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Facially Discriminatory Admissions Policies in Homeless Shelters and the Fair Housing Act

Greg C. Cheyne

I. INTRODUCTION

During recent decades, legislators have created strong protections for individuals from housing discrimination in its various forms. Thanks to these efforts, sex and familial status have joined race, color, religion, national origin, and disability as protected classes, and administrative agencies have been charged with proactively enforcing all fair housing laws. Courts have similarly risen to the task of protecting against discrimination based on sex and familial status, finding violations in ever-widening categories of structures including mobile home parks and temporary farm-labor camps.

1 BA 2007, University of Chicago; JD Candidate 2010, University of Chicago.
2 Executive Order Number 12,892, 59 Fed Reg 2939 (1994) (instructing agency heads to enforce fair housing laws under the coordination of the Secretary of the Department of Housing and Urban Development).
3 United States v Lepore, 816 F Supp 1011, 1021 (M D Pa 1991) (holding that a mo-
Despite these efforts, the occupants of one class of structure remain subject to frequent discrimination. Every day, homeless shelters openly discriminate against potential occupants. Restrictive admissions policies instruct shelter staff to turn individuals away on the basis of their sex or familial status. Most emergency and temporary homeless shelters in the United States are segregated based on sex. Because these policies treat occupants differently based on their membership to a protected class, they meet the definition of facial discrimination and are recognized as such by courts.

While the impacts of this discrimination have not been well studied, there is evidence of serious adverse effects on the low-income population. Fathers are forced to leave their families. Children are placed in foster care. The composition of the low-income population is altered and likely for the worse. Adolescent sons are separated from their families and left to fend for

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4 Hernandez v Ever Fresh Co, 923 F Supp 1305, 1309 (D Or 1996) (holding that the prohibition against discrimination on the basis of familial status in the Fair Housing Act applies to labor camps for migrant workers).


7 International Union v Johnson Controls, 499 US 187, 197-99 (1991) (finding a sex-specific fetal protection policy "facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing .... [E]xPLICIT FACIAL DISCRIMINATION DOES NOT DEPEND ON WHY THE EMPLOYER DISCRIMINATES BUT RATHER ON THE EXPLICIT TERMS OF THE DISCRIMINATION."); Community House, Inc v City of Boise, 490 F3d 1041, 1048 (9th Cir 2007) (finding a shelter policy that excluded women and families to be "facially discriminatory because it explicitly treats women and families different from men").

8 Weinreb and Rossi, 69 Soc Serv Rev at 95 (cited in note 5) (noting that family shelters that do not admit men force men to abandon their families for shelter).


10 Peter H. Rossi, Troubling Families: Family Homelessness in America, 37 Am Beh Sci 342, 379 (1994) (arguing that the population of homeless families is skewed toward young single mothers with small families because of admissions policies restricting men and large families).

themselves, and men, women, and children are exposed to the humiliation of discriminatory treatment.

More and more Americans are joining the population vulnerable to these policies. Homelessness has become a major problem nationwide, even for working families. In every county, more than the minimum wage is required to afford a one-bedroom apartment at the local fair market rent. In major American cities, almost a fifth of homeless persons with children reported being employed. While homeless shelters are often thought of as temporary, the average length of stay in a shelter for a household with children is almost six months.

Despite the prevalence of restrictive admissions policies for homeless shelters and their clear classification as facially discriminatory, they have rarely been subject to litigation. Recently, however, the issue was brought to the foreground when the Ninth Circuit addressed such a policy. In a controversial ruling, the Ninth Circuit found that a men-only policy for a homeless shelter may violate the Fair Housing Act ("FHA"), though they noted in a footnote that the applicability of the FHA to homeless shelters generally was unresolved.

This Comment seeks to assist in resolving that issue by exploring possible legal regimes that would follow from proposed interpretations of the FHA. Little information about facially discriminatory policies in homeless shelters appears in the academic and legal literature. Part II documents the existence of such policies and the potential effects of these policies on the homeless

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12 Jacobs, Little, and Almeida, 2 J Soc Distress & Homeless at 283 (cited in note 9) (noting that the common policies rejecting adolescent males in family shelters leave adolescent males on their own to seek shelter).
13 It is estimated that as many as 3.5 million individuals experience homelessness in a given year in the United States, and the population has grown dramatically. The Urban Institute, A New Look at Homelessness in America (2000), available at <http://www.urban.org/url.cfm?ID=900302> (last visited May 3, 2009). There is reason to fear that the current financial downturn may accelerate the growth of this population. US Conference of Mayors, A Status Report on Hunger and Homelessness in America's Cities: A 23-City Survey, 17 (2007), available at <http://www.usmayors.org/HHSurvey2007/hhsurvey07.pdf> (last visited Apr 29, 2009) (reporting that most major cities surveyed expected to see increases in the need for services for the homeless because of the economic downturn).
16 Id at 16.
17 Community House, 490 F3d at 1048–51.
18 Id.
19 Id at 1048 n 2.
and society. Part III describes the current state of housing discrimination law with respect to homeless shelters. Between constitutional protections, federal fair housing statutes, executive orders, and state and local fair housing requirements, there is little doubt that there are existing protections for certain classes of individuals in homeless shelters. Due to ambiguity in the definition of "dwelling" in the FHA, however, whether occupants of homeless shelters are protected from discrimination based on sex and familial status by the FHA remains in doubt. Part III explores the few cases that have addressed this ambiguity and discusses potential justifications for facially discriminatory policies under the FHA. Part IV explores the implications of interpreting the FHA to cover homeless shelters, sketching the outlines of potential legal regimes under the existing statute. Part V concludes by identifying empirical questions in need of further study to help resolve this issue.

While this Comment largely focuses on the negative consequences of restrictive admissions guidelines, it should not be read as an indictment of all such policies. There are legitimate safety, privacy, and resource concerns which may justify such rules, and courts have recognized exceptions to the FHA that would allow facially discriminatory policies for such reasons. The focus is on negative effects because most are not found elsewhere in the legal literature and are little studied in any field. This Comment seeks to begin to fill this gap by drawing attention to the collateral consequences of shelter admission policies. It argues that these effects deserve consideration and argues for an interpretation of the FHA which would allow courts to be a forum for that consideration.

II. FACIALLY DISCRIMINATORY POLICIES IN HOMELESS SHELTERS

Homeless shelters routinely and openly maintain policies that treat homeless individuals differently based on their membership in protected classes. Known as facially discriminatory


21 See, for example, Familystyle of St. Paul v City of St. Paul, 923 F2d 91, 94 (8th Cir 1991); Bangertor v Orem City Corp, 46 F3d 1491, 1503–04 (10th Cir 1995). For a discussion of these exceptions to the FHA, see Part III, B, 4.
policies to the courts, these policies may have impacts that go beyond leaving some homeless individuals without shelter.

A. The Prevalence and Scope of Facially Discriminatory Policies in Homeless Shelters

Social scientists, though rarely targeting such policies for study, have long documented the existence of facially discriminatory policies in homeless shelters with respect to sex, familial status, religion, and disability. Such policies based on race, color, and national origin have not been documented recently, and there is little reason to believe they exist.

Facially discriminatory policies typically come in the form of admissions criteria. When homeless individuals seek shelter, they are usually screened by staff at a homeless shelter or a central office guided by admissions criteria. Some shelters, known

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23 See Victoria L. Banyard, Taking Another Route: Daily Survival Narratives from Mothers Who Are Homeless, 23 Am J Community Psych 871, 875 (1995) (describing qualitative data collected in shelters for women and children in three Midwestern cities); Weinreb and Rossi, 69 Soc Serv Rev at 95 (documenting different types of homeless shelters); Jacobs, Little, and Almeida, 2 J Soc Distress & Homeless at (documenting the admissions criteria for shelters nationwide); Elizabeth W. Lindsey, Service Providers' Perception of Factors that Help or Hinder Homeless Families, 79 Families in Socy 160, 165 (1998) (documenting which populations different shelters in North Carolina and Georgia serve, including the percentages that do not serve men, women, and families); McChesney, 69 Soc Serv Rev at 447 (noting that men are considered nuisances at family shelters and are frequently excluded); Stephen Metraux and Dennis P. Culhane, Family Dynamics, Housing, and Recurring Homelessness Among Women in New York City Homeless Shelters, 20 J Fam Issues 371, 373-375 (1999) (documenting the parsing of the homeless population by the New York Department of Homeless Services into two separate systems, one for families and one for individuals); Cynthia Rocha, et al, Predictors of Permanent Housing for Sheltered Homeless Families, 77 Families in Socy 50, 51 (1996) (noting that shelters in their study welcomed all types of homeless families, including those with teenage children unlike other shelters in St. Louis); Rossi, 37 Am Beh Sci at 366 (cited in note 10) (analyzing the selectivity of shelter admissions policies); Shirley P. Thrasher and Carol T. Mowbray, A Strengths Perspective: An Ethnographic Study of Homeless Women with Children, 20 Health and Soc Work 93, 94 (1995) (studying three shelters in the Detroit metropolitan area, one mixed-use and two exclusive to families and women).

24 Id.

25 Rossi, 37 Am Beh Sci at 368 (cited in note 10) (documenting mandatory attendance at religious services policies for shelter residents).

26 Weinreb and Rossi, 69 Soc Serv Rev at 95–96 (cited in note 5) (documenting the admissions criteria for shelters nationwide finding that 39 percent of shelters exclude the mentally ill).

27 Rossi, 37 Am Beh Sci at 380 (cited in note 10) (noting that discrimination based on race, color, and national origin has not been seen).

28 Weinreb and Rossi, 69 Soc Serv Rev at 95 (cited in note 5) (describing how restrictive intake procedures function).
as mixed-use, do not have policies that restrict based on sex or familial status. These shelters do not exclude at all or exclude based on other characteristics such as substance abuse. However, many shelters are defined by the sex and familial restrictions they impose. If it is a men-only shelter, then only men gain admission. If women-only, then only women gain admission. If it is a family shelter, then generally only parents with young children are allowed, though different shelters often define "family" differently. "In some instances, shelters will only accept mothers accompanied by their children, a practice that means that fathers are often sent off to a single men's shelter."29 Such policies openly treat individuals differently based on their sex and familial status.

