

NO ONE SHOULD BE FORCED TO SLEEP OUTSIDE: ENDING DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES IN TEMPORARY SHELTERS

Emma R. Alzner*

Nationwide, the number of individuals that lack access to housing is increasing. At the same time, local governments have escalated efforts to criminalize the unsheltered. Given this context, access to temporary shelters has become a critical component of addressing issues surrounding homelessness. However, not all groups have equal access to temporary shelters. Disabled people face significant barriers to accessing shelter systems, frequently forcing them to sleep outdoors. This Note seeks to highlight the discrimination faced by people with disabilities in temporary shelters, explain why our current legal regime has failed to protect against the types of discriminatory behaviors shelters frequently engage in, and explore potential solutions to this problem. Specifically, this Note proposes utilizing the Affirmatively Furthering Fair Housing mandate to stop discrimination by shelters. Establishing access to temporary shelters is neither a solution to homelessness nor a solution to housing discrimination against disabled people in general. Still, ensuring that all individuals can reside in shelters if they so choose is a critical intermediary step, particularly in light of the increasingly inhumane consequences that individuals may face by remaining unsheltered, including criminalization, health risks, and in some places, forcible commitment.

* J.D. Candidate 2024, Columbia Law School. Thank you to Professor Olatunde Johnson, who supervised the drafting of this Note and whose research proved incredibly helpful in writing it, and to Devyn Helsing for her thoughtful editing.

TABLE OF CONTENTS

INTRODUCTION	276
PART I: DISCRIMINATION FACED BY PEOPLE WITH DISABILITIES IN THE SHELTER SYSTEM.....	281
A) Lack of Access to Shelter for People with Disabilities	282
B) Discrimination Against Disabled People in the Shelter System	284
PART II: LEGAL PROTECTIONS AGAINST DISCRIMINATION BY SHELTERS ON THE BASIS OF DISABILITY STATUS	288
A) The Equal Protection Clause	288
B) The Fair Housing Act	290
C) The Americans with Disabilities Act.....	293
PART III: WHY DISCRIMINATION HAS CONTINUED DESPITE LEGAL PROTECTIONS	296
A) Shortcomings of the ADA and FHA Don't Explain Continued Discrimination.....	297
B) Shelter Discrimination Has Continued Due to an Underenforcement Problem	301
C) Doctrine-Related Explanations Fail to Explain Continued Discrimination by Shelters.....	305
PART IV: THE AFFIRMATIVELY FURTHERING FAIR HOUSING MANDATE AS A COUNTER TO DISCRIMINATION BY SHELTERS	308
A) What is the AFFH Mandate?	309
B) How the AFFH Could be Used to End Discrimination by Shelters	313
1) The AFFH's Applicability to Shelters.....	313
C) Potential Challenges to Using the AFFH to Stop Discrimination by Shelters.....	320
1) The potential for AFFH underenforcement.....	320
2) The risk that shelters will shut down or limit their operations	324
CONCLUSION.....	326
APPENDIX I	328

INTRODUCTION

In 2018, the housing crisis in the quiet, Midwestern town of Kalamazoo, Michigan came to a breaking point. Protestors gathered to decry the city's lack of resources for people experiencing houselessness, including the poor conditions in its shelter system and a shortage of affordable housing.¹ Protestors, led by people experiencing houselessness, occupied Bronson Park through a tent encampment they named the "Bronson Park Freedom Encampment."² In a city with an unhoused³ population of over 2,000,⁴ and resources to provide temporary shelter for only about a fourth of this group, many felt the local government's failure to address housing conditions was akin to punishing those who quite literally had nowhere else to go.⁵ These concerns were exacerbated by the City Commission's announcement that it planned to propose changes to a city ordinance that would expand the definition of public camping and impose fines on unhoused

1. Bryce Huffman & J.D. Duval, *Here's What You Need to Know About Why the Homeless are Protesting in Kalamazoo*, NPR (Sept. 18, 2018), <https://www.michiganradio.org/news/2018-09-18/heres-what-you-need-to-know-about-why-the-homeless-are-protesting-in-kalamazoo> [https://perma.cc/2DLU-99WC]. For a background on the housing crisis in Kalamazoo more generally, see THE HOMEFRONT, CONFRONTING KALAMAZOO'S HOMELESSNESS CRISIS 19 (Nov. 2019), https://nowkalamazoo.org/wp-content/uploads/2023/06/the-homefront_fall-2019.pdf [https://perma.cc/4N7T-E6J2].

2. THE HOMEFRONT, *supra* note 1, at 19.

3. This Note uses the terms "unhoused," "houseless," and "people experiencing houselessness" instead of the terms "homeless" or "homeless person." Housing advocates have highlighted how the term "houseless" is more accurate and humanizing than the word "homeless," as many individuals who lack access to housing still have places they consider to be home. See The L.A. Community Alliance, *Why "Houseless" Instead of "Homeless?"* (Apr. 8, 2021), <https://www.lacommunityalliance.org/life-skills-blog/houseless> [https://perma.cc/2PYT-K88N] (elaborating on the linguistic decision to use "houseless" instead of "homeless").

4. KALAMAZOO CTY. CONTINUUM OF CARE, 2021 ANNUAL REPORT KALAMAZOO 3 (Jan. 27, 2021), <https://www.housingresourcesinc.org/wp-content/uploads/2022/04/Continuum-of-Care-Annual-Report-2021-Final.pdf> [https://perma.cc/7H3W-DZV6] (population estimates as of 2020).

5. Ryan Boldrey, *Why Kalamazoo Gospel Ministries Shelter isn't a Fit for All Who are Unhoused*, MLIVE (Oct. 6, 2021), <https://www.mlive.com/news/kalamazoo/2021/10/why-kalamazoo-gospel-ministries-shelter-isnt-a-fit-for-all-who-are-unhoused.html> [https://perma.cc/LQT2-DKBQ] (noting that the Kalamazoo Gospel Mission, the town's only overnight emergency shelter, has only 360 beds available on a nightly basis).

people who took refuge in Bronson Park.⁶ Within days, the protest was forcibly dispersed, leading to over a dozen arrests.⁷

In the years since, the housing crisis in Kalamazoo has not subsided. Thousands still lack access to housing, and resources have not expanded to meet the needs of the unhoused population.⁸ Vast disparities also exist amongst those who lack access to shelter: as of 2018, 54 percent of unhoused single adults in Kalamazoo have one or more disabilities.⁹ Even more, the city's sole overnight shelter, the Gospel Mission, which lacks capacity to serve the city's entire population of people experiencing houselessness,¹⁰ has a reputation for turning away¹¹ disabled people.¹² Protestors at the Bronson Park Freedom Encampment Movement included unhoused people with disabilities. One leader, Miranda Drake, has since spoken about how

6. The ordinance would have also changed certain punishments for public camping from misdemeanors to fines. However, the ordinance ultimately failed to pass. Malachi Barrett, *Homeless Still Face Misdemeanors for Occupying Kalamazoo Parks*, MLIVE (Aug. 21, 2018),

https://www.mlive.com/news/kalamazoo/2018/08/homeless_kalamazoo_revise_park.html [<https://perma.cc/GU7C-GTYJ>]; Bronson Park Freedom Encampment, FACEBOOK (Sept. 10, 2018), <https://www.facebook.com/freedomencampment/> [<https://perma.cc/GU7C-GTYJ>] (demonstrating the sentiments of the unhoused leaders of the protest).

7. *Police Arrest More Than a Dozen While Clearing Kalamazoo Homeless Camp*, THE DETROIT NEWS (Sept. 19, 2018), <https://www.detroitnews.com/story/news/local/michigan/2018/09/19/homeless-camp-kalamazoo-arrests-made/37862487/> [<https://perma.cc/W27Q-BM8W>].

8. For insight as to current housing conditions in Kalamazoo, see THE HOMEFRONT, *supra* note 1, at 2; KALAMAZOO CTY. CONTINUUM OF CARE, *supra* note 4.

9. HOUSING RESOURCES, INC., 2018 ANNUAL HOMELESS COUNT REPORT 8 (2018), <https://housingresourcesinc.org/wp-content/uploads/2019/06/Kalamazoo-2018-Annual-Count-Report-002.pdf> [<https://perma.cc/2MLZ-VMDA>].

10. Boldrey, *supra* note 5.

11. THE HOMEFRONT, *supra* note 1, at 19.

12. Strong and diverse views exist within the disabled community as to whether using people-first or identity-first language is more appropriate for addressing individuals in the community. Some individuals feel that people-first language is more humanizing because it focuses on the individual rather than their disability, acknowledging that a person's disability does not define them. Others argue that identity-first language recognizes the centrality of disability to one's identity and combats stigma around having a disability. *Compare Should I Say 'Disabled' or 'Person with a Disability'?*, ENDEAVOR FOUNDATION, <https://www.endeavour.com.au/about-us/our-stories/blog-posts/should-i-say-disabled-or-person-with-disability> [<https://perma.cc/KYZ3-C54Y>] (discussing why some prefer people-first language), with Brittany Wong, *It's Perfectly OK to Call a Disabled Person 'Disabled,' and Here's Why*, THE HUFFINGTON POST (June 14, 2019), https://www.huffpost.com/entry/what-to-call-disabled-person_15d02c521e4b0304a120c7549 [<https://perma.cc/E4XK-3GSB>] (discussing why others prefer identity-first language). Keeping this context in mind this Note uses the terms "people with disabilities" and "disabled people" interchangeably.

discrimination based on disability has, for some in the area, posed a barrier to accessing shelter.¹³

The story of Kalamazoo is important because it is not an anomaly. Communities across the country are similarly being overwhelmed by housing crises and struggling to respond. Nationwide, the population of people experiencing homelessness is growing, as is the number of unhoused people who lack any access to shelter.¹⁴ Additionally, the criminalization of this population has continued to escalate, with more and more jurisdictions imposing penalties for life-sustaining actions, such as sleeping in a public park, essentially outlawing unhoused peoples' very existence.¹⁵ Some cities have begun enacting policies which work to remove unsheltered individuals from the streets.¹⁶ For example, in 2020 New York City Mayor Eric Adams authorized law enforcement and other officials to forcibly institutionalize any unsheltered person with a mental or physical disability, even when those individuals pose no threat to others.¹⁷

These developments are even more concerning considering the huge discrepancies amongst the populations who lack access to shelter.¹⁸

13. THE HOMEFRONT, *supra* note 1, at 18–20.

14. NAT'L. ALL. TO END HOMELESSNESS, STATE OF HOMELESSNESS: 2022 EDITION 5 (2022), https://endhomelessness.org/wp-content/uploads/2023/05/StateOfHomelessness_2022.pdf (last visited Oct. 10, 2023) [<https://perma.cc/NV7Q-VJG8>].

15. NAT'L. L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 9, 12–13 (2019) [hereinafter HOUSING NOT HANDCUFFS].

16. *Id.* at 57–60.

17. Gloria Oladipo, *New York Mayor Plans to Hospitalize Mentally Ill People Involuntarily*, THE GUARDIAN (Nov. 30, 2022), <https://www.theguardian.com/us-news/2022/nov/30/nyc-eric-adams-involuntarily-hospitalize-mentally-ill-people> [<https://perma.cc/HTL5-SB5E>]; see also Zachary B. Wolf, *A Hard Look at New York's Controversial New Approach to the Homeless*, CNN (Dec. 3, 2022), <https://www.cnn.com/2022/12/03/politics/nyc-hospitalize-mentally-ill-what-matters/index.html> [<https://perma.cc/WN32-FEWW>] (providing an overview of the backlash against Eric Adams' proposed new policy).

