of the approach they take.
19. Section 5.106 also raises serious constitutional concerns that independently counsel rescission under the doctrine of constitutional avoidance²¹ by chilling the participation of faith-based organizations in HUD programs. Many religious organizations that operate emergency shelters hold sincere religious beliefs about biological sex and the importance of single-sex housing environments for the populations they serve. By conditioning federal program participation on compliance with section 5.106's gender-identity placement mandate, HUD substantially burdens those beliefs²² and effectively excludes faith-based providers who cannot comply without violating their religious convictions. Congress enacted the Religious Freedom Restoration Act²³ to prevent exactly this kind of government-imposed burden. Rescission would eliminate these constitutional tensions..

THE RULE IS ARBITRARY AND CAPRICIOUS

20. Independent of its lack of statutory authority, section 5.106 is arbitrary and capricious under 5 U.S.C. § 706(2)(A) and must be rescinded.
21. Under the APA, a reviewing court must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²⁴ An agency rule is arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before an agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."²⁵ The agency must "examine the relevant data

²¹ See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979).

²² *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 423–24 (2006).

²³ 42 U.S.C. § 2000bb.

²⁴ 5 U.S.C. § 706(2)(A).

²⁵ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”²⁶

22. HUD failed to consider the safety and privacy interests of existing female shelter residents when it finalized the rule. The APA requires agencies to consider the important aspects of the problem before them.²⁷ The record shows that HUD received extensive comments raising concerns about the impact of the rule on women in congregate shelter settings, but the agency did not grapple meaningfully with those concerns.²⁸ Instead, HUD concluded, without adequate evidentiary support, that the gender-identity mandate would not compromise occupant safety.
23. HUD also failed to consider the reliance interests of faith-based shelter operators and other CPD grantees who had structured their programs and facilities to serve single-sex populations. Where a rule displaces settled practices and expectations, the APA requires the agency to take such reliance into account and to offer a reasoned explanation for proceeding nonetheless.²⁹ HUD did not do so.
24. The vagueness of section 5.106’s operative requirements further renders the rule arbitrary. Regulations must provide “ascertainable standards” to avoid arbitrary enforcement.³⁰ The regulation requires operators to place individuals in accordance with gender identity, but provides no guidance on how to manage competing safety and privacy concerns among existing occupants, how to handle disputes about an individual’s claimed gender identity, or what standards govern the “nondiscriminatory steps” required to address post-admission privacy concerns. This open-ended mandate invites inconsistent enforcement and leaves providers without fair notice of what compliance requires.

REQUESTED ACTION

²⁶ *Id.*

²⁷ *Id.*

²⁸ *See, e.g.*, Catherine Brennan, Comment on Equal Access in Accordance With an Individual’s Gender Identity in Community Planning and Development Programs, Docket No. HUD-2015-0104 (posted on Regulations.gov Jan. 6, 2016), <https://perma.cc/K4F6-L3U2>; Hearth M. Rising, Comment on Equal Access in Accordance With an Individual’s Gender Identity in Community Planning and Development Programs, Docket No. HUD-2015-0104 (posted on Regulations.gov Feb. 22, 2016); Erika Olsen, Comment on Equal Access in Accordance With an Individual’s Gender Identity in Community Planning and Development Programs, Docket No. HUD-2015-0104 (posted on Regulations.gov Jan. 5, 2016), <https://perma.cc/R7JB-X4A7>.

²⁹ *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020) (agency must “assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.”).

³⁰ *See Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

25. To restore lawful, sex-based protections in federally assisted housing programs and comply with Executive Order 14,168, AFL respectfully requests that HUD initiate notice-and-comment rulemaking to rescind 24 C.F.R. § 5.106 in its entirety.
26. Rescission would restore HUD’s pre-2016 approach under which single-sex emergency shelter operations were permissible, and would return program administration to a neutral, statutorily grounded framework that gives effect to the plain meaning of “sex” in CPD program statutes.

CONCLUSION

27. HUD must rescind 24 C.F.R. § 5.106 to comply with current law and the President’s explicit directives. The rule rewrites the statutory term “sex” to encompass “gender identity” without congressional authorization—a substitution that is foreclosed by *Loper Bright* and the Major Questions Doctrine. It eliminates single-sex emergency shelter operations that exist to protect women who are survivors of violence, imposes unworkable compliance burdens on grantees and faith-based providers, and fails to account for the safety and privacy interests of female shelter residents. Executive Order 14,168 expressly directs rescission of this rule. HUD should act promptly to carry out that directive through the formal notice-and-comment process required by the APA. For these reasons, AFL respectfully requests that HUD initiate the rulemaking process to rescind section 5.106 and return to a neutral, sex-based framework that faithfully applies the statute Congress enacted.
28. Please confirm receipt of this petition and advise on the timeline and process for HUD’s consideration. We stand ready to provide additional information or participate in any public comment process that may follow. AFL respectfully requests that HUD respond to this petition within 45 days of receipt.³¹ If HUD does not act upon this petition within a reasonable time, AFL reserves its right to seek appropriate judicial relief.

Dated: April 22, 2026

Respectfully submitted,

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³¹ See 5 U.S.C. § 555(b) (requiring agencies to conclude matters presented to them within a reasonable time).