In addition to these basic restrictions, which define the type of shelter (family, men-only, women-only, and mixed-use), there are often further restrictions. Common among these for family shelters are bans on drug abusers, alcohol abusers, spousal abusers, child abusers, the mentally ill, the physically ill, large families, adolescent males, and those with a criminal record.30 It is striking to note that large families and families with adolescent males are often treated the same as active alcohol and drug abusers. Families with adolescent males are more likely to be excluded than individuals with records of child abuse; one study found that 40 percent of family shelters exclude families because of the presence of adolescent males.31

There is reason to believe that the use of these policies is expanding. One recent study of shelters in Los Angeles County found that almost 40 percent of shelters reported instituting more restrictive entry requirements in the last three years, while fewer than 5 percent lessened their requirements.32 The study did not determine whether the policies became more restrictive with respect to sex or familial status but did note that family type and sobriety were the two most common restrictions.33

Additionally, it should be noted that the vast majority of homeless shelters of all types receive government funding. "[A]lthough the vast majority (86%-95%) are run by private organizations, the shelters obtain anywhere from 29% to over 50%
of their funds from governmental sources, with almost every shelter receiving some funds from the federal government.” As discussed in Part III, this public funding has important implications in triggering certain prohibitions against discrimination.

B. The Societal Impact of Discriminatory Policies

According to the best national estimate, as many as 3.5 million people are likely to experience homelessness in a given year. It is estimated that twelve million Americans will experience homelessness in their lifetime. There are more than 750,000 homeless individuals in the United States on a given day with an average of 335,000 of those residing in shelters and transitional housing. Almost 600,000 families with 1.35 million children experience homelessness every year in the United States, and the homeless population is growing.

Homelessness tripled in 182 large cities between 1981 and 1989. A 2007 survey of twenty-three major American cities reported that fifteen predicted that requests for emergency shelters would increase in 2008, and all twenty-three predicted increases in requests from households with children. "Officials in these cities cited the foreclosure crisis, increases in poverty, and a pattern of steady increases in the numbers of homeless families entering the homeless system during the year as reasons to expect an increase in requests for emergency shelter in 2008.”

This growth in the size of the homeless population over the last few decades has been nearly paralleled by growth in shelter capacity. A study found that shelter capacity in nine major U.S.

34 Rossi, 37 Am Beh Sci at 373 (cited in note 10).
35 Urban Institute, A New Look at Homelessness (cited in note 13).
41 Id.
communities doubled between 1987 and 1997, and the number of homeless assistance organizations increased by roughly 40 percent from 1989 to 2002. The growth in the homeless population and number of shelters has brought, and will continue to bring, more and more individuals in contact with the facially discriminatory shelter policies documented above.

The most obvious impact of these discriminatory policies is that some homeless individuals are denied shelter when they request it. No data is kept on how many individuals are denied admission based on admissions criteria, what percentage are able to find another source of shelter, or the quality of the alternative shelter that is secured. The only evidence of what is likely a substantial harm to the affected population is either inferential or anecdotal. Of 750,000 individuals estimated to experience homelessness each day, only 335,000 are housed in shelters and transitional housing. How many of the 55 percent who remain unhoused never seek shelter, how many are turned away based on restrictive admissions policies, and how many are turned away for capacity and other reasons is undocumented. Anecdotally, the Ninth Circuit in Community House, Inc v City of Boise noted that the women and children displaced when their shelter instituted a men-only policy experienced "significant hardship" and had to move into "much less desirable housing."

The consequences of leaving people unsheltered are dire. Inadequate housing often involves a lack of access to safe water for drinking and personal hygiene, proper disposal of sewage, and facilities for safe food preparation in addition to protection from extreme temperatures and natural hazards. Living on the streets presents "a unique set of hardships beyond those presented by poor quality housing." In addition to being at a higher risk for developing new medical conditions, chronic medical conditions commonly worsen, and death from disease and expo-

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43 Esparza, Shelters, Soup Kitchens, and Supportive Housing at 18 (cited in note 39).
44 HUD, Annual Homeless Assessment Report to Congress at iii (cited in note 37).
45 490 F3d 1041 (9th Cir 2007).
46 Id at 1046.
47 Thomas D. Matte and David E. Jacobs, Housing and Health: Current Issues and Implications for Research and Programs, 77 J Urban Health: Bull NY Acad Med 7, 9 (2000).
48 Id.
49 Id at 10 (noting the difficulty of storing insulin and securing a diabetic diet for a diabetic homeless individual, illustrating the struggle of maintaining a regular medical
sure is a very real concern for the unsheltered.\textsuperscript{50} In addition, individuals living on the streets are frequently subject to violence.\textsuperscript{51}

The harm of leaving people unsheltered is largely mitigated in cities with "right-to-shelter" policies. In these cities, all homeless persons are taken to shelters with admissions policies that will accept them. In a survey of twenty-three major American cities, eleven reported not turning individuals away.\textsuperscript{52} Some of these cities, such as Miami, have policies that no family will be turned away.\textsuperscript{53} Others, such as New York, have a court-created right to shelter.\textsuperscript{54} While the increased burden of being transported to another shelter may result in some individuals opting to stay on the streets, it is unlikely this is a large population, and the number of homeless individuals without shelter as a result of restrictive admissions criteria is likely far smaller in communities with such policies.

Even in cities that provide some form of shelter for excluded individuals, there is reason to believe that there are harmful collateral consequences of these policies that are widely felt. One such collateral consequence is the alteration of the composition of the low-income population. Facially discriminatory policies shape

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\textsuperscript{52} US Conference of Mayors, \textit{Report on Hunger and Homelessness}, at 17 (cited in note 13).

\textsuperscript{53} Id.

\textsuperscript{54} See \textit{Callahan v Carey}, 307 AD 2d 150, 153-55 (NY App 2003) (referencing a 1981 consent decree requiring New York City to provide shelter to homeless men meeting certain criteria).
the structure of the low-income population. For example, through restrictive admissions policies, "shelters have defined the composition of the families constituting the homeless family population."55 Policies that only admit mothers with children, as opposed to couples with children, increase the proportion of female-headed households among homeless families. Shelters that do not allow large families or families with adolescents distort the age structure toward larger proportions of young mothers.56

Additionally, facially discriminatory admissions policies often require families to separate to receive shelter and are thereby particularly damaging to the family structure. Researchers have suggested that restrictive admissions policies may contribute to the dissolution of low-income families.57 Homeless teenage boys are particularly targeted for exclusion and often are left to fend for themselves. Families in need of social services can rarely find housing that will both accept them and provide the necessary services.58 Restrictive admissions policies may encourage families to place children in foster care.59 As one study summarized, "it makes the difficult task of maintaining a 'normal' family (husband, wife, and children) that much more difficult."60

Researchers have also noted the impact of these policies on the social support of homeless families. Lack of social support is a risk factor for homelessness.61 These policies weaken the social support of the homeless and perhaps contribute to continued homelessness by keeping the homeless apart from potential sources of support. For example, policies which discourage men from interacting with homeless single mothers deprive both groups of potential marriage partners. If male partners were encouraged to interact with homeless families and were included in the permanency planning process, more homeless parents might marry. "[I]f our goal is to increase social support, we need a reversal of attitude toward men in shelter policies and programs."62

All of these impacts can be long-lasting and likely shape the composition of low-income households even after they leave the

55 Rossi, 37 Am Beh Sci at 379 (cited in note 10) (emphasis in original omitted).
56 Id (giving examples of how shelter exclusion policies distort the composition of low-income families).
57 Jacobs, Little, and Almeida, 2 J Soc Distress & Homeless at 283 (cited in note 9).
58 Id.
59 Id.
60 Id.
62 Id at 447.
shelters. Considering that 12 million Americans will experience homelessness in their lifetime, yet only 750,000 are homeless on any given day, it is clear that the effects of discriminatory policies have the potential to touch populations beyond those currently residing in shelters. While no study has been conducted on the matter, there is a risk that, even after leaving the shelter, households continue to be headed by single women with lower levels of social support, children continue to remain in foster care, and adolescent males who have lived alone on the streets continue to utilize whatever skills helped them survive when they were separated from their families.

Another important impact, largely unstudied by social scientists in this domain but readily acknowledged by the legal community, is the humiliation caused by discrimination. The recognition of the gravity of this harm was a chief motivator in the enactment of civil rights legislation. As noted in Boyle v. Jerome Country Club, "Congress enacted Title II of the Civil Rights Act of 1964 to 'vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" This deprivation of personal dignity is present every time a homeless adolescent is turned away or a father is forced to separate from his family for them to find shelter.

Of course, there are some benefits to these restrictive admissions criteria. One key concern is that serving a mixed population will strain shelter resources. With this in mind, shelters establish entry requirements based on various factors including the target population (for example, substance users or victims of abuse), the physical configuration of the facility, and capacity. "An agency may establish more restrictive admissions criteria due to funding requirements or as a way to facilitate client movement through the program." More restrictive policies might yield a resident population that is higher functioning and more compliant, allowing the shelter to serve more clients more cheaply. In Community House, the shelter providers argued

64 HUD, Annual Homeless Assessment Report to Congress at iii (cited in note 37).
66 Shelter Partnership, Operating at Capacity at 16 (cited in note 20).
67 Id at 19.
68 Jacobs, Little, and Almeida acknowledge the tradeoffs in developing admissions policies without arguing that current admissions policies have struck the proper balance. After noting that such policies seek the higher functioning members of the homeless population, they ask, "And where, if at all, are those [lower functioning, less compliant]
that running a men-only shelter allowed them the resources to open additional accommodations for women and children.\textsuperscript{69}

The theoretical literature on organizational behavior provides one explanation for the concern over resource stretching. According to resource dependence theory, an organization, such as a homeless shelter, confronted with a potentially heterogeneous client population and limited resources will seek homogeneous clients because a complex client population puts pressure on the organization to provide a wide range of services.\textsuperscript{70} By seeking like clients, organizations limit themselves to like services. While the power of this theory is more fully explored in predicting organizational behavior based on the environment, it is enough for our purposes to note the logic underlying the discriminatory practices of organizations.

In addition to resource concerns, guidelines for managing homeless shelters identify safety and privacy as key concerns for homeless shelters maintaining sex-segregated policies.\textsuperscript{71} In \textit{Community House}, the shelter provider argued that "the difficulties of serving the homeless population are exacerbated in a mixed gender shelter environment."\textsuperscript{72} Specifically, they argued that the policy protected the safety of women and children.\textsuperscript{73} The Ninth Circuit additionally noted that a privacy justification may exist for these discriminatory admissions policies if, for example, occupants of the shelter did not have their own rooms.\textsuperscript{74}

Even given these appreciable benefits, considering the mounting evidence of large, society-wide impacts of these policies, it may well be time to revisit whether they should be allowed to continue, and the courts may provide a forum for that consideration to take place. The next section will discuss the legal rights of homeless individuals to challenge these policies in court.

\textsuperscript{69} \textit{Community House}, 490 F3d at 1051.