18. While this paper focuses on barriers to shelter for people with disabilities, it is important to note that this is not the only group which experiences housing discrimination and lacks access to shelter. See Joy H. Kim, *The Case Against Criminalizing Homelessness*, 95 N.Y.U. L. REV. 1150, 1176–84 (2020) (exploring examples of other groups which experience discrimination by shelters). For example, people of color, particularly Black people, are disproportionately likely to experience homelessness due to the legacy of systemic racism. See generally *Homelessness and Racial Disparities*, NAT'L. ALL. TO END HOMELESSNESS, <https://endhomelessness.org/homelessness-in-america/what-causes-homelessness/inequality/> (last updated April 2023) [<https://perma.cc/RH5J-EUBE>]. It is especially important for this Note to recognize these disparities because race, gender, and other identities intersect with disability status and inform the ways in which many individuals experience discrimination in accessing shelter. This Note focuses on disabled

Disabled people are not only more likely to experience houselessness,¹⁹ but they are also disproportionately likely to lack access to shelter. The Department of Housing and Urban Development (HUD) found that in 2008 over 60 percent of unhoused adults with disabilities lacked access to shelter, and this figure was likely underinclusive.²⁰ When people with disabilities lack access to shelter, they are highly likely to stay in dangerous locations which put their health at risk.²¹ Recent lawsuits have been brought against cities across the country for their failure to provide people with beds accessible to disabled people in government-funded shelters.²² The nationwide lack of accessible beds highlights how discrimination in the

people because of the well-documented pervasiveness of their lack of access to shelter, and because a number of federal antidiscrimination laws have been passed to protect this group and that seem to prohibit the exclusionary policies of shelters.

19. *Homelessness and Disabilities: The Impact of Recent Human Rights Developments in Policy and Practice*, HOUS. RTS. WATCH (Dec. 18, 2018), <https://www.housingrightswatch.org/content/homelessness-and-disabilities-impact-recent-human-rights-developments-policy-and-practice%E2%80%8B> [<https://perma.cc/NPZ8-X78R>].

20. U.S. DEPT. OF HOUS. AND URB. DEV., THE 2008 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS 16 (2008), <https://www.huduser.gov/portal/publications/pdf/4thHomelessAssessmentReport.pdf> [<https://perma.cc/RR3S-RWZR>] [hereinafter HUD 2008 Report]. This survey only includes individuals who fit HUD's definition of "chronic homelessness," which only includes a subset of persons with disabilities. U.S. DEPT. OF HOUS. AND URB. DEV., *Definition of Chronic Homelessness*, HUD EXCHANGE, <https://www.hudexchange.info/homelessness-assistance/coc-esg-virtual-binders/coc-esg-homeless-eligibility/definition-of-chronic-homelessness/> (last visited Aug. 9, 2023) [<https://perma.cc/TRN7-48FK>]. Additionally, data on houselessness is generally underinclusive as a whole, as it typically only counts unhoused people who are visible. See Kim, *supra* note 18, at 1152 n.4 (explaining why data typically undercounts unhoused individuals).

21. Erin Vinoski Thomas & Chloe Vercruysse, *Homelessness Among Individuals with Disabilities: Influential Factors and Scalable Solutions*, NACCHOVOICE (June 14, 2019), <https://www.naccho.org/blog/articles/homelessness-among-individuals-with-disabilities-influential-factors-and-scalable-solutions> [<https://perma.cc/73DL-SBRC>].

22. See, e.g., U.S. DEPT. OF JUST., *Settlement Agreement in U.S. v. District of Columbia*, ADA ARCHIVES, https://www.ada.gov/dc_shelter_factsheet.html [<https://perma.cc/9YAK-DB5T>] (laying out the terms of a settlement in a lawsuit over people with disabilities' lack of access to shelter in D.C.); Anna Kim, *City-Funded Chicago Homeless Shelters Violate Rights of People with Disabilities, Lawsuit Claims*, CHICAGO TRIBUNE (Mar. 12, 2019), <https://www.chicagotribune.com/politics/ct-met-homeless-shelters-accessible-disability-20190312-story.html> (on file with the *Columbia Human Rights Law Review*) (explaining a lawsuit brought over shelters' inaccessibility to unhoused people with disabilities in Chicago); Nikita Stewart, *Under Settlement, City Shelters Will Do More for the Disabled*, N.Y. TIMES (Mar. 18, 2017), <https://www.nytimes.com/2017/05/18/nyregion/homeless-shelters-disabled-people-settlement.html> [<https://perma.cc/2LP5-42ZZ>] (announcing a settlement reached between the City of New York and advocates for the houseless over shelter inaccessibility).

shelter system leaves disabled people at risk of being targeted by criminal and civil penalties, as well as vulnerable to remaining unsheltered and experiencing harmful health consequences.

Contrary to the lived reality of, and documented discrimination against, individuals with disabilities experiencing houselessness, there are a number of legal protections against housing discrimination on the basis of disability. Both the Fair Housing Act (FHA) and Americans with Disabilities Act (ADA) have provisions that apply to the disparate treatment of people with disabilities in the shelter system, and courts have issued rulings that interpret these provisions to outlaw much of the discrimination experienced today.²³ But, despite these protections, discrimination against disabled people in the shelter system has continued unabated, leaving many unsheltered and exposed to the harsh penalties lawmakers have imposed on the life-sustaining activities that houseless people have no choice but to perform in public.

This Note proposes using the recently reenacted Affirmatively Furthering Fair Housing (AFFH) mandate as a tool to fill the gap in existing legal protections. While the AFFH rule has its own shortcomings, it likely offers a more promising solution to discrimination by shelters because, unlike the FHA and ADA, the AFFH does not rely on individual plaintiffs to bring claims. Particularly when partnered with community and stakeholder engagement, the AFFH holds promise in its potential to pressure housing providers to change their discriminatory policies, and therefore provide a path to expanding the availability of shelters accessible to people with disabilities.

Of course, access to emergency shelters is not a solution to houselessness in general, nor will it dismantle the barriers people with disabilities face in accessing housing. Many disabled people and many unhoused people in general choose not to stay in shelters, even when they are available, for a variety of reasons. These include: security concerns;

23. 42 U.S.C. § 3604(a) (“[I]t shall be unlawful to refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”); 42 U.S.C. § 12132 (holding that no person 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, or be subjected to discrimination by any such entity.”); 42 U.S.C. § 12182(a) (prohibiting discrimination “on the basis of disability in the full and equal enjoyment of . . . any place of public accommodation . . .”). For examples of courts interpreting the FHA and ADA as prohibiting discriminatory actions carried out by shelters, see *Defiore v. City Rescue Mission of New Castle*, 995 F. Supp. 2d 413 (W.D. Pa. 2013) (denying Defendant’s motion for summary judgment in a case where a shelter refused to admit a person with a disability because of their reliance on a service animal).

policies which require men to be housed separately from their spouses and children; restrictive rules imposed on residents, such as participation in religious services and engagement in programming; and discrimination by shelter staff or other residents, on the basis of disability status or other identities such as gender, sexual orientation, or race.²⁴ Without larger systemic change, achieving a world in which no individual lives unsheltered would require addressing each of these concerns. Nevertheless, in the meantime, ensuring that disabled people have access to temporary shelters and can choose to reside in them is critical, particularly in light of the increasing criminalization of unsheltered houselessness and its associated health risks.²⁵

This Note highlights the discrimination faced by people with disabilities in the shelter system, explains why our current legal regime has failed to protect against the types of discriminatory behavior shelters frequently exhibit, and explores potential solutions to this problem. Particularly, this Note argues that with community engagement, the AFFH mandate could be used to pressure shelters to change their discriminatory practices. Part I offers a background on the kinds of discrimination disabled people face when seeking access to emergency shelters. Part II lays out the legal protections that apply to discrimination on the basis of disability status in emergency shelters. Part III discusses why these legal protections have failed to prevent discriminatory outcomes. Finally, Part IV will consider the recently restored AFFH mandate as a potential solution to discrimination against people with disabilities in the shelter system.

PART I: DISCRIMINATION FACED BY PEOPLE WITH DISABILITIES IN THE SHELTER SYSTEM

Part I of this Note provides background on the housing discrimination faced by unhoused people with disabilities both in shelters

24. See *Talk of the Nation: Why Some Homeless Choose the Streets Over Shelters*, NAT'L PUBLIC RADIO (Dec. 6, 2012), <https://www.npr.org/2012/12/06/166666265/why-some-homeless-choose-the-streets-over-shelters> [<https://perma.cc/7AG9-WR8F>] (discussing the treatment unhoused people experience in some shelters); Dialynn Dwyer, *"You Feel Trapped": One Unhoused Man Shares Why Shelters Don't Always Feel Safe for Individuals Struggling with Homelessness*, BOSTON.COM, (Nov. 11, 2021) <https://www.boston.com/news/local-news/2021/11/11/why-unhoused-people-do-not-feel-safe-shelter/> [<https://perma.cc/4SZ8-UC8D>] (exploring safety and discrimination issues in shelters); Kilyssa Shay, *Why Don't Homeless People Use Shelters?*, SOAPBOXIE (Oct. 19, 2022), https://soapboxie.com/social-issues/why_homeless_people_avoid_shelters [<https://perma.cc/FH3F-8295>] (shedding light on unhoused individuals' experiences in shelters).

25. Thomas & Vercruyse, *supra* note 21.

and more broadly. Part I will begin by discussing why unhoused people with disabilities disproportionately lack access to shelter, and proceed by examining the behaviors shelters frequently engage in that discriminate against disabled people.

A) Lack of Access to Shelter for People with Disabilities

Discrimination by shelters against disabled people is particularly concerning given that, as of 2022, HUD estimated that nearly a third of America's houseless population has a disability.²⁶ When considering that people with disabilities constitute only about 18 percent of the population, it is clear that this group is disproportionately likely to experience houselessness.²⁷ A number of factors contribute to this outcome. Disabled people are twice as likely as people without disabilities to experience poverty.²⁸ Nearly four million people with disabilities rely on Supplemental Security Income (SSI) because their disability limits their access to the job market.²⁹ However, these payments are, on average, 44 percent below the federal poverty level.³⁰ Those with disabilities who are employed receive lower pay, at an average pay of \$2.15 an hour.³¹ Disabled people also frequently face high levels of medical debt, which contributes to difficulties in accessing stable housing.³²

The overrepresentation of people with disabilities amongst the unhoused is so severe that HUD has a special categorization of houselessness for this population: HUD defines a "chronically homeless individual" as "an individual with a disability who has been continuously homeless for one year or more or has experienced at least four episodes of homelessness in the last three years where the combined length of time homeless on these occasions

26. U.S. DEPT. OF HOUS. AND URB. DEV., THE 2022 ANNUAL HOMELESSNESS ASSESSMENT REPORT TO CONGRESS 72 (Dec. 2022) [hereinafter HUD 2022 Report]. This number is likely underinclusive because it only captures those who qualify as "chronically homeless." HUD 2008 Report, *supra* note 20.

27. Michelle Diament, *More Than Two-Fifths of Homeless Have Disabilities*, DISABILITY SCOOP (Jul. 16, 2009), <https://www.disabilityscoop.com/2009/07/16/homeless-report/4153/> [<https://perma.cc/TM9L-B3FX>].

28. Jaboa Lake et al., *Recognizing and Addressing Housing Insecurity for Disabled Renters*, CTR. FOR AM. PROGRESS (May 27, 2021), <https://www.americanprogress.org/article/recognizing-addressing-housing-insecurity-disabled-renters/> [<https://perma.cc/U59C-8VK4>].

29. *Monthly Statistical Snapshot, June 2023*, U.S. SOC. SEC. ADMIN. (June 2023), https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/ [<https://perma.cc/Y66L-D9JP>]; Diament, *supra* note 27.

30. Diament, *supra* note 27.

31. Lake et al., *supra* note 28.

32. *Id.*

is at least 12 months.”³³ Of course, this is just a specific subset of disabled people experiencing houselessness, but the fact that HUD lists having a disability as the fundamental criteria of “chronic homelessness” further illustrates the close relationship between disability and access to housing.