\textsuperscript{71} Mottet and Ohle, \textit{Transitioning Our Shelters} at 2 (cited in note 6) (identifying safety and privacy as concerns of shelter administrators in integrating trans-gendered persons into the shelters).

\textsuperscript{72} \textit{Community House}, 490 F3d at 1046 (quotation marks omitted).

\textsuperscript{73} Id at 1051.

\textsuperscript{74} Id at 1051 n 6.
III. THE LEGAL RIGHTS OF THE HOMELESS TO CHALLENGE

FACIALLY DISCRIMINATORY POLICIES

Fair housing law provides a patchwork of protections against facially discriminatory policies. While this Comment focuses on discrimination based on sex and familial status, this Part will briefly address fair housing laws with respect to other protected classes as well. It does so to address interactions both within and between fair housing laws. First, laws often ban multiple types of discrimination using the same language. Interpretations of fair housing law that affect discrimination based on sex and familial status often have an influence on the protections offered to other protected classes. For example, because the provision banning discrimination in "dwellings" in the FHA applies to race, color, religion, sex, familial status, or national origin, altering the interpretation of "dwelling" to benefit the subjects of sex and familial discrimination would also alter the interpretation with regard to the other classes.

Second, protections in different fair housing laws interact with one another. If courts follow the canon to avoid redundancy, changes in the interpretation of one law may affect the coverage of another. For example, some courts have recognized a distinction between "public accommodations"—deserving of Title II protection—and "dwellings"—deserving of FHA protection. Placing homeless shelters into one category may result in their exclusion from the other.

It is likely that we, like the Supreme Court, vary in our aversion to types of discrimination. For example, we might be more comfortable with shelter admissions policies which discriminate based on sex or familial status than with shelter admissions policies which discriminate based on religion or race. Knowing that religious and racial discrimination in shelters is likely barred by Title II, even if courts find it is not barred by

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75 42 USC § 3604(a) (2006).
76 Patel v Holley House Motels, 483 F Supp 374, 381 (holding that a motel is a public accommodation not a dwelling under the FHA).
77 The Court has a higher comfort level with discrimination based on gender than based on race as is apparent from the three-tiered equal protections framework the Court has developed, discussed below. Compare Mississippi University for Women v Hogan, 458 US 718, 724–26 (1982) (holding gender a semi-suspect classification and requiring the government provide an important, but not necessarily compelling, interest to not violate the fourteenth amendment), with Loving v Virginia, 388 US 1, 11 (1967) (finding race a suspect classification, requiring a compelling state interest for the regulation to stand).
78 42 USC § 2000a(b)(1) (2006) (prohibiting discrimination in public accommoda-
the FHA, may lead us to favor an interpretation of the FHA that does not include shelters, confident that there is still a means to address the less favored discrimination. Knowing the background rules of fair housing law allows us to tailor our legal regime based on our preferences.

Section A of this Part gives a brief summary of fair housing laws that are likely to prohibit some discrimination in homeless shelters, even if the FHA is found not to. Section B discusses the protections that may be offered to occupants of homeless shelters by the FHA and discusses recent cases addressing the issue.

A. Non-FHA Fair Housing Requirements

1. The Equal Protection Clause.

The Fourteenth Amendment commands that a state not “deny to any person within its jurisdiction the equal protection of the laws.”\(^7^9\) In order for the Fourteenth Amendment to apply, the element of state action is essential.\(^8^0\) This is easily established in cases where the government builds and operates housing.\(^8^1\) It is also relatively easily proven when the government approves and subsidizes housing.\(^8^2\) State action can also be proven by establishing that private parties are performing public functions normally assumed by the state,\(^8^3\) or where the state has entered into a symbiotic relationship with private parties.\(^8^4\) Given that the vast majority of private shelters are publicly subsidized,\(^8^5\) it is likely that state action may be established for many homeless shelters.

\(^7^9\) US Const Amend XIV, § 1.
\(^8^0\) The Civil Rights Cases, 109 US 3, 13–14 (1883).
\(^8^1\) See, for example, Escalera v New York City Housing Authority, 425 F2d 853, 861 (2d Cir 1970) (involving public housing).
\(^8^2\) See, for example, Swann v Gastonia Housing Authority, 675 F2d 1342, 1346 (4th Cir 1982) (holding that eviction from § 8 housing constitutes state action); but see Miller v Hartwood Apartments, Ltd., 689 F2d 1239, 1243–44 (5th Cir 1982) (holding that it is not a state action to evict in § 8 subsidized private housing).
\(^8^3\) See, for example, Evans v Newton, 382 US 296, 301–302 (1966) (private park treated as public where the state acted as trustee).
\(^8^4\) See, for example, Burton v Wilmington Parking Authority, 365 US 715, 724–26 (1961) (holding that partnership in leased facilities with clear public character is a state action that implicates the Equal Protection Clause).
\(^8^5\) Rossi, 37 Am Beh Sci at 373 (cited in note 10).
Once state action is established, courts apply a three-tiered formula for determining whether equal protection has been violated. According to this formula, courts apply strict scrutiny when a classification is deemed "suspect" or a fundamental right is at issue. This level of scrutiny requires that the regulation in question serve a compelling state interest, such as national security, and that there be no less restrictive alternative means for the state to achieve its objectives. Race and national origin have been deemed suspect classifications, and examples of fundamental rights include voting, access to the courts, and the right to travel.

The second tier of scrutiny is applied when a "semi-suspect" classification is at interest. When such an interest is at stake, courts require that the regulation substantially serve an important government interest, albeit one that is less than compelling, in order for the regulation to not violate equal protections. Gender and alienage have been held to be semi-suspect classifications.

Finally, in matters involving social and economic legislation, the courts grant extreme deference to legislative and administrative acts, requiring only that there be some rational relationship

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86 See, for example, Korematsu v United States, 323 US 214, 216 (1944) (applying strict scrutiny to a classification based on national origin).
87 Dunn v Blumstein, 405 US 330, 335 (1972) (holding that the state must show a substantial and compelling state reason for imposing durational residence requirements for voting).
88 Loving v Virginia, 388 US 1, 11 (1967) (finding race a suspect classification, requiring a compelling state interest for the regulation to stand).
90 Harper v Virginia Board of Elections, 383 US 663, 666 (1966) (holding that the state violates the Equal Protection Clause when it makes affluence of the voter or a poll tax the standard for voting).
91 Griffin v Illinois, 351 US 12 (1956) (holding that the Equal Protection Clause demands that the court system cannot invidiously discriminate between people or groups of people).
92 Shapiro v Thompson, 394 US 618, 634 (1969) (holding that moving between states is a constitutional right, and the state can only limit that right to the extent necessary to promote a compelling government interest).
94 Mississippi University for Women v Hogan, 458 US 718, 724–26 (1982) (finding gender a semi-suspect classification and requiring the government provide an important, but not necessarily compelling, interest to not violate the fourteenth amendment).
95 Ambach v Norwick, 441 US 68, 73–74 (1979) (finding alienage a semi-suspect classification and requiring the government provide an important, but not necessary compelling, interest to not violate the fourteenth amendment).
to a legitimate state purpose.\textsuperscript{96} For example, a court confronted with an allegation of familial discrimination held that a university policy that excluded children from married student housing did not violate the Equal Protection Clause because there was a state of facts that could reasonably be conceived to justify it.\textsuperscript{97} Disability also falls into this level of scrutiny.\textsuperscript{98}

Where the fourteenth amendment is violated, litigation may be brought under Section 1983 of the Civil Rights Act of 1866.\textsuperscript{99}

2. The Establishment Clause.

The Establishment Clause of the First Amendment provides a means of challenging religious discrimination in homeless shelters, such as mandatory religious services requirements. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion."\textsuperscript{100} Whether the Establishment Clause is applicable depends on the presence and function of state action.

Most homeless shelters receive some level of government funding.\textsuperscript{101} \textit{Community House} provides an example of the test for determining whether the policies of a private organization that receives government aid violate the Establishment Clause.\textsuperscript{102} Government aid to religious organizations "survives an Establishment Clause challenge if it (1) has a secular purpose, (2) has a primary effect of neither advancing nor inhibiting religion, and (3) does not foster excessive government entanglement with religion."\textsuperscript{103} At issue in \textit{Community House} was a lease between the City of Boise and the Boise Rescue Mission Ministries to administer a shelter. The court found that even though the City leased the shelter to the Ministries for valid secular purposes, the lease violated the Establishment Clause because it gave the Ministries a heavily subsidized platform to spread their religious message, having the effect of advancing religion.\textsuperscript{104} The Ninth Circuit found that the City's lease with the Ministries required

\begin{footnotes}
\item[97] \textit{Bynes v Toll}, 512 F2d 252, 257 (2d Cir 1975).
\item[98] \textit{City of Cleburne v Cleburne Living Center}, 473 US 432, 446 (1985).
\item[99] 42 USC § 1983 (2006) (granting a private right of action to individuals deprived of constitutional rights by the government).
\item[100] US Const Amend I.
\item[101] Rossi, 37 Am Beh Sci at 373 (cited in note 10).
\item[102] \textit{Community House}, 490 F3d at 1054–60.
\item[103] Id at 1054–55.
\item[104] Id at 1057–59.
\end{footnotes}
an injunction not only against forcing occupants to participate in religious services but also against holding voluntary religious services in the building.105


Congress first created protections against housing discrimination when it passed section 1982 of the Civil Rights Act of 1866.106 This act established that "[a]ll citizens" had the same right as "white citizens" to "inherit, purchase, lease, sell, hold, and convey real and personal property."107 While initially the law was only thought to reach public action, that changed in 1968 when the Supreme Court held in Jones v Alfred H. Mayer Co108 that section 1982 applied to private discrimination as well. Claims brought under section 1982 are independent from those brought under the FHA, and claims may be brought concurrently.109

It is unclear whether section 1982 applies to homeless shelters. While no court has held it applicable to a shelter, courts have interpreted section 1982 liberally.110 It should be noted that the question is likely purely academic since section 1982 only applies to racial discrimination,111 and there is no documentation of homeless shelters with facially discriminatory racial policies.

4. Title II of the Civil Rights Act of 1964.

Title II of the Civil Rights Act of 1964 prohibits discrimination based on race, color, religion, or national origin in public accommodations.112 Places of public accommodation within the meaning of Title II include "any inn, hotel, motel or other estab-

105 Id 1059–60 (holding that the lower court abused its discretion by not granting the plaintiff a preliminary injunction).
107 Id.
109 See, for example, Village of Bellwood v Gorey and Associates, 664 F Supp 320, 328 (N D Ill 1987).
110 See, for example, Tillman v Wheaton-Haven Recreation Association, 410 US 431, 437 (1973) (holding that 1982 prohibited discrimination in access to neighborhood amenities); Terry v Elmwood Cemetery, 307 F Supp 369, 371–72 (N D Ala 1969) (holding that 1982 applies to cemetery plots under a broad interpretation of "property").
111 Racial discrimination as race was understood at the time section 1982 was enacted, which includes Jews and Arabs as separate races. See Shaare Tefila Congregation v Cobb, 481 US 615, 617–18 (1987).
lishment which provides lodging to transient guests.” 113 Whether an establishment is a “public accommodation” depends on whether it provides lodging to “transient guests,” but not all guests need be transient in order for the establishment to qualify. If some guests are transient, it is immaterial that the majority are permanent residents. 114 No definition of “transient guest” is given by the statute, and no court has found it necessary to define the term, though occupancy for a week or less has been considered “transient.” 115

Although no court has explicitly held that a homeless shelter is a “public accommodation,” one court assumed that it was. In O’Neal v Porchlight, Inc, an occupant of an emergency homeless shelter brought suit alleging racial discrimination by the staff, among other complaints. 116 The court noted that the pro se plaintiff was “not a stranger to this court” having filed three earlier lawsuits and characterized his complaint as “scattershot allegations with irrelevant words or phrases.” 117 After assuming Title II applied to homeless shelters for the purposes of the analysis, the court dismissed the case on procedural grounds. 118 Given the expansive language of Title II and the broad reading courts have given it, 119 it is highly likely that future courts will find homeless shelters to be “public accommodations.”

Of the classes protected by Title II, only religious discrimination has been documented in homeless shelters. 120 Actions under Title II for religious discrimination have been exceedingly rare. In one case alleging religious discrimination, a Mormon alleged religious discrimination by his country club because it held tournaments on Sundays, when his religion counseled against recreational activities. 121 In another, practitioners of Judo alleged discrimination by the Judo rulemaking authority be-

114 Stout v YMCA, 404 F2d 687, 689 (5th Cir 1968) (holding that a YMCA was a public accommodation within the meaning of Title II because transient guests stayed in rooms there when they were available).
117 Id at *2.
118 Id at *20-*22.
119 See, for example, Dean v Ashling, 409 F 2d 754, 755-56 (5th Cir 1969) (holding that trailer parks are places of public accommodation); Nesmith v YMCA, 397 F 2d 96, 100 (4th Cir 1968) (holding that YMCAs are places of public accommodation).
120 Rossi, 37 Am Beh Sci at 380 (cited in note 10) (noting that admissions policies which discriminate based on race, color, and national origin have not been documented).
cause Judo rules require bowing to inanimate objects, which violated the practitioners’ religious beliefs. Neither claim was successful, but the court in the Judo case did note that “Title II precludes private and public actors from segregating or depriving individuals of services on account of their religion.”

Title II includes an exemption for private clubs “not in fact open to the public.” A series of Supreme Court cases has narrowed this exemption significantly, allowing Title II suits to succeed when the private club is used as a façade to avoid the statute. Successful exemptions have been rare. It is unlikely that homeless shelters would be able to be sufficiently selective to qualify as a private club.

Even though Title II appears to apply to homeless shelters and has few loopholes for shelters to avoid liability, it still may prove ineffective at protecting occupants of homeless shelters from facially discriminatory policies. Title II does not protect occupants from sex or family-based discrimination. The only relief available under Title II is injunctive. Though reasonable attorney’s fees are ordinarily available to successful counsel, given this limited form of relief and the limited means of the potential plaintiffs, it is understandable that Title II is rarely invoked in response to discrimination in homeless shelters. As noted above, though this act was passed in 1964, no court has ruled on whether a homeless shelter is a public accommodation.

123 Id at 1185.
125 See Daniel v Paul, 395 US 298, 307–308 (1969) (holding an outdoor recreational facility was a public accommodation despite a twenty-five cent membership fee); Tilman, 410 US at 438–39 (holding that a pool association open to every white person did not qualify for the private club exemption); Runyon v McCrory, 427 US 160, 172 (1976) (holding that two private schools did not qualify because they advertised to members of the general population).
126 See, for example, Solomon v Miami Woman’s Club, 359 F Sup 41, 44–45 (S D Fla 1973) (finding that woman’s club was a “private club” and was exempt from Civil Rights Act and other anti-discrimination statutes); Welsh v Boy Scouts of America, 993 F2d 1267, 1269 (7th Cir 1993) (holding that the scouting organization was not a “public accommodation” or “place of public entertainment” under 42 USC § 2000a).
127 Adickes v SH Kress & Co, 398 US 144, 150, n 5 (1970) (stating that the legislative history is clear that Congress intended injunctive relief to be the exclusive remedy under Title II).
128 Newman v Piggie Park Enterprises, Inc, 390 US 400, 402–403 (1968) (holding that a litigant who successfully receives injunctive relief is entitled to recover attorneys fees except when the circumstances of the case would make it unjust).
Additionally, procedural requirements have proven to be barriers to relief. Title II requires that, if the discrimination occurred in a state that prohibits it, an action cannot be brought under Title II until thirty days after notifying the appropriate state or local authority.\textsuperscript{129} While this may seem to be a minor inconvenience, with this vulnerable, transient population it may be enough to prevent relief. In \textit{O'Neal} the court avoided addressing the plaintiff's claims by dismissing because he failed to exhaust his administrative remedies.\textsuperscript{130} A similarly situated plaintiff faced the same fate in \textit{Chance v Reed}.\textsuperscript{131} Given that Title II actions by homeless individuals are so rare, it is worth noting this pattern of dismissal for failure to exhaust administrative remedies.

5. Title VI of the Civil Rights Act of 1964.

Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color or national origin, be excluded from any program or activity receiving Federal financial assistance."\textsuperscript{132} Housing programs assisted by federal funds have been held to come within the reach of Title VI.\textsuperscript{133}

Title VI only applies to programs receiving federal funds, though its reach may extend beyond programs that receive federal funding directly. Title VI was amended by the Civil Rights Restoration Act of 1987,\textsuperscript{134} which subjected the entire program to a ban on discrimination, not just the specifically funded program. Courts have been mixed on the issue of whether the acceptance of federal tax benefits bring recipient organizations within the reach of Title VI.\textsuperscript{135} If the acceptance of tax breaks brings organizations within the reach of Title VI, it may prove a far more influential statute.

\begin{itemize}
\item \textsuperscript{129} 42 USC § 2000a-3(c) (2006).
\item \textsuperscript{130} \textit{O'Neal}, 2006 US Dist LEXIS 35750 at *20-*21.
\item \textsuperscript{131} 538 F Supp 2d 500, 510 (D Conn 2008) (dismissing on grounds that plaintiff did not file claim with state agency within 180 days after alleged discriminatory act).
\item \textsuperscript{132} 42 USC § 2000d (2006).
\item \textsuperscript{133} \textit{Hills v Gautreaux}, 425 US 284, 297 (1976).
\item \textsuperscript{134} The Civil Rights Restoration Act of 1987, codified at 42 USC § 2000d-4a (2006).
\item \textsuperscript{135} Compare \textit{McGlotten v Connally}, 338 F Supp 448, 461 (D DC 1972) (holding that tax benefits enjoyed by non-profit organizations were a form of federal assistance which brought its recipients within the reach of section 2000d) with \textit{Laramore v Illinois Sports Facilities Authority}, 722 F Supp 443, 451 (N D Ill 1989) (tax exemption for bonds not federal financial assistance implicating Title VI).
\end{itemize}
Failure to comply with Title VI is punishable by termination or refusal to grant or continue assistance, or by any other means authorized by law. Unlike Title II, the Supreme Court has held that, at least when the program is intentionally discriminatory, Title VI gives rise to a private right of action. Procedurally, Title VI requires the submission of an administrative complaint to the applicable federal agency as a prerequisite to judicial review.

Much like section 1982, Title VI's usefulness is limited by the small number of classes it protects. Title VI does not protect occupants of homeless shelters from discrimination based on religion, sex, or familial status. Since facially discriminatory policies based on race, color, and national origin—the categories protected by Title VI—are extremely rare if not nonexistent in homeless shelters, the value of Title VI is negligible in the shelter context.


The Americans with Disabilities Act ("ADA") prohibits discrimination based on disability in both the public and private sectors. Much like Title VI, the ADA prohibits discrimination in services and programs provided by the government, but the ADA goes beyond Title VI to include programs made available by state and local governments as well as the federal government.

In the private sector, the ADA prohibits discrimination by any place of public accommodation. In this way, the ADA mimics the patchwork of protections created by Title II and the FHA, and much like that patchwork, it is unclear whether any given homeless shelter falls under Title II or the ADA. Regulations have been issued which give some guidance on when a shelter is a "dwelling" under the FHA and when it is a "place of public ac-

140 42 USC § 12132 (2006) ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity. . . .").
141 42 USC § 12131(1)(A), (B) (2006) (defining public entity as including "any State or local government" as well as "any department, agency, special purpose district, or other instrumentality of a State . . . or local government").
commodation" under the ADA. However, these regulations both include homeless shelters and do not list any factors to guide the decision.143

7. Executive Order Number 11,063.

In 1962, President Kennedy signed Executive Order Number 11,063, prohibiting discrimination on the basis of race, religion, or national origin in housing that is owned, operated, or assisted by the federal government.144 In 1980, President Carter extended the order to cover sex-based discrimination.145 In 1994, President Clinton extended the order to disability and familial status.146

The original order had little effect due to its failure to place authority in a specific agency for enforcement.147 Presidents Carter and Clinton, however, updated the law to address this failing. Carter established the authority for agency coordination within the Department of Housing and Urban Development,148 and Clinton created a cabinet-level Fair Housing Council to assure that federal programs affirmatively further fair housing.149

The current executive order requires agencies to determine if their housing programs are discriminatory and, if so, to attempt to remedy any violations by informal means.150 If informal means are unsuccessful, they are directed to impose "such sanctions as authorized by law,"151 so the remedies offered by this order will not exceed those offered by the laws discussed above. Since the executive order applies to programs receiving grants, loans, contracts, insurance, and guarantees through the federal

143 28 CFR § 36.104 (2009) (interpreting the ADA and defining a place of public accommodation as including a homeless shelter); 24 CFR § 100.201 (2009) (interpreting the FHA with respect to disabilities and defining a dwelling as including "dormitory rooms and sleeping accommodations in shelters intended for occupancy as a residence for homeless persons").
147 3 CFR § 652 (cited in note 144) (placing responsibility for enforcement upon "all departments and agencies in the executive branch of the federal government").
149 59 Fed Reg at 2940 (cited in note 146).
150 Id at § 5-502.
151 Id.
government, it is likely that this order affects most homeless shelters as most receive federal support.