Not only are people with disabilities more likely to experience houselessness, but even amongst unhoused people, they are more likely to go unsheltered, meaning they often sleep in places such as parks, tents, overpasses, or other similar locations rather than in shelters or transitional housing.³⁴ HUD has estimated that nearly 40 percent of all unsheltered adults fit its definition of the “chronic homeless,” indicating that at least 40 percent of unsheltered adults have one or more disabilities.³⁵ Additionally, over 60 percent of all disabled people experiencing houselessness are unsheltered.³⁶ The fact that people with disabilities face such a high risk of experiencing unsheltered houselessness is particularly concerning given the serious health consequences they could suffer,³⁷ in addition to the intensifying threat of criminal legal penalties.³⁸

Several lawsuits have been recently brought in cities across the country over disabled peoples’ lack of access to shelter. In 2017, New York City’s Homeless Services Agency was forced into a settlement after advocates brought a lawsuit when an investigation revealed that only 32 beds in the city’s entire shelter system were accessible to people with disabilities.³⁹ A similar lawsuit was brought in 2019 by a woman who was turned away from multiple shelters in Chicago because she had difficulty walking. As it turned out, only one shelter in the entire city was accessible to people with wheelchairs.⁴⁰ Settlements have also been reached in Washington, D.C.⁴¹ and Orange County, California⁴² over allegations similar to those in the Chicago and New York lawsuits. Further, a class-action lawsuit was brought in 2018

33. HUD 2022 Report, *supra* note 26, at 4.

34. See U.S. DEPT. OF HOUS. AND URB. DEV., *A GUIDE TO COUNTING UNSHELTERED HOMELESS PEOPLE* 4 (2004), <https://www.hudexchange.info/sites/onecpd/assets/File/Guide-for-Counting-Unsheltered-Homeless-Persons.pdf> [<https://perma.cc/R7KL-SKZJ>] (explaining that people experiencing houselessness are considered unsheltered if they sleep in locations that are not meant for human habitation, such as parks).

35. HUD 2008 Report, *supra* note 20, at 16. See note 20 for why this number is likely underinclusive.

36. HUD 2022 Report, *supra* note 26, at 75.

37. Thomas & Vercruysse, *supra* note 21.

38. HOUSING NOT HANDCUFFS, *supra* note 15, at 12–13.

39. Stewart, *supra* note 22.

40. Kim, *supra* note 22.

41. U.S. DEPT. OF JUST., *supra* note 22.

42. *Glover v. City of Laguna Beach*, No. SACV 15-01332 AG (DFMx), 2018 WL 6131601 (C.D. Cal. July 18, 2018).

in Massachusetts, where plaintiffs claimed that while they had been given shelter placements, the shelters where they were placed were unable to accommodate their disabilities, and the shelter system refused to grant them a suitable transfer.⁴³ The volume and similarity of these legal actions demonstrates the acuteness of the discrimination unhoused people with disabilities face nationwide in attempting to access emergency shelters.

B) Discrimination Against Disabled People in the Shelter System

Shelters engage in a broad range of discriminatory behaviors that result in the exclusion of disabled people.⁴⁴ As the aforementioned lawsuits illustrate, one type of discrimination that disabled people regularly face in emergency shelter access is the physical inaccessibility of the shelters themselves. Many shelters are not built to accommodate people with physical disabilities or mobility impairments.⁴⁵ For example, shelters may lack wheelchair ramps or accessible bathrooms, or require residents to walk upstairs to access their rooms.⁴⁶ When shelters have been criticized for discriminating against certain groups, they have claimed to lack the resources to make necessary accommodations.⁴⁷

Similarly, shelter staff often lack the training needed to provide accessible housing to people with cognitive or developmental disabilities.⁴⁸ Some individuals, including certain people with autism, may require accommodations to typical shelter policies and procedures, such as alternatives to pat-down security searches.⁴⁹ However, shelter staff rarely provide these accommodations, in part due to lack of training and awareness,

43. *Garcia v. Dep't. of Hous. and Comm. Dev.*, 480 Mass. 736, 738 (2018) (illustrating that even when persons with disabilities are given access to a shelter, the shelters are not always able to meet their basic needs).

44. While this Note provides a general overview of several discriminatory policies that disabled people frequently encounter in shelters, this overview is not intended to be fully comprehensive, and shelters' discriminatory behavior is not limited to the actions described herein.

45. Thomas & Vercruysse, *supra* note 21.

46. While these are hypothetical examples, they are realistic to the types of barriers people with disabilities face in shelters. See Kim, *supra* note 22 (describing a Chicago shelter that could not accommodate wheelchairs).

47. *McGee v. Poverello House*, No. 1:18-cv-00768-NONE-SAB, 2021 WL 3602157, at *13 (E.D. Cal. Aug. 13, 2021).

48. See Zelalem Tiruneh Rejie, *5 Things You Should Know About Autism and Homelessness*, AUTISM HOUSING NETWORK (Nov. 13, 2017), <https://www.autismhousingnetwork.org/5-things-know-autism-homelessness/> [<https://perma.cc/Q8ER-MEQE>] (noting that shelter staff are usually untrained on how to work with individuals who have developmental disabilities like autism); Thomas & Vercruysse, *supra* note 21.

49. Zelalem Tiruneh Rejie, *supra* note 48.

rendering shelters inaccessible to many people with disabilities that are not clearly visible.⁵⁰

Shelters often have other policies which result in the exclusion of disabled people.⁵¹ For example, policies which require residents to complete daily chores, assist with serving meals, attend programming, and actively search for employment, in order to stay in the shelter.⁵² While facially neutral, these policies can bar certain people with disabilities from residing in shelters. For example, serving meals or cleaning can require one to be on their feet for significant periods of time. For people whose disability restricts their mobility, completing these chores may not be feasible. These policies can also discriminate against disabled people in less obvious ways. For example, while shelters often require residents to seek out employment, many people with disabilities face barriers which prevent them from entering the job market.⁵³ The discriminatory impact of shelter policies can intersect with barriers people face in other social and political systems.⁵⁴

Another common shelter policy leading to the exclusion of disabled people is the prohibition of animals.⁵⁵ People with disabilities have reported

50. *Id.*; Thomas & Vercruyse, *supra* note 21.

51. Tracy Ferezan, *Experiencing Homelessness as a Person with a Disability*, TEXAS HOMELESS NETWORK, (Oct. 08, 2021), <https://www.thn.org/2021/10/08/disability/> [<https://perma.cc/7M43-ZCPM>].

52. *Id.* The Kalamazoo Gospel Mission, the shelter discussed in the introduction to this paper, is an example of a shelter that requires residents to complete chores to obtain housing. Alex Cale, *Letter: During Hard Times, It Would Be Nice to Rest at the Train Station*, MLIVE (Apr. 5, 2011), https://www.mlive.com/opinion/kalamazoo/2011/04/letter_during_hard_times_it_wo.html [<https://perma.cc/HCA2-3U7B>].

53. *Persons with a Disability: Barriers to Employment and Other Labor-Related Issues News Release*, U.S. BUREAU OF LAB. STATS. 2 (May 1, 2020), <https://www.bls.gov/news.release/pdf/dissup.pdf> (on file with the *Columbia Human Rights Law Review*); CTR. FOR AM. PROGRESS, *Removing Obstacles for Disabled Workers Would Strengthen U.S. Labor Market* (May 24, 2022), <https://www.americanprogress.org/article/removing-obstacles-for-disabled-workers-would-strengthen-the-u-s-labor-market/> [<https://perma.cc/9VSX-B7UC>].

54. For a discussion on how individuals in certain racial groups, including Black, Indigenous, and Hispanic individuals, are disproportionately represented among the total population of people with disabilities, see Martha Ross & Nicole Bateman, *Disability Rates Among Working-Age Adults are Shaped by Race, Place, and Education*, THE BROOKINGS INST. (May 15, 2018), <https://www.brookings.edu/articles/disability-rates-among-working-age-adults-are-shaped-by-race-place-and-education/> [<https://perma.cc/2BNF-X4Y4>].

55. HOUS. EQUALITY CTR. OF PENNSYLVANIA, *FAIR HOUSING GUIDE TO REASONABLE ACCOMMODATIONS AND MODIFICATIONS 20* (2020), <https://www.equalhousing.org/wp-content/uploads/2020/02/Fair-Housing-Guide-to-Reasonable-Accommodations-and-Modifications.pdf> [<https://perma.cc/27KM-R74Y>] (noting that many shelters have no-pet policies).

being turned away from shelters due to their reliance on a service animal because of shelter policies or the absence of staff training for such matters.⁵⁶ Similarly, many shelters do not allow residents to keep their belongings in the shelter during the day.⁵⁷ This can create barriers for people with physical disabilities who may not be able to pack their things up and carry them out of the shelter each day.⁵⁸ This policy especially negatively impacts those who rely on crutches or other walking aids.⁵⁹ As a result, some disabled people may not be able to access shelters and choose instead to create makeshift lodgings outdoors, such as tents, where they can keep their belongings in one place.⁶⁰

People with disabilities who require medications or the use of medical devices for treatment have reported being denied access to their medication and equipment.⁶¹ For example, some shelters do not allow, or impose restrictions on, refrigerator access.⁶² This has posed an issue for unhoused people who require medications that must be stored in a fridge.⁶³ In fact, even when medications do not require special storage, shelters restrict the times that residents can access them, interfering with their

56. *Id.*; For examples of cases in which shelters have turned away individuals for having a service animal, see *Defiore v. City Rescue Mission of New Castle*, 995 F. Supp. 2d 413, 415 (W.D. Pa. 2013); *Lewis v. Joy Junction Homeless Shelter*, No. 09-269 LFG/WDS, 2009 WL 10708266, at *1–3 (D.N.M. Apr. 1, 2009); *Smith v. Khouzam*, 33 F. App'x 809, 809–810 (6th Cir. 2002). The Kalamazoo Gospel Mission has also been known to turn away individuals with service animals. *Boldrey*, *supra* note 5; *THE HOMEFRONT*, *supra* note 1.

57. See Noelle Swan, *The Things They Carry*, CHRISTIAN SCIENCE MONITOR (Aug. 9, 2021), <https://www.csmonitor.com/Commentary/From-the-Editors/2021/0809/The-things-they-carry> [<https://perma.cc/QTA6-8U8W>] (expanding on the common shelter ban on individuals keeping their belongings with them in the shelter).

58. See *id.* (explaining the difficulties people experiencing houselessness face when forced to carry their belongings with them at all times).

59. Andrea Adelson, *Updated: Court Refuses to Block Anti-Camping Laws*, LAGUNA BEACH INDEPENDENT (Feb. 19, 2016), <https://www.lagunabeachindy.com/court-refuses-to-block-anti-camping-laws/> [<https://perma.cc/D4EA-QVKZ>].

60. See Rick Paulas, *This Is Why Homeless People Don't Go to Shelters*, VICE NEWS (Feb. 24, 2020), <https://www.vice.com/en/article/v74y3j/this-is-why-homeless-people-dont-go-to-shelters> [<https://perma.cc/9MZH-2RES>] (explaining that some people choose to stay in tents to have easier access to the things they need and have people they trust watch over their things).

61. For examples of lawsuits brought by unhoused people with disabilities against shelters after being denied access to medications or medical devices, see, e.g., *Jones v. Volunteers of Am. Greater N.Y.*, No. 1:20-cv-5581 (MKV), 2022 WL 768681, at *1–3 (S.D.N.Y. Mar. 14, 2022); *Anderson v. Usher*, No. CIV.A. 11-1621 RCL, 2012 WL 4076177, at *1 (D.D.C. Cir. Sept. 17, 2012); *Oslzly v. Rosenblatt*, No. 14-CV-3638 (SLT)(LB), 2014 WL 4161347, at *1–3 (E.D.N.Y. Aug. 19, 2014); *Wright v. Giuliani*, 230 F.3d 543, 545 (2d Cir. 2000).

62. *Jones*, 2022 WL 768681, at *2; *Wright*, 230 F.3d at 546.

63. *Jones*, 2022 WL 768681, at *2; *Wright*, 230 F.3d at 546.

medical needs.⁶⁴ In addition, individuals have also reported being denied access to necessary medical equipment in shelters due to policies prohibiting this equipment.⁶⁵

Lastly, disabled people are frequently turned away or removed from shelters after shelter administrators learn of their disability for reasons that are not always made clear.⁶⁶ Upon seeking admission to a shelter, some individuals have been questioned in intake interviews about their disabilities and the effect their disabilities have on their daily lives. Subsequently, they were denied residence at the shelter.⁶⁷ In these situations, the reason for the person's exclusion often remains unknown, or at least unspoken. Regardless, the outcome is the same for the unhoused person who must now find somewhere else to stay overnight.