8. State and local fair housing requirements.

The majority of states and many of the nation's cities and counties have enacted fair housing legislation. These requirements are highly varied but generally mirror the federal fair housing statutes. Most prohibit discrimination based on race, color, religion, and national origin, and recently marital status, sex, and disability have been added to many. A search of state fair housing laws did not reveal any provisions specifically referring to applicability to homeless shelters. The Supreme Court has held that the FHA "preserves and defers to local fair housing laws," so any protections offered by state and local requirements to occupants of homeless shelters would not be disrupted by FHA coverage.

B. Fair Housing Act

1. Background.

Under the FHA, it is unlawful to "make unavailable . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin." It is also unlawful to "make unavailable . . . a dwelling . . . because of a handicap." As amended, the FHA provides protections to the largest number of classes of the federal fair housing laws.

The FHA provides two procedures for vindicating a deprivation under the Act, an administrative proceeding and a civil action. The remedies available under both procedures include

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152 Id at § 1-102.
153 Rossi, 37 Am Beh Sci at 373 (cited in note 10) (noting that most privately run shelters receive some federal funding).
155 2-16B Powell on Real Property § 16B.09 (2009).
159 42 USC § 3610 (2006) (allowing aggrieved person to file a discriminatory housing claim to the Secretary within one year); 42 USC § 3612 (2006) (allowing a party to the complaint to elect to have the complaint heard in a hearing or in US district court); 42
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actual and punitive damages as well as injunctions including affirmative orders.\textsuperscript{160} In civil actions, reasonable attorney's fees are available to the prevailing party.\textsuperscript{161} Of the fair housing laws, the FHA provides both the widest range of protections and the strongest of remedies.

2. "Dwellings" under the FHA.

The applicability of the FHA to homeless shelters is uncertain. The FHA makes it unlawful to "make unavailable . . . a dwelling" based on membership to a protected class, so whether occupants of homeless shelters are protected is contingent on whether the shelters are considered dwellings. Dwelling is defined as "any building, structure or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families."\textsuperscript{162} No clarification of what constitutes a "residence" is given.

The regulations interpreting the coverage of the FHA do not clarify the legal status of homeless shelters. In the section dealing with handicap discrimination, the regulations specify that "residences" within homeless shelters qualify as "dwellings."\textsuperscript{163} However, homeless shelters are not mentioned in the regulations for any of the other protected classes.\textsuperscript{164} It is important to note that the regulations for the disabled specify "residences" within homeless shelters. Since the issue is what constitutes a "residence," the regulations do little more than clarify that, at least in the context of discrimination against the disabled, homeless shelters may contain units that qualify as residences. They give no further indication of what constitutes a "residence."

Thus, it is left to the courts to interpret this ambiguity. The Supreme Court has never ruled on whether homeless shelters or other temporary lodgings are protected by the FHA. The standard circuit courts have developed for determining whether a structure is a "dwelling" is built upon the definition of "residence" found in \textit{United States v. Hughes Memorial Home}: "a temporary or permanent dwelling place, abode or habitation to

\begin{footnotes}
\item[160] USC § 3613 (2006) (allowing aggrieved party to file a complaint in federal or state court within two years of the alleged discrimination).
\item[162] 42 USC § 3613(c)(2) (2006).
\item[163] 42 USC § 3602(b) (2006).
\item[164] 24 CFR § 100.20 (2008).
\end{footnotes}
which one intends to return as distinguished from the place of temporary sojourn or transient visit."\textsuperscript{165} In applying this definition, courts have focused on factors including whether the occupants intend to remain in the structure for any significant period of time,\textsuperscript{166} whether they view the structure as a place to return to,\textsuperscript{167} and whether the structure was intended as a residence.\textsuperscript{168}

In searching for these elements, courts frequently look at the length of time one expects to stay in the structure.\textsuperscript{169} The central premise is that the longer one expects to stay, the more likely one is to qualify for the protections of the FHA. But while the expected length of stay is important in determining FHA coverage, it is not dispositive, and courts have found a wide range of durations to be sufficient to warrant FHA protection. In \textit{Lakeside Resort Enterprises, LP v Board of Supervisors}, the Third Circuit found a facility with an average stay of only 14.8 days to be covered by the FHA.\textsuperscript{170} They noted that the facility was intended to accommodate thirty-day stays as a matter of course and even longer stays on occasion.\textsuperscript{171} In their analysis, they cited the fact that the FHA refers to "any building, structure, or portion thereof,"\textsuperscript{172} reasoning that "[s]ome rooms in the facility—i.e., a ‘portion thereof’—would house occupants staying for extended periods, thereby satisfying with ease the significant-stay factor."\textsuperscript{173} Thus, if a court is able to cite any example of a significant stay, it may find that the length of stay factor is met.

Other factors courts may consider in determining whether a structure qualifies as a "dwelling" include whether the occupants treated it like a home,\textsuperscript{174} whether they had an alternative place

\begin{footnotes}
\item[166] \textit{United States v Columbus Country Club}, 915 F2d 877, 881 (3d Cir 1990) (holding that summer homes are "dwellings" because residents intended to remain in them for significant periods of time and to return).
\item[167] Id.
\item[168] \textit{Garcia v Condorco}, 114 F Supp 2d 1158, 1160 (D NM 2000) (holding that a jail is not a "dwelling" because it is intended as a penal institution, not a residence).
\item[169] See, for example, \textit{Columbus Country Club}, 915 F2d at 881 (ruling the club members were not "mere transients" because they may spend up to five months in their bungalows).
\item[170] \textit{Lakeside Resort Enterprises, LP v Board of Supervisors}, 455 F3d 154, 158–59 (3d Cir 2006) (holding that a drug and alcohol treatment facility is considered a "dwelling" under the FHA).
\item[171] Id at 159.
\item[172] Id, citing 42 USC § 3602(b).
\item[173] Id.
\item[174] \textit{Lakeside}, 455 F3d at 160 (noting that residents hung pictures on the walls and treated the facility as a home even though they were not allowed off the property unsu-
of residence,\(^{175}\) or whether the structure’s purpose was to serve as a residence.\(^{176}\) Whether the occupants treated the structure like a home is intimately bound to the question of whether they viewed the structure as a place to return to. In Lakeside, the Third Circuit looked to evidence such as receiving mail at the facility, eating meals at the facility, returning to a designated room, and hanging pictures on the wall to suggest that the occupants treated it like a home.\(^{177}\)

The question of whether the individual had an alternative place of residence was developed in response to a suit brought against a homeless shelter. In Woods v Foster, the lack of an alternative residence was held to be evidence that the shelter was treated as a residence by the homeless individuals.\(^{178}\) This element has been cited by other courts considering whether structures qualify as “dwellings.”\(^{179}\)

In Garcia v Condarlo, the court developed a new criterion for determining whether a structure qualified as a “dwelling.”\(^{180}\) In order to avoid giving protections to occupants of a city jail, the court held that because the purpose of the jail was not as a residence, but rather as a penal institution, it was not a “dwelling.”\(^{181}\) No court has expanded this “purpose” reasoning beyond penal institutions, and there is little reason, given the much wider acceptance of the Woods reasoning, to believe courts would expand it to exclude homeless shelters because their purpose is, some may argue, rehabilitation or emergency shelter.

3. Past applications of the FHA to shelters.

While not heavily litigated, this continuing ambiguity in the definition of “dwelling” has led to different outcomes in different courts. Several district courts have applied the FHA to occupants of homeless shelters without discussion of the definition of “dwel-

\(^{175}\) Woods v Foster, 884 F Supp 1169, 1173 (N D Ill 1995).

\(^{176}\) Garcia, 114 F Supp 2d at 1160.

\(^{177}\) Lakeside, 455 F3d at 160.

\(^{178}\) 884 F Supp 1169, 1173 (N D Ill 1995).

\(^{179}\) See, for example, Villegas v Sandy Farms, Inc, 929 F Supp 1324, 1328 (D Or 1996) (holding that cabins for migrant farm worker qualified as “dwellings” since, like homeless shelters, the cabins were their only homes).

\(^{180}\) 114 F Supp 2d 1158, 1160–62 (D NM 2000).

\(^{181}\) Id at 1161 (stating that the prison’s purpose was as a penal facility as opposed to a residence).
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ling."\(^{182}\) *Red Bull Associates v Best Western* is typical of such cases. In *Red Bull*, the plaintiff motel alleged that a large motel association had revoked its membership because of animus towards the minority homeless housed by the motel.\(^{183}\) The court assumed without comment that the FHA was applicable to a motel that had a contract to house the homeless.\(^{184}\)

One district court explicitly held that the FHA applies to shelters.\(^{185}\) In *Woods*, the plaintiff occupants of a homeless shelter alleged sex discrimination because of severe sexual harassment by the supervisors of the homeless shelter.\(^{186}\) In its analysis of the "dwelling" question, the court cited with approval the *Hughes Memorial* standard for determining whether a structure is a "dwelling."\(^{187}\) Emphasizing whether the occupants view the location as a place to which they will return, the court reasoned that "[b]ecause the people who live in the Shelter have nowhere else to ‘return to,’ the Shelter is their residence in the sense that they live there and not in any other place."\(^{188}\)

One district court has explicitly questioned whether the FHA applies to homeless shelters. In *Johnson v Dixon*, occupants of two homeless shelters sought an injunction against the closing of the homeless shelters, alleging that their closure would be unlawful discrimination based on the handicapped status of the majority of the occupants.\(^{189}\) On the "dwelling" issue, the court suggested that the FHA only protected "buyers" and "renters" from unlawful discrimination and stated that it was doubtful that emergency overnight shelters would qualify as a "dwelling."\(^{190}\) However, the court ruled against the homeless plaintiffs on other grounds, avoiding a direct ruling on the "dwelling" issue.\(^{191}\)

The Ninth Circuit has twice applied the FHA to homeless shelters. Once, much like *Red Bull*, the court did so without discussion because the parties did not contend that it did not ap-

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\(^{182}\) See, for example, *Red Bull Associates v Best Western Int'l, Inc*, 686 F Supp 447, 451 (S D NY 1988); *Project BASIC v. City of Providence*, 1990 WL 429846 at *4–*5 (D RI).

\(^{183}\) *Red Bull*, 686 F Supp at 450.

\(^{184}\) Id at 451.

\(^{185}\) *Woods*, 884 F Supp at 1173.

\(^{186}\) Id at 1170–72.

\(^{187}\) Id at 1173.

\(^{188}\) Id at 1173–74.

\(^{189}\) 786 F Supp 1, 4 (D DC 1991).

\(^{190}\) Id (noting that the conclusion would be the same even if the shelter seemed like a home to the occupants).

\(^{191}\) Id at 4–5.
ply,\textsuperscript{192} and recently in \textit{Community House} the court applied the \textit{FHA} to a homeless shelter without ruling on the "dwelling" issue by noting that the homeless shelter also received rent for some low-income units it managed, which meant it easily fell under the \textit{FHA}.\textsuperscript{193} In a footnote in \textit{Community House}, the court drew attention to the ambiguity about the definition of "dwelling," noting that it had never squarely addressed the issue.\textsuperscript{194} This footnote along with the controversial holding of \textit{Community House}—that a men-only policy for a homeless shelter may be in violation of the \textit{FHA}—has raised the profile of this long-standing issue and highlighted the need for resolution.\textsuperscript{195}

4. Level of scrutiny for exceptions to the \textit{FHA}.

Even if a shelter is found to be within the scope of the \textit{FHA} and the policy is found to be facially discriminatory, the policy still may not violate the \textit{FHA}. Courts have recognized exceptions to the \textit{FHA} that allow for members of protected classes to be treated differently, requiring another step of analysis to determine if they are justified.\textsuperscript{196} For example, if a discriminatory policy furthered an interest the courts recognize as legitimate, courts may find the discrimination permissible. Courts are currently in disagreement over what level of scrutiny should be used to determine whether the facially discriminatory policy is permitted.\textsuperscript{197}

Courts have taken two approaches with the Eighth Circuit taking a different approach than all other circuits. The Eighth Circuit imported the equal protection tiers of scrutiny analysis discussed above. If a public policy is shown to discriminate, the government has the burden to demonstrate that its conduct was necessary to promote a governmental interest commensurate with the level of scrutiny afforded the class of people affected.

\textsuperscript{192} Turning Point, \textit{Inc v City of Caldwell}, 74 F3d 941, 942 (9th Cir 1996).

\textsuperscript{193} Community House, 490 F3d at 1048 n 2.

\textsuperscript{194} Id.


\textsuperscript{196} See, for example, Community House, 490 F3d at 1050 (discussing the approaches adopted by the Sixth, Eighth, and Tenth Circuits to determine whether different treatment of protected groups is justified).

\textsuperscript{197} Compare Oxford House-C \textit{v City of St. Louis}, 77 F3d 249, 252 (8th Cir 1996) (using an equal protection framework), with Bangerter \textit{v Orem City Corp}, 46 F3d 1491, 1504 (10th Cir 1995) (using framework similar to Title VII framework).
under the Equal Protection Clause. As noted above, under standard equal protection jurisprudence, familial discrimination has been subject only to the rational basis test. Under this level of scrutiny, the court asks if the discriminatory rule is rationally related to a legitimate government purpose. If so, the discrimination is permitted. If not, the discrimination is not permitted. The Eighth Circuit has not addressed a claim of sex discrimination using this framework for the FHA, but if they follow the Supreme Court's treatment of sex discrimination under equal protection, they will likely require the state to demonstrate that a requirement substantially serves an important governmental interest, a slightly higher threshold than rational basis. It is unclear what level of scrutiny the Eighth Circuit would use with a purely private defendant, but given the pervasive subsidization of shelters, such a defendant would be rare.

The Sixth, Ninth, and Tenth Circuits have turned to Title VII employment discrimination cases for guidance on exceptions to the FHA's prohibition on facial discrimination. The leading case on this point in Title VII litigation is International Union v Johnson Controls, Inc. In Johnson Controls, the Supreme Court held that the appropriate test for whether a facially discriminatory policy was permissible was whether the policy was justified by Title VII's bona fide occupational qualification exception. This exception allows discrimination on the basis of religion, sex, or national origin "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

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198 Familystyle of St. Paul v City of St. Paul, 923 F2d 91, 94 (8th Cir 1991) (discussing the shifting burdens of proof in discriminatory policy cases); Oxford House, 77 F3d at 252.
199 Bynes v Toll, 512 F2d 252, 255 (2d Cir 1975) (holding that a university's policy of excluding children from married housing was neither arbitrary nor irrational).
200 See, for example, Oxford House, 77 F3d at 252 (8th Cir 1996) (holding that St. Louis did not violate the FHA despite a facially discriminatory zoning law because they had a rational basis for enacting the rule).
201 Mississippi University for Women v Hogan, 458 US 718, 724–26 (1982) (finding gender a semi-suspect classification and requiring the government to provide an important, but not necessarily compelling, interest to satisfy the fourteenth amendment).
202 Larkin v Michigan Department of Social Services, 89 F3d 285, 290 (6th Cir 1996) (rejecting the Eighth Circuit approach); Community House, 490 F3d at 1050 (adopting the Sixth and Tenth Circuits' approach); Bangerter, 46 F3d at 1503–04 (rejecting the Eighth Circuit approach and adopting a framework similar to that used for Title VII cases).
204 Id at 200.
205 Id (quoting 42 USC § 2000e-2).
proach makes allowances for discriminatory policies only where reasonably necessary, balancing the needs of companies against the harms of discrimination.

In this spirit, the Sixth, Ninth, and Tenth Circuits require individualized determinations of the impacts of the discriminatory practices to assess whether they should be excepted from the FHA. For example, in *Bangerter v Orem City Corp*, the Tenth Circuit held that to rebut a finding of facial discrimination, the defendant must show either (1) that the ordinance is benign or (2) that it responds to legitimate safety concerns based on the particular individuals involved, not stereotypes.\(^{206}\) Under the benign exception, courts have repeatedly held that a benign motive is not sufficient. The effects of the policy must be benign regardless of intent.\(^{207}\) This requires an individualized assessment of the costs and benefits of the policy to the person claiming discrimination as well as the potential threat the party claiming discrimination poses.

Which standard is chosen will ultimately have a large impact on the outcomes of shelter cases. The resolution of this circuit split may influence whether or not shelters are found to be "dwellings" as courts take into account policy outcomes as they resolve the ambiguity. If the Eight Circuit standard is followed, it is likely that many of the restrictive admissions policies—including some of the more worrisome ones such as the ban on large families—will be found to be rationally related to a legitimate government purpose and therefore permitted. Generalized interests in safety, stability, and tranquility have proven sufficient to satisfy rational basis review.\(^{208}\) As noted above, justifications along these lines can be easily asserted for restrictive admissions policies.

If the Sixth, Ninth, and Tenth Circuit standard is followed, it will be much more difficult for such interests to justify an exception to the FHA for shelters. This is clearly illustrated by *Community House*. Under the "benign" exception, the inquiry focuses on the needs of the particular persons burdened by the discrimination, not the community.\(^{209}\) The court has to balance the costs against the benefits of the discrimination for the indi-

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\(^{206}\) 46 F3d 1491, 1503–04 (10th Cir 1995).

\(^{207}\) See, for example, *Larkin*, 89 F3d at 290 (stating that a benign motive does not prevent a law from being facially discriminatory).

\(^{208}\) See *Village of Belle Terre v Boraas*, 416 US 1, 8–9 (1974).

\(^{209}\) *Larkin*, 89 F3d at 290.
viduals facing discriminatory treatment. In *Community House*, the City asserted that the men-only policy would benefit the women and families displaced because it would allow them to build an additional shelter for women and families at a later date.\footnote{Community House, 490 F3d at 1052.} The court did not accept this argument, finding that the City's plans to build a future shelter were not binding and that the City failed to prove that the new shelter would be as desirable as the existing, men-only shelter.\footnote{Id.} As applied by the Ninth Circuit, the benign exception calls for rigorous documentation of the costs and benefits of the policy.

Under the safety exception, the safety concern cannot be based on stereotypes.\footnote{Id at 1050.} In *Community House*, the Ninth Circuit found that the City did not sufficiently support its contention that a men-only policy was necessary to protect the safety of women and families.\footnote{Id at 1051.} The only evidence given on this matter was the opinion of the Executive Director that mixing genders created an unstable shelter environment.\footnote{Community House, 490 F3d at 1051.} While the court left the issue open on remand, without some documentation of this danger the court was unwilling to accept that a men-only policy was justified by concerns for the safety of women and families.\footnote{Id.}

There are strong arguments in favor of this higher level of scrutiny, and the judicial trend is to require it. Courts have preferred this standard because of the strength of the parallels to Title VII litigation and the weakness of the parallels to equal protection. Some classes of persons specifically protected by the FHA are given extremely little protection for constitutional purposes.\footnote{See, for example, *City of Cleburne v Cleburne Living Center*, 473 US 432, 446 (1985) (holding that the handicapped are not a suspect class).} By finding the classes of persons specifically protected by the FHA to not be protected, these decisions in the equal protection case law run counter to the purpose of the FHA and its amendments: to protect the classes enumerated from discrimination.\footnote{Bangert, 46 F3d at 1503.} *Community House* was recently decided on this basis, part of a trend everywhere outside of the Eighth Circuit.\footnote{Community House, 490 F3d at 1050.}
district courts have followed this trend. In considering the impact of differing protection regimes for homeless shelters, it is useful to consider this trend towards higher scrutiny for facially discriminatory policies.

IV. FINDING THE APPROPRIATE LEVEL OF PROTECTION

Given this patchwork of protections, it is clear that some level of protection is afforded to occupants of homeless shelters from discrimination based on race, color, religion, national origin, and disability at the very least. Any shelter not found to fall within the FHA is likely covered by Title II as a public accommodation; by the Equal Protection Clause, the Establishment Clause, Title VI, the ADA, and Executive Order 11,063 because of state funding; or by state and local fair housing requirements.

In deciding whether the FHA covers homeless shelters, courts are deciding what sorts of discrimination to permit in homeless shelters and what form of redress they are prepared to afford those bringing suits. If a shelter is found to be covered by the FHA, discrimination on the basis of all protected classes would be actionable with fairly strong remedies. If the shelter is found to be covered only by other fair housing law, sex and familial discrimination is far less likely to be actionable, and often the remedy offered would be both procedurally and substantively weaker.

This Part sets forth the rough outlines of two approaches courts could take to addressing discrimination in homeless shelters: individualized and categorical. It goes on to explore the likely coverage of each approach and discuss the merits of each approach. Under the individualized approach, courts would individualize their assessments of each shelter, deciding which level of protections to provide based on factors specific to each shelter. Under the categorical approach, courts would treat homeless shelters as a category of structure and give all the same level of protection, regardless of individual factors.