Together, these policies and behaviors illustrate how discrimination by shelters frequently prevents disabled people from accessing temporary housing. While guaranteeing access to temporary shelters is not a solution to homelessness or housing discrimination experienced by people with disabilities, it is critical to reducing these harms and cannot be overlooked. Shelters remain the only way for many people to avoid the increasingly severe consequences associated with sleeping on the streets—including incarceration, life-threatening health consequences, and involuntary

64. See *Wright*, 230 F.3d at 546 (lawsuit by a person experiencing homelessness whose medical needs were impaired because he was restricted to accessing his medications at certain times).

65. See *Jones*, 2022 WL 768681, at *2 (lawsuit by person experiencing homelessness who was denied the ability to access medical devices necessary for his treatment while residing in a shelter).

66. For examples of cases in which disabled people have been turned away from shelters without being provided a clear explanation for this denial, see, e.g., *Thomas v. The Salvation Army S. Territory*, 841 F.3d 632, 641 (4th Cir. 2016); *Alvey v. Gualtieri*, No. 8:15-cv-1861-T-33AEP, 2016 WL 6582897, at *1–3 (M.D. Fla. Nov. 17 2016); *Stowell v. Open Door Mission*, No. 8:17CV75, 2017 WL 1380537, at *1 (D. Neb. Apr. 17, 2017); *Wilmer v. Albany Cnty. Soc. Servs.*, No. 1:16-CV-00905 (NAM/CFH), 2016 WL 4398489, at *1 (N.D.N.Y. July. 25, 2016); *Olszyk v. Thorne*, No. 3:20-CV-445 (TJM/ML), 2020 WL 56343281, at *1–2 (N.D.N.Y. June. 17, 2020); see also George Ramos, *Disabled—And Homeless: Turned Away by Shelters Because of Wheelchair, Couple Seek Refuge*, L.A. TIMES (June 24, 1989), <https://www.latimes.com/archives/la-xpm-1989-06-24-me-2003-story.html> [<https://perma.cc/T5MJ-QDKK>] (describing the experiences of a person with disabilities and his partner and their difficulties finding housing due to his medical needs).

67. Anita Hofschneider, *Disabled and Homeless: This Hawaii Woman Found She Had Nowhere To Go*, HONOLULU CIVIL BEAT (Sept. 16, 2015), <https://www.civilbeat.org/2015/09/disabled-and-homeless-this-hawaii-woman-found-she-had-no-place-to-go/> [<https://perma.cc/9JNA-GMQP>] (describing the story of a woman with a physical disability who was told that in order to be admitted to a temporary shelter, she would have to pass a “test” that would examine her ability to stand up off the ground on her own).

commitment.⁶⁸ When shelters deny people access to an essential resource, they are putting lives at risk.

PART II: LEGAL PROTECTIONS AGAINST DISCRIMINATION BY SHELTERS ON THE BASIS OF DISABILITY STATUS

Despite what the pervasive discrimination against people with disabilities might suggest, a number of legal protections address the problem of discrimination against disabled people in accessing housing, including emergency shelters. These protections include the Equal Protection Clause (EPC) of the Fourteenth Amendment, the Fair Housing Act (FHA), and the Americans with Disabilities Act (ADA).⁶⁹ Each provides varying levels of protection to disabled people seeking access to temporary shelters. Part II of this Note will discuss these legal protections and how they apply to shelters.

A) The Equal Protection Clause

The EPC holds that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”⁷⁰ The EPC applies to discrimination carried out through state action. Emergency shelters are covered by the EPC because the majority of shelters, even privately run shelters, receive a significant amount of government funds.⁷¹ The EPC should therefore be expected to prohibit the kinds of discrimination that people with disabilities face in the shelter system, but has failed to do so in practice.

First, the level of protection provided by the EPC is determined by whether the group claiming harm is a “suspect class” and whether the right

68. Thomas & Vercruysse, *supra* note 21; Kim, *supra* note 18, at 1152–55.

69. One other protection, Section 504 of the Rehabilitation Act, also provides protection against discrimination based on ability. However, this provision is not discussed in-depth here, as it is essentially identical to the ADA. The primary differences between the two are that Section 504 only applies to recipients of federal funds and requires showing that the discrimination was *solely* because of disability. On the other hand, the ADA has provisions that apply to recipients of any government funding as well as private entities and does not require discrimination be solely based on ability. Aside from this, the two have identical substantial protections. Essentially, the ADA was intended to be an expansion of Section 504. *See Thomas*, 841 F.3d at 641.

70. U.S. CONST. amend. XIV, § 1.

71. Dennis P. Culhane & Seongho An, *Estimated Revenue of the Nonprofit Homeless Shelter Industry in the United States: Implications for a More Comprehensive Approach to Unmet Shelter Demand*, 32 HOUSING POLICY DEBATE 1, 9–10 (May 11, 2021) (showing that government grants represent the largest source of income for shelters and the average shelter receives 38 percent of its funding from government grants).

at issue is a “fundamental right.”⁷² The Supreme Court only considers certain groups to be “suspect classes,” based on factors such as historical discrimination and political power.⁷³ Because the Supreme Court has held that people with disabilities are not a “suspect class,” the EPC provides little protection from discrimination to disabled people in the shelter system.⁷⁴ Although people with disabilities have experienced a history of discrimination, the Court has found that they are not politically powerless, and that classifications based on disability status are frequently made by legislatures for the purpose of providing benefits and protections to disabled people rather than for discriminatory reasons.⁷⁵

Additionally, while the Court has not directly addressed the right to access emergency shelters, its Fourteenth Amendment jurisprudence suggests the issue is not a “fundamental right.” The Court has a very narrow interpretation of “fundamental rights”, requiring that any such rights be rooted in history and tradition to qualify.⁷⁶ The Supreme Court has never taken up the question of whether the right to shelter qualifies as a fundamental right.⁷⁷ However, it is unlikely to rule affirmatively on this question because the right to shelter lacks roots in history and tradition. The modern shelter system is a relatively recent development that did not exist until the 1980s when the federal government took action to create the shelter system that exists today.⁷⁸

72. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 437 (1985); *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982); *Romer v. Evans*, 517 U.S. 620, 631 (1996).

73. *Plyler*, 457 U.S. at 216 n.14.

74. *City of Cleburne*, 473 U.S. at 442.

75. *Id.* at 444–45.

76. *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989); *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). The Court has in some cases articulated a slightly broader interpretation of which rights classify as fundamental, allowing for consideration of change over time. *See, e.g.* *Obergefell v. Hodges*, 576 U.S. 644, 671–72 (2015) (finding that the fundamental right to marry is guaranteed to same-sex couples). However, the current Court takes a narrower approach. *See Dobbs v. Jackson Women’s Health Org.*, 142 S.Ct. 2228, 2283 (2022) (finding that the Fourteenth Amendment does not confer the fundamental right to abortion).

77. The only jurisdiction which has ever recognized a legal right to shelter is New York City. Alex Maroño Porto, *Understanding New York City’s ‘Right to Shelter’*, WEST SIDE RAG (May 24, 2023), <https://www.westsiderag.com/2023/05/23/understanding-new-york-citys-right-to-shelter> [<https://perma.cc/3KQ5-UUMY>].

78. In 1987, Congress passed the McKinney-Vento Act, which was the federal government’s first major legislative response to the problem of homelessness. *See NAT’L COAL. FOR THE HOMELESS, MCKINNEY-VENTO ACT* (2006), <https://www.nationalhomeless.org/publications/facts/McKinney.pdf> [<https://perma.cc/P5B4-5BMR>]. This act provided for the creation of temporary shelters and transitional housing to support the needs of people experiencing homelessness

Because people with disabilities are not a suspect class and access to emergency shelters has not been recognized by the Supreme Court as a fundamental right, courts can only find that shelters have violated the EPC in discriminating against disabled people if there is no rational basis to justify their actions, which is very difficult to prove.⁷⁹ Additionally, even if courts were to adopt a stricter standard to review discriminatory actions by shelters, they would be unlikely to find a violation of the EPC in this context, as the Supreme Court has held that to do so would require showing *intentional* discrimination.⁸⁰ It would be difficult for a claimant to prove that a shelter engaging in the de facto discriminatory actions described in Part I was *intentionally* discriminating on the basis of disability status. Shelters could argue that these policies are facially neutral and merely have a discriminatory impact.⁸¹ For these reasons, claims relating to discrimination by shelters against disabled people brought under the EPC are unlikely to succeed.

Even if a claimant had a valid EPC challenge to a shelter's policy or action on the basis that it intentionally discriminated against persons with disabilities, several administrative and logistical barriers could stand in their way. First, under modern Supreme Court jurisprudence courts can only issue damages as a remedy when legislation explicitly provides authorization. The sole available remedy for shelter discrimination claims under the EPC is a court injunction.⁸² For the same reason, courts cannot award attorney's fees to successful claimants, as unlike the FHA and the ADA, the EPC provides no explicit authorization for courts to do so.⁸³ Legal costs are also likely prohibitive for unhoused persons, creating another barrier to the feasibility of EPC claims.

B) The Fair Housing Act

The FHA is the primary legal protection against housing discrimination in the American legal system. The FHA makes it unlawful to "refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national

throughout the country. *Id.* at 2. Prior to this act, responses to the issue of homelessness were primarily local. *Id.* at 1.

79. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440.

80. *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977).

81. *Washington v. Davis*, 426 U.S. 229, 242 (1976); *Vill. of Arlington Heights*, 429 U.S. at 266; *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

82. Arturo Peña Miranda, "Where There Is A Right (Against Excessive Force), There Is Also A Remedy": *Redress For Police Violence Under The Equal Protection Clause*, 65 UCLA L. REV. 1678, 1686 (2018).

83. 42 U.S.C.S. § 3613(c)(2); 42 U.S.C.A. § 12205.

origin.”⁸⁴ Under the FHA, plaintiffs can bring three kinds of claims to obtain injunctions or monetary damages. Courts can find that a housing provider has breached the FHA’s ban on discrimination if plaintiffs can show the provider intentionally discriminated against them,⁸⁵ acted with discriminatory animus in a way that disparately impacted a protected group of which they are a member,⁸⁶ or denied them reasonable accommodation for their disability.⁸⁷ However, housing providers may have an affirmative defense if they can show either a strong justification for the challenged policy or a non-discriminatory explanation for the policy.⁸⁸ Additionally, for reasonable accommodations claims, housing providers can make out a defense by showing the requested accommodation would impose an undue administrative or financial burden, require a fundamental alteration to the housing program, or, in the case of alterations to physical structures, that the remedy is not readily achievable.⁸⁹

In addition to the fact that the FHA recognizes a broader range of claims than the EPC, another reason why the FHA is the primary means of legal redress for people experiencing housing discrimination is the Act’s comparative accessibility. Under the FHA, plaintiffs do not have to exhaust any administrative remedies before bringing a claim. They can claim monetary damages, including punitive damages, and have their attorney’s fees waived, their fees awarded after-the-fact, or even have an attorney appointed at the court’s discretion.⁹⁰ This makes it possible for individuals

84. 42 U.S.C.A. § 3604(a).

85. 42 U.S.C.A. § 3604(b).

86. JEANINE M. WORDEN, U.S. DEP’T OF HOUS. AND URB. DEV., MEMORANDUM ON ELEMENTS OF PROOF at 12–13 (2018), <https://www.hud.gov/sites/dfiles/FHEO/images/AJElementsofproofmemocorrected.pdf> [<https://perma.cc/J55D-L273>]. The FHA’s recognition of disparate impact claims is very significant because housing discrimination is often carried out by policies and decisions which are facially neutral but have a discriminatory effect. It is very hard for victims of housing discrimination to obtain relief when they are required to show that the challenged policy was the result of intentional discrimination, as other legal protections often require them to do. *See* Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (holding that under the Equal Protection Clause there must be proof of racially discriminatory intent to find a facially neutral action as unconstitutionally discriminatory); Stephen Rinehart, *Proving Intentional Discrimination In Equal Protection Cases: The Growing Burden Of Proof In The Supreme Court*, 10 N.Y.U. REV. OF L. & SOC. CHANGE 435, 460 (1980).