219 See, for example, Community Housing Trust v Department of Consumer and Regulatory Affairs, 257 F Supp 2d 208, 228–29 (D DC 2003); United States v City of Chicago Heights, 161 F Supp 2d 819, 843 (N D Ill 2001); Children's Alliance v City of Bellevue, 950 F Supp 1491, 1497–98 (W D Wash 1997); Alliance for the Mentally Ill v City of Naperville, 923 F Supp 1057, 1074–75 (N D Ill 1996).

220 This is likely because: 1) the low levels of scrutiny provided by the Equal Protection formula for sex and familial discrimination; 2) the absence of additional remedies in Executive Order 11,063; and 3) the widely varying levels of protection provided by state and local fair housing law.
A. Basing Protections on Individual Factors

As noted above, the question of whether a structure qualifies as a "dwelling" under the FHA has long turned on a number of factors deemed important given the Hughes Memorial definition of "residence." This section will look at the possibilities of determining the level of protections afforded a homeless shelter based on the length of stay, whether the occupants treat it like a home, and the structure's intended purpose. These factors do not represent mutually exclusive tests, and it is likely courts will consider all factors in answering the question.

1. Protections contingent on length of stay.

In the shelter context, basing the determination on the intended length of stay has some appeal. Shelters already are often categorized as either emergency or transitional.\(^{221}\) Emergency shelters typically provide housing for only short periods of time, while transitional shelters provide longer-term housing while occupants transition to the housing market.\(^{222}\) Since any shelter not covered by the FHA would likely be covered as a public accommodation under Title II, basing the level of protection on the type of shelter would create a system with stratified protections. Occupants of more home-like, transitional shelters would receive protection from sex and familial discrimination under the FHA. Occupants of emergency shelters, often no more than large rooms with cots, would receive a lower level of protection from sex and familial discrimination but still have constitutional and statutory protections against other forms of discrimination.

This solution is likely to be attractive to some who have been critical of some FHA cases dealing with homeless shelters. The main argument against affording homeless individuals protections against sex and familial discrimination is the cost it would impose on shelters.\(^{223}\) The nightmare scenario is a rise in homeless individuals living on the streets as shelters have to make costly upgrades in security, staffing, and even infrastructure to handle mixed populations, reducing the resources available for feeding and sheltering the population. This stratified system

\(^{221}\) Weinreb and Rosai, 69 Soc Serv Rev at 91–93 (cited in note 5) (documenting the different types of homeless shelters).

\(^{222}\) Id.

would allow facilities that operate emergency shelters segregated based on sex and familial status to continue to do so, keeping those in true emergency situations off the street cheaply and affording them a remedy—however weak—to prevent certain forms of discrimination. Meanwhile, it would still address some of the most damaging forms of familial discrimination, including the exclusion of fathers and teenage sons from transitional family shelters.

Courts are likely to determine whether a shelter warrants FHA protections based on length of stay based on the length of stay of any occupant. As noted above, the FHA refers to any "building, structure, or portion thereof." It is likely that courts would, as the Third Circuit did in Lakeside, look at the longest stays in even a small portion of the facility in determining whether it qualifies for FHA protections.

Such judicial action may inspire shelters to institute firm time limits for all occupants. Already, some shelters have policies that require occupants to leave for a period of time every day, and it is not unreasonable to think that some shelters may adopt such policies to avoid more rigorous discrimination laws. It should be noted that in the small sample of cases to address the question of whether homeless shelters are dwellings, only Johnson presented a shelter with such a policy and only Johnson ruled against the inclusion of homeless shelters under the FHA. This might suggest that the permitted length of stay is already influencing the outcomes of these cases.

As is the case with each of the factors discussed, in assessing the desirability of this option the greatest unknown is how shelters and policymakers will respond to the rule. The Department of Housing and Urban Development ("HUD") has placed a high priority on developing longer-term housing to deal with the nation's homeless, and over the last decade permanent and transitional housing capacity has dramatically increased while emergency housing capacity has declined. If shelters respond to the more rigorous discrimination regime applied to longer-term housing by converting to emergency shelters and requiring occupants to vacate their rooms daily, much of the work towards

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224 Lakeside, 455 F3d at 159, citing 42 USC § 3602(b).
225 Id at 58–59.
226 Johnson, 786 F Supp at 2 (noting that the shelters were only open from 7 pm to 7 am and accepted people on a first-come, first-served basis).
227 HUD, Annual Homeless Assessment Report to Congress at 38 (cited in note 37).
HUD's goal could be undone. Whether this would be a negative effect will depend on the response of policymakers. If policymakers respond to this situation by increasing the availability of low-income housing or altering fair housing law, it may be a net benefit to the homeless community. If policymakers fail to respond, it may mean that more homeless individuals will be left in temporary, emergency shelters with fewer services and little hope of transitioning to the housing market. It is difficult to predict how shelter operators and policymakers will respond, making it difficult to argue for any particular approach on a policy basis.

Interestingly, giving greater protections to longer-term facilities runs precisely counter to the prevailing pattern of discrimination seen in shelters today. Shorter-term, emergency shelters generally have less restrictive admissions policies with regard to family size or the presence of adolescents, while longer-term, transitional shelters tend to have more restrictive admissions policies. This is to be predicted by resource dependence theory. Transitional shelters provide more extensive services and have more reason to fear resource stretching from serving a heterogeneous client population.

2. Protections contingent on treating the structure like a home.

Should the courts emphasize whether the structure is treated like a home, the desirability of the outcome will likely be similarly dependent on the response of shelters and policymakers. Evidence of “treat[ing] a building like [a] home” includes whether occupants “cook their own meals, clean their own rooms and maintain the premises, do their own laundry, and spend free time together in common areas.” It is unlikely most emergency shelters would have these elements, and it is likely that transitional shelters would have some of them.

If shelters desired to have a more permissive discriminatory regime, they may respond by reducing the opportunities for their occupants to engage in activities that might be considered treating the shelter as a home. To the extent that treating a shelter as a home has positive influence on homeless individuals, this response could have negative effects unless properly addressed by policymakers.

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228 Weinreb and Rossi, 69 Soc Serv Rev at 96 (cited in note 5).
229 Schwarz v City of Treasure Island, 544 F3d 1201, 1215 (11th Cir 2008).
3. Protections contingent on a structure's intended purpose.

Should courts decide to emphasize the intended purpose of the structure, it is entirely unclear what outcome would be expected. Whether the FHA applied would depend on how courts characterized the purpose of each shelter. The shelter system in the United States has many purposes including rehabilitation and education along with providing varying levels of housing relief.

Drawing from the penal institution example, courts may focus on the primary purpose of the shelter. Should the intended purpose be characterized as emergency overnight shelter, then there would be a strong parallel to penal institutions. Just as the intended purpose of a penal institution is to punish, not to serve as a residence, the intended purpose of a shelter is as emergency overnight lodgings, not to serve as a residence. Then again, there is less difference in saying something is intended as emergency lodging, not a residence than in saying something is intended as punishment, not a residence. Courts may simply decide that shelters are intended as residences.

As noted above, there seems to be little risk of the intended-purpose factor expanding to exclude homeless shelters. However, it is worth noting that, unlike other cases to consider the "dwelling" question with regard to homeless shelters, the analysis in Johnson gives priority to the perspective of the housing provider, not the occupant being housed. The Johnson court found it "doubtful if 'emergency overnight shelter,' as the District conceives itself to be providing . . . can be characterized as a 'dwelling' within the meaning of the Act, even if it may seem like home to [the homeless plaintiffs]." Johnson again demonstrates how the emergency-transitional distinction can be created using factors courts have recognized in determining whether a structure qualifies as a "dwelling." It may be that the outcome of the adoption of this factor would be the same as emphasizing length of stay or whether the structure was treated like a home. We may end up with a stratified system of protections that allowed FHA actions against more home-like, transitional shelters and only other actions against emergency shelters.

230 Garcia, 114 F Supp 2d at 1161.
231 786 F Supp at 4 (emphasis added).
B. Basing Protections on Category of Housing

An approach that may require courts to spend less time considering various factors and shelters to expend less effort enacting policies to avoid regulation would be to treat homeless shelters as a single category of housing either deserving or undeserving of FHA protection.

1. Non-FHA protections only.

The case for giving all homeless shelters only non-FHA protections is weak. There is minimal legal grounding for such a decision, and the policy implications are uncertain.

Holding that all homeless shelters are undeserving of protection under the FHA runs contrary to the overwhelming weight of precedent. In all but one case, courts have treated homeless shelters as “dwellings.” The main difficulty arises in cases involving longer-term transitional shelters. In these cases, the shelters typically have very similar characteristics to many other structures that have been found to be “dwellings.” Drug- and alcohol-treatment centers, group homes, and halfway houses have all been found to be “dwellings,” despite relatively short stays and communal living situations.

Furthermore, giving only non-FHA protections to homeless shelters disagrees with regulations defining residences with respect to disability discrimination, which specifically acknowledge

\[232\] Compare Community House, 490 F3d at 1048 n 2 (finding with “little trouble” shelter was a “dwelling” because it provided more than just over-night housing and it charged rent to people staying up to one year); Turning Point, Inc v City of Caldwell, 74 F3d 941, 942 (9th Cir 1996) (assuming without discussion that a shelter was a “dwelling” under the FHA); Red Bull, 686 F Supp 451 (assuming without comment that the FHA was applicable to a motel that had a contract to house the homeless); Project BASIC v. City of Providence, 1990 WL 429846 (D RI) (assuming without comment that homeless shelters are covered under the FHA); Woods, 884 F Supp at 1173 (concluding that a church-run homeless shelter is a “dwelling” under the FHA); with Johnson, 786 F Supp at 4 (doubting without determining that homeless shelters would be considered “dwellings” under the FHA).

\[233\] Lakeside, 455 F3d at 160 (holding that a drug and alcohol treatment facility is considered a “dwelling” under the FHA).

\[234\] Connecticut Hospital v City of New London, 129 F Supp 2d 123, 134–35 (D Conn 2001) (determining that the group home is a “dwelling” under the FHA after considering several factors including intent to return to the residence, the length of time the person expects to stay at that location, absence of an alternative place of residence, the nature of the occupancy, and the relationship between the resident and the property owner).

\[235\] Schwarz v City of Treasure Island, 544 F3d 1201, 1215–16 (11th Cir 2008) (comparing halfway houses to other structures that have been previously held to be “dwellings” under the FHA).
that there can be residential units within shelters.\textsuperscript{236} While these regulations mean little, at the very least, they specify that there must be some situation in which the FHA would apply to a homeless shelters, making a categorical exclusion untenable. Courts have long given judicial deference to the Office of Housing and Urban Development in its interpretations.\textsuperscript{237}

Using existing factors courts have used in determining whether a structure is a "dwelling," the only clear path to finding a lack of FHA coverage is through the intended-purpose element. If courts were to characterize the intended purpose of all homeless shelters as emergency lodgings as opposed to residences, they may hold that all homeless shelters fall outside of the FHA. If the cost of providing protections against discrimination in homeless shelters is sufficiently high, there may be a policy argument for this result, however, there is little evidence to support this conclusion at this time.