87. 42 U.S.C.A. § 3604(f)(3)(A)–(B).

88. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503–04 (10th Cir. 1995).

89. N.C. COAL. TO END HOMELESSNESS, SERVING PERSONS WITH DISABILITIES at 4–5 (2008), <https://www.ncceh.org/media/files/article/FairHousing-shelters.pdf> [<https://perma.cc/4ZVJ-7TCE>]

90. 42 U.S.C.A. § 3613(a)–(c).

without extensive financial resources—those most likely to experience FHA violations in the first place—to take advantage of the Act’s protections.⁹¹

For these reasons, the FHA provides more substantial protections to people with disabilities in the context of housing. However, it is important to note that not all courts have interpreted the FHA as applying to temporary shelters. Courts are split over whether shelters fall under the FHA’s definition of a “dwelling” and are subject to the Act.⁹² Therefore, the strength of the FHA’s protections for disabled people experiencing discrimination in the shelter system will depend on how the given jurisdiction interprets the FHA.

Additionally, the FHA exempts any housing provider that is religious and “operated, supervised, or controlled by or in conjunction with a religious organization,” allowing them to restrict occupancy of non-commercial housing “to persons of the same religion,” and to give “preference to such persons.”⁹³ Courts have held this exception to be relatively narrow and to only apply in cases where the organization’s primary purpose is religious in nature.⁹⁴ One court found that a religious organization that proved it was purely private, accepted no government funds, had religious iconography throughout its facility, and had ties to a specific faith still did not submit enough evidence to prove it fell under the FHA exemption.⁹⁵ Even if the FHA exemption does apply, it only allows housing providers to give preference to

91. Kathryn A. Sabbeth, *(Under)Enforcement of Poor Tenants’ Rights*, 27 GEO. J. ON POVERTY L. & POL’Y 97, 120 (2019).

92. Some courts have said the FHA does apply to shelters, but others have disagreed. Compare *Red Bull Assocs. v. Best W. Int’l, Inc.*, 862 F.2d 963 (2d Cir. 1988) (finding that a contractual forum selection clause in regards to an FHA suit deriving from a shelter could be avoided to advance a “strong public policy” such as the Act), *Project B.A.S.I.C. v. City of Providence*, No. 89-248P, 1990 WL 429846, at *11 (D.R.I. April 25, 1990) (finding standing for a FHA claim arising out of a shelter), and *Hunter ex rel. A.H. v. District of Columbia*, 64 F. Supp. 3d 158, 176 (D.D.C. 2014) (finding that the FHA does apply to shelters), with *Smith v. Salvation Army*, No. 13-114-J, 2015 WL 5008261, at *7 (W.D. Pa. Aug. 20, 2015) (“[T]he Court finds that the Shelter does not constitute a dwelling”), and *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 717 F. Supp. 2d 1101, 1109 (D. Idaho 2010) (finding that the FHA does not apply to shelters).

93. 42 U.S.C.S. § 3607(a).

94. *Defiore v. City Rescue Mission of New Castle*, 995 F. Supp. 2d 413, 416–17 (W.D. Pa. 2013); see also *Intermountain Fair Hous. Council*, 717 F. Supp. 2d at 1112–14 (indicating that the rescue mission’s primary purpose is a non-profit corporation that gives “spiritual guidance [and] Christian counseling” to its guests and residents); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 226–227 (3d Cir. 2007); for a broader discussion of the factors relevant in making this determination.

95. *Defiore*, 995 F. Supp. 2d at 416–18.

people of their own religion and does not exempt them from the FHA's requirements entirely.⁹⁶

However, one recent case suggested that religious entities may be able to stretch the scope of this exception. In *Tassinari v. Salvation Army Nat'l Corp.*, a U.S. District Court refused to grant summary judgment to the plaintiffs.⁹⁷ The court was receptive to the religious entity's arguments that its policy of excluding people taking certain medications, which would have otherwise violated the FHA, was acceptable under the Act's religious exemption as it merely gave preference to people of the organization's own religion.⁹⁸ While this decision is not controlling beyond the District Court of Massachusetts and the court did not decide the issue entirely (but merely denied summary judgment), the case still suggests that some courts may be willing to stretch the otherwise limited FHA religious exemption to permit discriminatory behavior by certain shelters.

C) The Americans with Disabilities Act

The last federal legislative protection against housing discrimination for disabled people is the ADA, which provides perhaps the strongest protections in the context of temporary shelters. Generally, courts have interpreted the FHA's protections against housing discrimination for people with disabilities as being identical to the protections in the ADA.⁹⁹ However, while courts are split on the FHA's applicability to shelters, such dwellings clearly fall within the purview of the ADA.¹⁰⁰ For this reason, the ADA could provide stronger protections than the FHA in many jurisdictions for people with disabilities who are attempting to access temporary shelters.

Emergency shelters may fall under either Title II or Title III of the ADA, depending on the shelter's characteristics.¹⁰¹ Title II applies to public service providers funded by state or local governments¹⁰² and declares that

96. 42 U.S.C.S. § 3607(a); *Intermountain Fair Hous. Council*, 717 F. Supp. 2d at 1117-18.

97. *Tassinari v. Salvation Army Nat'l. Corp.*, 610 F. Supp. 3d 343 (D. Mass. June 22, 2022).

98. *Id.*, at 361.

99. *See Blatch ex rel. Clay v. Hernandez*, 360 F. Supp. 2d 595, 630 (S.D.N.Y. 2005) (noting that the FHA's protections against discrimination on the basis of ability mirror those in the ADA).

100. U.S. DEPT. OF JUST., THE ADA AND EMERGENCY SHELTERS: ACCESS FOR ALL IN EMERGENCIES AND DISASTERS (Oct. 26, 2009), <https://archive.ada.gov/pcatoolkit/chap7shelterprog.htm> [<https://perma.cc/97EZ-MU8U>] [hereinafter THE ADA AND EMERGENCY SHELTERS].

101. 42 U.S.C.A. § 12131(1); 42 U.S.C.A. § 12182(a).

102. 42 U.S.C.A. § 12131(1).

“no 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, or be subjected to discrimination by any such entity.”¹⁰³ Because virtually all shelters receive government funding, Title II applies to the vast majority of shelters.¹⁰⁴ But even if a shelter were to run on completely private funds, it would still fall under Title III of the ADA.¹⁰⁵ Title III applies to places of public accommodation, including private entities, and prohibits discrimination “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.”¹⁰⁶

Still, the ADA’s protections are in some ways weaker than those of the FHA. While the ADA does take some measures to reduce the financial barriers to suits, it does not go as far as the FHA: the ADA does not permit courts to waive attorney’s fees or appoint an attorney to a plaintiff’s case, although it does allow attorney’s fees to be awarded to successful claimants.¹⁰⁷ Additionally, unlike the FHA, the ADA does not allow plaintiffs to claim compensatory damages.¹⁰⁸ This may make the Act less advantageous to disabled people bringing discrimination claims against shelters, as these individuals may benefit more from financial payments than injunctions allowing them to stay at a shelter—particularly a shelter which has already discriminated against them. In several cases, courts have found that unhoused plaintiffs lacked standing to bring ADA claims against shelters because they could not show they would need to reside in the shelter in the future and that the shelter would still deny them even if they did not have their disability.¹⁰⁹ Without this proof, the courts held those plaintiffs had

103. 42 U.S.C.S. § 12132.

104. Culhane & An, *supra* note 71, at 10; Igor Popov, *Shelter Funding for Homeless Individuals and Families Brings Tradeoffs*, U.C., DAVIS CTR. FOR POVERTY AND INEQ. RSCH., <https://poverty.ucdavis.edu/policy-brief/shelter-funding-homeless-individuals-and-families-brings-tradeoffs> [<https://perma.cc/AQ2W-2V8M>] (citing that nearly all shelters receive government funds).

105. This is because shelters qualify as places of public accommodation. 42 U.S.C.S. § 12181(7)(A).

106. 42 U.S.C.S. § 12182(a).

107. 42 U.S.C. § 12205. *Cf.* 42 U.S.C. § 3613(b)–(c) (providing that plaintiffs may recover actual and punitive damages under the FHA).

108. U.S. DEPT. OF JUST., *Lesson 9: Enforcing the ADA*, ADA ARCHIVES (September 2005), <https://archive.ada.gov/reachingout/lesson91.htm> [<https://perma.cc/9UJU-PKAZ>]. However, some states have passed their own laws allowing ADA plaintiffs to claim compensatory damages, such as CAL. CIV. CODE § 54.3(a) (West 2023) *et. seq.*

109. *Thomas v. The Salvation Army S. Territory*, 841 F.3d 632, 641 (4th Cir. 2016); *Alvey v. Gualtieri*, No. 15-cv-1861-T-33AEP, 2016 WL 6087874, at *1, *4 (M.D. Fla. Oct. 18, 2016) (noting that because the plaintiff had not been homeless, her claims that she may again need to stay in the shelter she was suing were merely speculative).

failed to show that an injunctive remedy would have been advantageous to them.¹¹⁰

Finally, the ADA, like the FHA, contains a religious exemption. Title III of the ADA states that its provisions “shall not apply to . . . religious organizations or entities controlled by religious organizations, including places of worship.”¹¹¹ By exempting these entities, this provision narrows Title III’s protections. But because this exemption only applies to Title III, many religious shelters would still be subject to the ADA’s protections under Title II, as Title II applies to all organizations which receive state or local funds regardless of their religious affiliation.¹¹² However, for shelters run by religious organizations on purely private funds, this exception provides expansive protection against ADA claims. This is because, unlike the FHA exemption, the ADA’s religious exemption is broad and exempts entities from the Act altogether.¹¹³

Courts have found that religious organizations may still fall under the ADA’s Title III exemption even if they engage in both secular and religious activities or utilize corporations, boards, or other secular entities as organizing mechanisms.¹¹⁴ In fact, the ADA Regulations¹¹⁵ provide that Title III’s religious exemption “is very broad, encompassing a wide variety of situations.”¹¹⁶ Further, the Regulations state that, “[r]eligious organizations and entities controlled by religious organizations have no obligations under the ADA.”¹¹⁷ So, while the ADA religious exemption may only apply to a few shelters, those entities that can claim its benefits are provided broad immunity from the ADA’s protections.

Together, the EPC, ADA, and FHA constitute the core federal legal protections against discrimination for disabled people in the emergency shelter system. Some states and local governments provide their own

110. *Thomas*, 841 F.3d at 641; *Alvey*, 2016 WL 6087874, at *4.

111. 42 U.S.C. § 12187.

112. N.C. COAL. TO END HOMELESSNESS, *supra* note 89, at 4 (explaining that Title II applies to all shelters which receive funds from state or local government).

113. *Tassinari v. Salvation Army Nat’l Corp.*, 610 F. Supp. 3d 343, 359 (D. Mass. 2022); 42 U.S.C. § 12187.

114. *Tassinari*, 610 F. Supp. 3d 343; 42 U.S.C. § 12187; *White v. Denver Seminary*, 157 F. Supp. 2d 1171 (D. Colo. 2001); *Sky v. Haddonfield Friends Sch.*, No. 14-5730, 2016 WL 1260061, at *1 (D.N.J. Mar. 31, 2016).

115. The ADA Regulations are rules developed by the Department of Justice that elaborate on the ADA’s requirements. They are binding on all state and local governments and many businesses, including all places of public accommodation and all places receiving government funding. U.S. DEPT. OF JUST., *Laws, Regulations & Standards*, ADA ARCHIVES (Aug. 9, 2023), <https://www.ada.gov/law-and-regs/> [<https://perma.cc/3AF6-LYDQ>].

116. 28 C.F.R. § pt. 36, app. C (2023).

117. *Id.*

protections as well.¹¹⁸ However, these generally do not stray far from the federal norm.¹¹⁹ In spite of these protections, evidence shows that discrimination against unhoused people with disabilities has gone unabated,¹²⁰ suggesting that our current legal protections fail to capture the discriminatory behavior of shelters. Part III of this Note will attempt to explain this failure. First, Part III will examine how courts and government agencies have interpreted the ADA and FHA's applicability to discriminatory conduct by shelters in order to show that the failure of these acts to prevent discrimination cannot be explained by their texts alone. Then, Part III will propose that the failure of the ADA and FHA to prevent discrimination by shelters is due to an underenforcement problem related to the inaccessibility of the civil legal system, especially for unhoused individuals.

PART III: WHY DISCRIMINATION HAS CONTINUED DESPITE LEGAL PROTECTIONS

Part III will examine litigation and government regulations related to the Americans with Disabilities Act (ADA) and Fair Housing Act (FHA) and reveal that courts and government agencies have found many of the discriminatory actions described in Part I to be violations of the ADA and FHA.¹²¹ Of course, there are some legal arguments shelter administrators and

118. For example, New York has passed the New York State Human Rights Law, which prohibits discriminating against someone on the basis of ability in housing and places of public accommodation. N.Y. EXEC. LAW § 256 (2)(a) (McKinney 2022). Similarly, Michigan's Persons with Disabilities Civil Rights Act prohibits discrimination on the basis of ability in public services, places of public accommodation, and housing, and requires that accommodations be provided in these areas unless they pose an undue hardship. MICH. COMP. LAWS. § 37.1102. Additionally, in New York City, a consent decree arising out of the original Callahan v. Carey case established a "right to shelter" for all men experiencing homelessness. 12 N.Y.3d 496, 498 (2009). The decree was later extended to cover women as well. Eldredge v. Koch, 98 A.D.2d 675, 469 N.Y.S.2d 744 (1983). Following this decree, lawsuits have been brought alleging that the city has failed to comply with its decree and have successfully won increases in shelter capacity. *The Callahan Legacy: Callahan v. Carey and the Legal Right to Shelter*, COALITION FOR THE HOMELESS (Aug. 10, 2022), <https://www.coalitionforthehomeless.org/our-programs/advocacy/legal-victories/the-callahan-legacy-callahan-v-carey-and-the-legal-right-to-shelter/> [https://perma.cc/L6RS-7DJA].

119. Joan Farrell, *State Law Provisions for Public Accommodations*, ADA COMPLIANCE GUIDE ¶ 720 (2010).

120. See HUD 2008 Report, *supra* note 20, at 15 (finding that roughly 30 percent of unsheltered individuals fit HUD's definition of chronic homelessness). For examples of lawsuits highlighting the extent of discrimination against unhoused people with disabilities by shelters, see Kim, *supra* note 22; Stewart, *supra* note 22.

121. See, e.g., 28 C.F.R. § 35.136(a) (2023) (prohibiting exclusion of disabled people in places of public accommodation because of their service animals); Defiore v. City Rescue Mission of New Castle, 995 F. Supp. 2d 413 (W.D. Pa. 2013) (finding that the shelter failed to show that Plaintiff's use of a service animal was not a reasonable accommodation).

other housing providers have made that have been successful in avoiding liability in certain cases.¹²² However, these cases fail to fully explain the extent of the ongoing discrimination against people with disabilities in the shelter system and cannot account for why the FHA and ADA have failed to prevent this discrimination from occurring in the first place. Part III will explain how this suggests that the failure of our legal protections to prevent discrimination is an enforcement issue rather than a shortcoming of the laws on their face or legal interpretation.

A) Shortcomings of the ADA and FHA Don't Explain Continued Discrimination

To start, many shelters use eligibility criteria such as requiring residents to complete chores, serve meals, attend programming, or actively search for jobs.¹²³ While these policies do not explicitly discriminate against disabled people, they often result in people with disabilities being excluded from shelters.¹²⁴ This sort of eligibility criteria is clearly outlawed by the ADA. The ADA defines discrimination to include “utilizing standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability; or that perpetuate the discrimination of others who are subject to common administrative control.”¹²⁵

Court decisions have affirmed the illegality of this type of criteria under the ADA. Courts have held that the ADA prohibits any eligibility criterion that “‘tend to screen out’ individuals with disabilities from the use and enjoyment of goods and services.”¹²⁶ This includes “policies and practices that are neutral on their face, but deny disabled people an effective opportunity to participate.”¹²⁷ Because courts have applied this rule to both policies *and* practices of housing providers, shelter policies prohibiting residents from keeping their belongings inside during the day likely violate the ADA, as these policies make it difficult for disabled people who cannot carry their belongings with them to stay in shelters. Under this same legal reasoning, shelter policies that prohibit medical equipment or the storage of

122. For example, shelters have in some cases succeeded in arguing that plaintiffs' requested accommodations were not reasonable. *See, e.g.,* *Rodriguez v. City of N.Y.*, 197 F.3d 611, 619 (2d Cir. 1999) (finding that the ADA does not mandate the provision of a new benefit that is not already provided for by the city-run facility).

123. *Ferezan, supra* note 51.

124. *Id.*

125. 42 U.S.C. § 12112(b)(3).

126. *Guckenberger v. Bos. Univ.*, 974 F. Supp. 106, 134 (D. Mass. 1997).

127. *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 995 (N.D. Cal, 2010) (issuing a preliminary injunction striking down the imposition of eligibility criteria which did not overtly discriminate against disabled people but had the effect of excluding them).

medicine in refrigerators would also violate the ADA, as these policies would essentially “screen out” many individuals with disabilities.¹²⁸

Still, courts have recognized that these sorts of eligibility criteria can be used if housing providers can show that the requirements are necessary.¹²⁹ However, it would likely be difficult for emergency shelters to meet this showing. While shelter operations may be impacted if they could not require *any* residents to do chores, help cook meals, search for jobs, engage in programming, carry their belongings with them when they leave, or store medicine in a fridge, it would be difficult for shelters to prove that they would be significantly harmed by providing exceptions for people with disabilities. This is particularly true as courts have treated this determination as a fact-intensive analysis and have required eligibility criteria to be narrowly drawn.¹³⁰ So, courts’ ADA jurisprudence strongly indicates that the eligibility criteria used by a number of shelters is unlawful.¹³¹

Courts have also held that denying someone residency in a shelter due to their reliance on a service animal violates the ADA and the FHA.¹³² The ADA Guidelines enacted by Congress require all entities covered by Title II of the ADA (public entities, including shelters which receive government funding) to modify their policies to accommodate service animals.¹³³ Housing and Urban Development (HUD) and the Department of Justice (DOJ) have advised shelters to modify their no-pet policies to allow residents to

128. THE ADA AND EMERGENCY SHELTERS, *supra* note 100.

129. *Bowers v. Nat’l Collegiate Athletic Ass’n*, 118 F. Supp. 2d 494, 518 (D.N.J. 2000).

130. *See Guckenberger v. Bos. Univ.*, 974 F. Supp. 106 (D. Mass. 1997) (closely examining the evidence and criteria a housing provider used that discriminated against disabled people in determining whether such criteria were necessary); *Doe v. Jud. Nominating Comm’n for Fifteenth Jud. Cir. of Fla.*, 906 F. Supp. 1534 (S.D. Fla. 1995) (allowed criteria which discriminated on the basis of ability because it was narrowly tailored); *Bowers*, 118 F. Supp. 2d 494 (denying summary judgment in part because the defendant housing provider did not show that it could not meet its objectives with more narrow criteria).

131. While the FHA does not have a provision specifically addressing eligibility criteria, the FHA does prohibit certain discrimination “against any person in the terms, conditions, or privileges” of housing. 42 U.S.C. § 3604(f)(2). Especially because courts interpret the FHA’s protections as similar to those in the ADA, a court would likely find these criteria to be a violation of the FHA as well. *See Blatch ex rel. Clay v. Hernandez*, 360 F. Supp. 2d 595, 630 (S.D.N.Y. 2005).

132. *See Sanzaro v. Ardiente Homeowners Ass’n. LLC*, 364 F. Supp. 3d 1158 (D. Nev. 2019); *Sabal Palm Condo. of Pine Island Ridge Ass’n, Inc. v. Fischer*, 6 F. Supp. 3d 1272 (S.D. Fla. 2014); *Green v. Hous. Auth. of Clackamas Cnty.*, 994 F. Supp. 1253 (D. Or. 1998); *Defiore v. City Rescue Mission of New Castle*, 995 F. Supp. 2d 413 (W.D. Pa. 2013) (finding that denying someone housing for their reliance on a service animal violates the ADA and FHA).

133. 28 C.F.R. § 35.136(a) (2023).

have service animals in order to remain compliant with the ADA.¹³⁴ Barring a person from a shelter due to their service animal is an ADA violation even if the animal has not been officially certified or lacks documentation verifying service animal status.¹³⁵ All that is required is that the animal be capable of performing tasks to assist a person with a disability, as verified by the animal's handler.¹³⁶

HUD and DOJ issued a joint declaration clarifying that the FHA and ADA also prohibit asking certain questions about a person's disability in the housing intake process.¹³⁷ Courts have affirmed this rule, holding that under the FHA, housing administrators may not question a disabled person about their ability to live independently.¹³⁸ Therefore, the questioning that unhoused people with disabilities have reported experiencing in the intake process, including being asked specific questions about a disability, is clearly prohibited by the FHA and ADA.¹³⁹

Courts' adjudication of FHA and ADA claims also show that shelters cannot automatically exclude disabled people based solely on an assumption that the shelter would not be able to accommodate them.¹⁴⁰ When a shelter

134. THE ADA AND EMERGENCY SHELTERS, *supra* note 100.

135. *Lewis v. Joy Junction Homeless Shelter*, No. 09-269, 2009 WL 10708266, at *1 (D.N.M. Apr. 1, 2009) (deciding that while documentation is not required for an animal to qualify as a service animal, the Plaintiff in this case did not make any showing that the animal could perform helpful tasks that would distinguish it from a regular pet).

136. THE ADA AND EMERGENCY SHELTERS, *supra* note 100.

137. *Reasonable Accommodations Under the Fair Housing Act*, U.S. DEPT. OF JUST. & U.S. DEPT. OF HOUS. AND URB. DEV. (May 14, 2004), <https://www.justice.gov/crt/us-department-housing-and-urban-development#:~:text=Under%20the%20Fair%20Housing%20Act%2C%20it%20is%20usually%20unlawful%20for,severity%20of%20such%20persons'%20disabilities> [<https://perma.cc/R2PK-RVB7>].

138. *Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002, 1007–8 (W.D.N.Y. 1990) (finding a housing provider's inquiry into whether a prospective tenant can live independently to be a violation of antidiscrimination laws); *Maziarz v. Hous. Auth. of the Town of Vernon*, 281 F.R.D. 71, 77 (D. Conn. 2012) (finding a genuine issue of material fact as to whether the housing provider actually required the prospective tenant prove their ability to live independently but noting that the parties were in agreement that such a requirement would violate fair housing laws).

139. For example, these rules would likely prohibit the questioning one unhoused woman was subjected to in Hawaii by a shelter which inquired about her ability to get up from the floor on her own. *Hofschneider*, *supra* note 67. These rules would also suggest that the shelter's conduct in *Thomas v. The Salvation Army S. Territory* constituted a violation, as the Plaintiff was required to disclose medical information at his intake which was used in his eligibility determination. 841 F.3d 632, 641 (4th Cir. 2016).