2. FHA protections only.

There is a much stronger case to be made for giving all homeless shelters FHA protection. While far from inarguable, precedent developed from the leading definition of "residence" likely favors including homeless shelters as dwellings. Courts have long defined "residence" in this context as "a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit."\textsuperscript{238} Courts distinguish between "transients" (those who certainly intend to move on to other residences, such as motel guests) and "inhabitants" (those who reside in a particular place) in determining whether the structure qualified as a "residence."\textsuperscript{239}

The reasoning of Woods within this framework is persuasive. Even if shelters are designed for short-term housing emergencies, stays are often lengthy. The plaintiffs in Johnson returned to the same shelter night after night, even though they were

\textsuperscript{236} 24 CFR § 100.201 (2008).
\textsuperscript{237} See, for example, Trafficante v Metropolitan Life Ins Co, 409 US 205, 210–11 (1972).
\textsuperscript{238} Hughes Memorial, 396 F Supp at 549 (citing Webster's Third New International Dictionary).
\textsuperscript{239} Compare Baxter v City of Belleville, 720 F Supp 720, 731 (S D Ill 1989) (holding that residents of an AIDS group home were protected by the FHA); with Patel v Holley House Motels, 483 F Supp 374, 381 (S D Ala 1979) (holding that a motel was not a dwelling under the FHA).
turned out every morning and never guaranteed a room.\textsuperscript{240} Nationally, the average length of stay in a shelter for a household with children is almost six months, while some cities reported an average length of stay of up to eighteen months.\textsuperscript{241} Though the homeless may hope to go elsewhere like motel guests, "the homeless are not visitors or those on a temporary sojourn in the sense of motel guests. . . . [T]hey have nowhere else to go."\textsuperscript{242} They often intend to return and, as much as is possible for someone in their circumstances, treat the shelters as homes.

As Woods makes clear, the treatment of homeless shelters as "dwellings" is not a departure from the Hughes Memorial standard. It is an acceptance of the fact that if a person has no other structure to call home, then they necessarily treat what shelter they do have as a residence. To make the FHA applicable to all homeless shelters only requires the recognition of the lack of an alternative residence as a dispositive—or perhaps just heavily weighted—factor in the "dwelling" analysis.\textsuperscript{243}

The purpose of the FHA likely also argues in favor of blanket inclusion. The FHA was intended to be an expansive piece of legislation, interpreted broadly to eradicate discrimination in all forms of housing. Courts have long noted that the FHA "should be given a generous construction to effectuate its broad and inclusive language."\textsuperscript{244} In this spirit, summer homes,\textsuperscript{245} halfway houses,\textsuperscript{246} and a group home for AIDS patients\textsuperscript{247} have all been found to be "dwellings." A strong argument can be made that this expansive purpose of the FHA suggests a reading that includes homeless shelters regardless of how long occupants stay or how they treat the shelter. "If the purpose of the FHA is to prevent discrimination in the housing market so that shelter may be

\textsuperscript{240} Johnson, 786 F Supp at 2.
\textsuperscript{241} US Conference of Mayors, Status Report on Hunger and Homelessness at 16 (cited in note 13).
\textsuperscript{242} Woods, 884 F Supp at 1173.
\textsuperscript{243} See, for example, Villegas v Sandy Farms, Inc, 929 F Supp 1324, 1328 (D Or 1996) (holding that cabins for migrant farm worker qualified as "dwellings" since, like homeless shelters, the cabins were their only homes). It should be noted, however, that treating this factor as dispositive might conceivably risk the expansion of FHA protections to cover other classes of structure the homeless may use, such as park benches.
\textsuperscript{244} Woods, 884 F Supp at 1173, citing Metropolitan Housing Development Corp v Village of Arlington Heights, 616 F2d 1006, 1011 (7th Cir 1980).
\textsuperscript{245} United States v Columbus Country Club, 915 F2d 877, 881 (3d Cir 1990).
\textsuperscript{246} Schwarz v City of Treasure Island, 544 F3d 1201,1215 (11th Cir 2008).
\textsuperscript{247} Baxter, 720 F Supp at 731.
found ... then this purpose would be served by applying the FHA to homeless shelters regardless of the length of stay.\textsuperscript{248}

Perhaps arguing against the inclusion of all homeless shelters under the FHA is the desire to not be duplicative of Title II. Courts have cited a desire to keep the statutes from being redundant in decisions finding structures to not fall within the FHA.\textsuperscript{249} The Eleventh Circuit recently highlighted the public accommodation-dwelling dichotomy noting, "[A]s the administrative definition of ‘dwelling unit’ suggests, the house, apartment, condominium, or coop that you live in is a ‘residence,’ but the hotel you stay in while vacationing at Disney World is not."\textsuperscript{250} As noted above, courts have assumed that Title II prohibits discrimination in homeless shelters,\textsuperscript{251} and definitionally, the arguments for considering homeless shelters to be public accommodations are likely stronger than those for considering them to be dwellings. The stratified solution would preserve the distinction between public accommodations and dwellings and prevent redundancy.

Also affecting the decision whether to include homeless shelters in the FHA is the standard by which the facially discriminatory policies would be judged. As noted above, the Eighth Circuit only requires a level of scrutiny mirroring equal protection analysis,\textsuperscript{252} while all other circuits to confront the question have allowed only two types of exceptions in the spirit of Johnson Controls.\textsuperscript{253} The justifications available to shelters for continuing the policies will set the boundaries for acceptable discrimination. In assessing the policy impacts of this decision, it will be important to know what level of scrutiny courts will apply.

If the Eighth Circuit standard is followed, then it is likely that many of the discriminatory policies that exist today will continue to exist, as it is a simple task to assert a rational basis for these policies. If the more searching approach is followed, it is much more likely that these policies will require documented proof for them to be justified as was the case in Community

\textsuperscript{248} Joseph W. Singer, \textit{Introduction to Property} at 585 (Aspen Law and Business 2001) (presenting this as a possible argument for including homeless shelters under the FHA).

\textsuperscript{249} Patel, 483 F Supp at 381 (holding that a motel is a public accommodation not a dwelling under the FHA).

\textsuperscript{250} Schwarz, 544 F3d at 1214.

\textsuperscript{251} O'Neal, 2006 US Dist LEXIS 35750 at *20--*21.

\textsuperscript{252} Familystyle of St. Paul v City of St. Paul, 923 F2d 91, 94 (8th Cir 1991); Oxford House-C v City of St. Louis, 77 F3d 249, 252 (8th Cir 1996).

\textsuperscript{253} Larkin v Michigan Department of Social Services, 89 F3d 285, 290 (6th Cir 1996); Community House, 490 F3d at 1050; Bangerter, 46 F3d at 1503--04.
House. Should the Eighth Circuit approach prevail, shelters that continued to discriminate would need to expend some time developing rational bases, and slightly more in the case of sex discrimination, for their policies. Whether this increased reflection would be sufficient to develop an appropriate level of protections is an empirical question in need of further study. If the more searching approach prevails, such shelters would need to document the benefits of their policies to justify them. As before, whether this would bring the level of discrimination to an optimal level remains unknown. Until we know which approach will be followed, the effects of including homeless shelters in the FHA are difficult to assess.

One promising sign that suggests this problem may be responsive to judicially mandated change is that there is already evidence of a reaction to Community House. In response to the Ninth Circuit’s decision, the King County Office of Civil Rights in Washington State released a Fair Housing Update for homeless shelters advising them that “fair housing laws prohibit sex/gender discrimination.” This promises that whichever rule is chosen, some homeless service providers are likely to notice.

Perhaps the strongest argument in favor of including all homeless shelters within the FHA is that without it, no justification for this open discrimination will ever be judicially required from these institutions. If occupants of homeless shelters are protected by the FHA, then they will be allowed to challenge facially discriminatory policies, and courts will be able to strike down those that are unjustifiable. Without a generous interpretation of the FHA, the means of redress may be severely limited, and shelters with sex- and family-based discriminatory policies may never be called upon to justify their policies, which have been linked to the dissolution of low-income families, the weakening of social support for a population with precious little social support to begin with, the altering of the composition of the low-income population, and, of course, the humiliation felt by the victims of discrimination.

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254 Community House, 490 F3d at 1052.
V. CONCLUSION

Facially discriminatory admissions policies in homeless shelters are widespread and tolerated. The impacts of such policies are not well studied, but a survey of the legal and social science literature suggests they have the potential to be far reaching. Individuals may regularly be denied shelter. The composition of the low-income population may be permanently altered. Families may be separated to receive shelter. Opportunities for social support may be cut off. Individuals may suffer humiliation when denied shelter based on their sex or familial status.

Historically, there has been very little litigation asserting fair housing rights on behalf of homeless individuals. Difficulties with procedural barriers and limited potential for relief have limited the usefulness of non-FHA prohibitions on discrimination for this population. However, despite textual ambiguity, there are strong arguments in favor of giving FHA protections to at least a portion of those housed in homeless shelters and perhaps all. This Comment primarily discussed the strengths and weaknesses of two legal regimes that may be developed in this area: (1) a stratified regime in which longer-term transitional shelters receive FHA protections and shorter-term emergency shelters receive on non-FHA protections and (2) a categorical regime in which all homeless shelters received FHA protections.

Ultimately which legal regime is preferable depends on how shelters and policymakers react to the regime. If shelters react to length-of-stay-dependent rulings by switching from transitional to emergency shelters, then the goal of HUD to promote transitional housing may be set back. If shelters react to a decision that all homeless shelters fall under the FHA by draining their resources in attempting to comply by creating all mixed-use shelters, they may not be able to serve as many individuals and may ultimately hurt the homeless population. There is also the possibility that some shelters will close in response to such rulings. The effect such shelter actions would have would depend on the response of policymakers. Such actions may induce local governments to do more to provide longer term affordable housing solutions, or they may provoke a less positive response. Until we know the answers to these empirical questions it is difficult to know which regime would better benefit the homeless population.

This Comment sought to begin to explore the collateral consequences of shelter admission policies and discuss interpretive frameworks for allowing that exploration to take place in a judi-
cial forum. Without such an interpretation, no justification for this discrimination may ever be judicially required.