140. *See, e.g., Defiore v. City Rescue Mission of New Castle*, 995 F. Supp. 2d 413, 419–20 (W.D. Pa. 2013) (finding that a shelter could not deny someone residency because of their service animal on the basis that such an accommodation would pose an undue burden without providing specific information as to why this would be the case); *Guckenberger v.*

excludes a person with a disability without exploring accommodations that would allow the person to reside there, they are merely excluding an individual based on stereotypes or assumptions about disabled people. In *Guckenberger v. Boston University*, the court explained that the ADA prohibits discrimination “not just based on invidious ‘affirmative animus,’ but also based on thoughtlessness, apathy and stereotypes about disabled persons.”¹⁴¹ Relatedly, if a person with a disability requests accommodations, they cannot be turned away or denied until providers have conducted a fact-specific inquiry into the burdens the accommodation would actually entail and whether any alternatives are available.¹⁴² This is important given that many unhoused people with disabilities have reported being denied from a shelter upon staff realizing they had a disability, with little effort made to offer accommodations.¹⁴³

Finally, interpretations of the ADA and FHA by the federal government further suggest that shelters’ claims that they cannot admit a disabled person due to the physical inaccessibility of their shelter would not hold up under either Act. DOJ has directed that shelters must make their facilities physically accessible to a basic extent in order to be compliant with the ADA.¹⁴⁴ For example, the government has ordered shelters to ensure that their facilities are accessible to people with wheelchairs and that their bathrooms can accommodate people with disabilities.¹⁴⁵ This rule also extends to kitchens and dining facilities, including residents’ access to food sources: e.g., people with diabetes may not be restricted to access food only

Bos. Univ., 974 F. Supp. 106, 134 (D. Mass. 1997) (ruling that denying individuals accommodations based on stereotypes about disabled people is in violation of the ADA).

141. *Guckenberger*, 974 F. Supp. at 134.

142. *Defiore*, 995 F. Supp. 2d at 418–19 (2013) (finding that a shelter would need to justify its denial of an accommodation with specific facts); *Easley by Easley v. Snider*, 36 F.3d 297 (3d Cir. 1994) (holding that reasonable accommodations cannot be denied on the basis that the accommodation would require a fundamental alteration without fact-specific findings); THE ADA AND EMERGENCY SHELTERS, *supra* note 100.

143. See *Alvey v. Gualtieri*, No. 8:15-cv-1861-T-33AEP, 2016 WL 6087874 (M.D. Fla. Oct. 18, 2016); *Stowell v. Open Door Mission*, No. 8:17CV75, 2017 WL 1380537 (D. Neb. Apr. 17, 2017); *Wilmer v. Albany Cnty. Soc. Servs.*, No. 1:16-CV-00905 (NAM/CFH), 2016 WL 4386007 (N.D.N.Y. Aug. 17, 2016); *Olszyk v. Thorne*, No. 3:20-CV-0445 (TJM/ML), 2020 WL 5634328 (N.D.N.Y. June 17, 2020) (examples in which people experiencing homelessness have been denied entry to shelters without any effort to explore possible accommodations); *Ramos*, *supra* note 66; THE HOMEFRONT, *supra* note 1; *Kim*, *supra* note 22 (including, but not limited to, parties being denied entry for physical disabilities, sensitivities to certain chemicals, and a need for additional medical procedures).

144. THE ADA AND EMERGENCY SHELTERS, *supra* note 100; U.S. DEPT. OF JUST., *ADA Checklist for Emergency Shelters*, ADA ARCHIVE (July 26, 2007), <https://archive.ada.gov/pcatookit/chap7shelterchk.htm> [https://perma.cc/4FAR-LN2E].

145. THE ADA AND EMERGENCY SHELTERS, *supra* note 100.

at certain times.¹⁴⁶ Shelters are further required to modify sleeping arrangements in order to accommodate people with disabilities, and the government recommends that shelters create separate, quiet spaces for those with a disability that necessitates such a space.¹⁴⁷

Therefore, much of the discrimination being carried out by the shelter system against disabled people has actually been declared to be in violation of the FHA and ADA. Nevertheless, discrimination has persisted. Experts have noted the puzzle of “the inefficacy of the FHA’s enforcement regime given that, in formal terms, the regime is the strongest of any civil rights statute.”¹⁴⁸ This suggests that determining why unhoused people with disabilities continue to face enormous barriers in accessing shelter requires looking beyond the text of existing antidiscrimination laws.

B) Shelter Discrimination Has Continued Due to an Underenforcement Problem

The inaccessibility of the civil legal system may explain the FHA and ADA’s inability to prevent discrimination in the shelter system. This inaccessibility hinders unhoused people’s ability to assert their rights in court, rendering the remedies of the FHA and ADA powerful in theory, but meaningless in practice. To start, studies of housing discrimination claims have clearly found that “only a small number of potential victims of housing discrimination make use of the enforcement system [by bringing litigation].”¹⁴⁹ This is because potential claimants “fear the time and money needed to resolve claims, and lack faith that the resolution will prove favorable.”¹⁵⁰ Martha Minow, an expert on barriers to legal redress for the poor, explains that, “Americans who cannot afford legal help routinely forfeit basic rights. Neither the facts of their situation nor governing law are to blame. Lack of legal assistance is the problem.”¹⁵¹

146. U.S. DEPT. OF JUST., *supra* note 144.

147. *Id.*

148. Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1191 (2011). Housing discrimination literature has found that the FHA has failed to prevent discrimination in contexts outside of just discrimination on the basis of ability by shelters. For example, the FHA has failed to effectively deter racial discrimination by landlords. *Id.* at 1192. The FHA’s failures to prevent housing discrimination have led some to conclude that the law has defied “the primary assumption of the civil rights enforcement model that litigation will deter discrimination.” *Id.* at 1193.

149. *Id.* at 1202.

150. *Id.*

151. Maria Scenna, ‘Our Justice System Has Become Inaccessible to Millions of Poor People,’ *Says Dean Martha Minow*, HARVARD L. TODAY (Oct. 29, 2014),

In general, the civil legal system is extremely inaccessible to low-income individuals. It is estimated that only one in five individuals receive assistance for civil legal problems, and more than 80 percent of the legal needs of the poor are going unmet.¹⁵² DOJ has declared that the lack of access to legal redress for the poor is a “crisis,”¹⁵³ and experts have expressed concern that the problem is only worsening over time.¹⁵⁴ The inaccessibility of the legal system for the poor is particularly alarming as those with the least resources are the most likely to encounter legal problems.¹⁵⁵ This inaccessibility is especially acute for unhoused individuals who lack access to even basic resources. When an unhoused person is turned away from or discriminated against by a shelter because of their disability, they likely have urgent and material needs that must be met and take priority over filing a lawsuit.

Of course, some legal service organizations provide assistance to unhoused people in making these claims.¹⁵⁶ However, there is a severe shortage of available legal services, and many providers do not offer assistance with certain housing discrimination claims against shelters.¹⁵⁷ One study found that legal service providers would have to offer more than twenty million hours of legal services to fulfill the civil legal needs of the poor.¹⁵⁸ In the context of housing, a state taskforce dedicated to expanding

<https://hls.harvard.edu/today/justice-system-become-inaccessible-millions-poor-people-says-dean-martha-minow/> [<https://perma.cc/BY2X-TYP8>].

152. Scott S. Brinkmeyer, *Are the Doors to the Courthouse Really Open?*, 83 MICH. B.J. 12, 12 (2004). Another study found that most low-income people cannot access courts. Alice Woolley & Trevor Farrow, *Addressing Access to Justice Through New Legal Service Providers: Opportunities and Challenges*, 3 TEX. A&M L. REV. 549 (2016).

153. Woolley & Farrow, *supra* note 152, at 549–550.

154. Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1539 (2016) (stating that “[C]ontemporary judges see fewer civil cases brought by or on behalf of poor people.”); Scenna, *supra* note 151.

155. Woolley & Farrow, *supra* note 152, at 549–550.

156. For examples of cases in which legal service organizations provided representation to plaintiffs bringing claims of disability discrimination by shelters, see *Defiore v. City Rescue Mission of New Castle*, 995 F. Supp. 2d 413 (W.D. Pa. 2013); *Hunter ex rel. A.H. v. D.C.*, 64 F. Supp. 3d 158 (D.D.C. 2014).

157. Laurence E. Norton, II, *Not Too Much Justice for the Poor*, 101 DICK. L. REV. 601 (1997); Woolley & Farrow, *supra* note 152. For example, The Legal Aid Society, one of the primary legal service providers in New York City, does not offer representation to unhoused people bringing ADA or FHA claims against shelters. *What You Need to Know About Bringing a Lawsuit Against the Department of Homeless Services*, LEGAL AID SOCIETY, <https://legalaidnyc.org/get-help/housing-problems/what-you-need-to-know-about-bringing-a-lawsuit-against-the-department-of-homeless-services/> (last updated Mar. 15, 2022) [<https://perma.cc/XWV6-LVDB>].

158. Jessica Davis, *Social Justice and Legal Education: Mandatory Pro Bono Services*, 1 CHARLESTON L. REV. 85, 85–86 (2006).

legal aid in Massachusetts found that Massachusetts civil legal service providers turned away 56 percent of eligible claim-holders.¹⁵⁹ As legal service organization funding has decreased over time, the scarcity of legal assistance available to unhoused individuals has only been exacerbated, causing many individuals to be turned away when they need help.¹⁶⁰

Accessible legal assistance is particularly important because while unhoused people can bring claims themselves, pro-se claims are difficult to bring and highly unlikely to succeed. Some legal service organizations have published guides to instruct unhoused people on how to file ADA and FHA claims against shelters.¹⁶¹ However, these guides can be very dense and difficult to follow.¹⁶² Filing a claim requires collecting proof of one's claims, deciphering how to state one's claims in a way that is cognizable under the law, figuring out who to sue and under what acts, and writing up a complaint, as well as crossing procedural hurdles such as filing the suit with the court, serving notice to the opposing party, and, in some cases, filing notice of the claim with administrative agencies.¹⁶³ Completing this process would be difficult for anyone, but especially difficult for unhoused individuals who lack access to necessary resources, such as easy access to the internet.

Still, a number of unhoused individuals who have experienced discrimination by shelters have overcome these hurdles and have filed claims in court. This paper examines all lawsuits initiated by or on behalf of unhoused people alleging discrimination by shelters in violation of the ADA or FHA that could be identified.¹⁶⁴ Amongst all cases examined, the vast majority were brought pro-se.¹⁶⁵ Lawsuits litigated pro-se were far less likely to succeed than those litigated with the assistance of counsel. In fact, of all

159. STATEWIDE TASK FORCE TO EXPAND CIV. LEGAL AID IN MASS. BOSTON BAR ASS'N, INVESTING IN JUSTICE: A ROADMAP TO COST-EFFECTIVE FUNDING OF CIVIL LEGAL AID IN MASSACHUSETTS 3 (Oct. 2014), <https://www.bostonbar.org/app/uploads/2022/06/statewide-task-force-to-expand-civil-legal-aid-in-ma-investing-in-justice.pdf> [<https://perma.cc/87QQ-XMCG>].

160. Scenna, *supra* note 151.

161. *See, e.g.*, LEGAL AID SOCIETY, *supra* note 157 (exemplifying one legal service provider which has provided instruction on how to file a claim against a shelter).

162. *Id.*

163. LEGAL AID SOCIETY, *supra* note 157 (explaining the complicated procedural, service, and notice requirements for filing an ADA or FHA claim against a shelter).

164. To identify these suits, the search terms "discrimination," "shelter," and "FHA" or "ADA" were used. Forty-nine cases were identified. For a list of all cases examined, *see infra* note 309.

165. Thirty-six out of 49 cases identified were brought pro-se. *See infra* Chart A, Appendix I (visually representing the proportion of claims brought pro-se vs. those that had representation).

the pro-se lawsuits examined, all but two resulted in a dismissal.¹⁶⁶ In comparison, nearly one-third of examined lawsuits initiated with representation either survived dismissal or resulted in relief.¹⁶⁷ Courts often cited pleading errors as the reason for dismissing the claims brought pro-se.¹⁶⁸

166. Only two cases out of the 36 pro-se suits identified did not end in a dismissal. *Lord v. City of N.Y.*, No. 1:20-cv-03890 (LTS)(SDA), 2021 WL 1254366 (S.D.N.Y. Apr. 5, 2021); *West v. City and Cnty. of S.F.*, No. 21-cv-02370-EMC, 2022 WL 1556415 (N.D. Cal. May 17, 2022). In *West*, 2022 WL 1556415, all the Plaintiff's claims were dismissed except some of those against one of the Defendants. In the other, the court dismissed several claims and ordered the shelter to assist the Plaintiff in identifying the names of particular shelter employees she may have still had valid claims against. *Lord*, 2021 WL 1254366. It is also important to note that in some of the pro-se cases which were dismissed, the court did give leave to amend. See, e.g., *Madison v. Graham*, No. 1:21-CV-4908 (LTS), 2021 WL 2784763 (S.D.N.Y. July 1, 2021); *Stone v. City of N.Y.*, No. 22-CV-8615 (LTS), 2022 WL 17822588 (S.D.N.Y. Dec. 19, 2022); *Lopez v. N.Y.C. Dept. of Homeless Servs.*, No. 17-CV-3014 (VEC), 18-CV-4293(VEC), 2019 WL 4593611 (S.D.N.Y. Sept. 23, 2019); *Milhouse v. Renaissance Men's Residence*, No. 12-CV-6437 (DLI)(LB), 2013 WL 1811332 (E.D.N.Y. Apr. 29, 2013); *Sullivan v. City of N.Y.*, No. 22-CV-8438 (LTS), 2022 WL 16837038 (Nov. 7, 2022); *Brock v. City of N.Y.*, No. 21-CV-3087 (LTS), 2021 WL 1600098 (S.D.N.Y. Apr. 19, 2021). However, there is reason to suspect that courts' granting of leave to amend was not ultimately helpful in many cases, as in several of the identified pro-se claims which courts denied, the court had granted leave to amend several times prior. See, e.g., *Jones v. Volunteers of Am. Greater N.Y.*, No. 1:20-cv-5581 (MKV), 2022 WL 768681 (S.D.N.Y. Mar. 14, 2022); *White v. Bethesda Project Inc.*, 672 F. App'x 218 (3d Cir. 2017); *Nachmenson v. Diaz*, No. 17-CV-738 (LDH)(RML), 2017 WL 4736733 (E.D.N.Y. Oct. 19, 2017).

167. Four out of the 13 cases which were brought with the assistance of counsel succeeded or survived a motion to dismiss. See *infra* Chart B, Appendix I (visually representing the outcomes of pro-se claims vs. represented claims). In one additional case, while relief was ultimately denied, the Plaintiff's suit made it all the way to the Circuit Court on appeal. *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 717 F. Supp. 2d 1101 (D. Idaho 2010). In another case, Plaintiffs did win a preliminary injunction, although this was eventually overturned on appeal. *Garcia v. Dept. of Hous. and Cmty. Dev.*, 480 Mass. 736 (2018).

168. See, e.g., *Thomas v. The Salvation Army S. Territory*, 841 F.3d 632, 641 (4th Cir. 2016) (dismissing in part for plaintiff's failure to adequately identify or provide verification of her disability); *Jones*, 2022 WL 768681, *6-10 (dismissing in part for failure to request a form of relief the court could grant and failure to plead facts showing that the plaintiff's treatment constituted intentional discrimination or disparate impact); *West*, 2022 WL 1556415, *1 (dismissing in part for failure of plaintiff to sufficiently allege his disability); see also *George v. Grace Church Cmty.*, (S.D.N.Y. Feb. 17, 2012); *White*, 672 F. App'x 218; *Ortega v. Samaritan Vill. Myrtle Ave. Men's Shelter*, No. 18-CV-5995 (KAM)(RER), 2020 WL 6873428 (E.D.N.Y. Nov. 23, 2020); *Madison*, 2021 WL 2784763; *Stone*, 2022 WL 17822588 (2022); *Al-Qadaffi v. Acacia Network*, No. 16-CV-05423 (BMC)(RLM), 2016 WL 6072374 (E.D.N.Y. Oct. 17, 2016); *Miller v. NW.Conn. YMCA*, No. 3:18CV01136(JCH), 2019 WL 13214773 (D. Conn. Apr. 23, 2019); *Milhouse*, 2013 WL 1811332 (2013); *Kellier v. Billups*, No. 21-CV-3921 (LTS), 2021 WL 2435556 (S.D.N.Y. June 14, 2021); *Sullivan*, 2022 WL 16837038 (2022); *Nachmenson*, 2017 WL 4736733 (2017); *Minor v. Salvation Army*, No. 1:13CV750, 2013 WL 5216228 (M.D.N.C. Sept. 16, 2013);

This demonstrates that even when shelters clearly violate the ADA and FHA, huge barriers stand in the way of enforcing these regulations due to lack of access to the civil legal system. Very few individuals have access to assistance in bringing claims against shelters.¹⁶⁹ While some are able to bring claims pro-se, their claims have been almost uniformly denied by courts.¹⁷⁰ Sometimes, pro-se claims have been dismissed due to errors which would likely have been avoided had the claimant been provided counsel; in one case, a plaintiff's ADA claim against a shelter for denying him entry due to his service dog was dismissed because he named the wrong defendant in his complaint.¹⁷¹ This further suggests that the prevalent discrimination against people with disabilities in the shelter system represents an underenforcement problem rather than shortcomings of the ADA or FHA.

C) Doctrine-Related Explanations Fail to Explain Continued Discrimination by Shelters

Even if a proper case is brought, shelters can make additional legal arguments that allow them to evade the protections imposed by the FHA and ADA. However, while these arguments have provided shelters with immunity in certain cases, they fail to explain why pervasive discrimination against disabled people has continued. While loopholes must be acknowledged, they do not defeat the idea that the reason our current legal protections have failed to stop discrimination in the shelter system is primarily due to underenforcement.

First, shelters, and housing providers in general, often claim that the accommodation or other remedy the plaintiff proposed would pose an undue burden or require a fundamental alteration of the provider's services in response to FHA and ADA suits.¹⁷² Shelters have an affirmative defense to

Anderson v. Usher, No. 12-7107, 2013 WL 1187399 (D.C. Cir. Mar. 4, 2013); Olszyk v. Thorne, No. 3:20-CV-445 (TJM/ML), 2020 WL 5633791 (N.D.N.Y. Sept. 21, 2020); Valder v. City of Grand Forks, 217 F.R.D. 491 (D.N.D. 2003).

169. See *supra* note 165 and accompanying text.

170. See *supra* note 167.

171. See *Valder*, 217 F.R.D. 491 (2003) (denying Valder's claim that a shelter discriminated against him by denying him because of his service animal on the basis that Valder named the city, and not the individual shelter, as the Defendant).

172. For examples in which defendants have argued proposed accommodations would pose an undue burden or require a fundamental alteration, see *Rodriguez v. City of N.Y.*, 197 F.3d 611 (2d Cir. 1999); *Townsend v. Quasim*, 328 F.3d 511 (9th Cir. 2003); *Reed v. City of Emeryville*, 568 F. Supp. 3d 1029 (N.D. Cal. 2021).

ADA and FHA claims if an accommodation poses an undue burden to shelters or would require them to fundamentally alter their programming.¹⁷³

Although courts and government agencies have made it clear that both the FHA and ADA require intensive fact-specific inquiries before a person's reasonable accommodation claim can be rejected on the grounds that the accommodation poses an undue burden or requires a fundamental alteration, courts have generally been deferential to service providers' arguments.¹⁷⁴ Courts have been receptive to arguments that shelters may have to cease their operations if forced to make expensive changes to their facilities or programming in response to FHA and ADA claims.¹⁷⁵ In this way, shelters put judges in the position of having to choose between excluding *some* residents (people with disabilities), or excluding *all* residents by forcing the shelter to shut down.

Consequently, courts have interpreted the undue burden/fundamental alteration exception broadly. For example, at least one court has found an undue burden existed simply because a shelter was asked to provide services or programming that it did not currently provide.¹⁷⁶ Another case suggested that a shelter would be fundamentally altered if it granted an accommodation request to provide a single-bed room.¹⁷⁷ Likewise, a court found that a request by persons with disabilities for a shelter to extend their maximum stay and make certain accommodations for their medical needs would fundamentally alter the shelter by turning it into a long-term housing provider.¹⁷⁸

These examples demonstrate that shelters have utilized the undue burden/fundamental alteration exemption to avoid being held liable under the FHA and ADA. Still, this tactic does not fully explain the extent of the ongoing discrimination disabled people experience in the shelter system even after the passage of the FHA and ADA for two reasons. First, the undue burden/fundamental alteration exemption only applies to cases in which a plaintiff has claimed a shelter discriminated against them by denying a

173. 42 U.S.C. § 12182 (b)(2)(A); 42 U.S.C. § 3604(f)(3)(A)-(B). *See Easley by Easley v. Snider*, 36 F.3d 297 (3d Cir. 1994) (denying an ADA claim because the requested accommodation would require a fundamental alteration of services).

174. For examples of cases in which courts have deferred to claims that findings in favor of plaintiffs could open service providers up to damning financial liability, see *McGee*, 2021 WL 3602157; *Thomas v. The Salvation Army S. Territory*, 841 F.3d 632, 641 (4th Cir. 2016).

175. *Thomas*, 841 F.3d at 640.

176. *Rodriguez*, 197 F.3d at 618-619.

177. *Reed*, 568 F. Supp. 3d at 1029.

178. *Rose v. Rhorer*, No. 13-cv-03502-WHO, 2014 WL 1881623, at *4 (N.D. Cal. May 9, 2014).

reasonable accommodation.¹⁷⁹ If this exemption were the primary means shelters were using to get around the protections in the FHA and ADA, one would not expect to see frequent instances of shelters discriminating in other ways, such as using eligibility criteria that tends to screen out people with disabilities.¹⁸⁰ Second, while courts are generally deferential to shelters' worries about financial burdens, some proposed accommodations, such as access to the building and accessible bathrooms, have been deemed per se reasonable, showing that the undue burden/fundamental alteration exemption has limits.¹⁸¹

Furthermore, shelters have defeated FHA and ADA claims on numerous occasions by convincing courts that plaintiffs have not proven they fall within a class covered by the FHA or ADA.¹⁸² Under the FHA and ADA, "disability" is defined as any "physical or mental impairment that substantially limits one or more major life activities,"¹⁸³ "a record of such an impairment,"¹⁸⁴ or "being regarded as having such impairment."¹⁸⁵ While this definition does not require that individuals have documentation of their disability or mental illness, a number of courts have cited the plaintiff's lack of documentation of their disability or failure to allege that their disability is one covered by the ADA or FHA as grounds for dismissal.¹⁸⁶ This is especially problematic as houseless persons face additional barriers in accessing medical care and less likely to have medical documentation of their disabilities or medical conditions.¹⁸⁷

Finally, some shelters have avoided liability under the FHA by convincing courts to accept an interpretation of the Act which does not view a shelter as a "dwelling," protecting shelters from the FHA's regulations.¹⁸⁸

179. 42 U.S.C. § 12182 (b)(2)(A); 42 U.S.C. § 3604(f)(3)(A)-(B).

180. See *supra* Part I.

181. U.S. DEPT. OF JUST., *supra* note 144.

182. See *Thomas v. The Salvation Army S. Territory*, 841 F.3d 632 (4th Cir. 2016); *West v. City and Cnty. Of S.F.*, No. 21-cv-02370-EMC, 2022 WL 1556415 (N.D. Cal. May 17, 2022); *Ortega*, 2020 WL 6872438; *Stowell*, 2017 WL 1380537; *Lewis*, 2009 WL 10708266; *Olszyk*, 2020 WL 5634328 (all denying plaintiffs' claims on basis that they did not provide sufficient proof that they had a disability covered by the FHA or ADA).

183. 42 U.S.C. § 12102(1)(A).

184. 42 U.S.C. § 12102(1)(B).

185. 42 U.S.C. § 12102(1)(C).

186. See *supra* note 168 for examples of cases that illustrate this phenomenon.

187. Alexandria Lee, *Disparities in Health Care for the Homeless*, LOMA LINDA UNIV.: INST. FOR HEALTH POL'Y AND LEADERSHIP, (Jan. 22, 2021), <https://ihpl.llu.edu/blog/disparities-health-care-homeless> [<https://perma.cc/3KZX-624D>].

188. *Smith v. The Salvation Army*, No. 12-114-J, 2015 WL 5008261, at *4-7 (W.D. Pa. Aug. 20, 2015); *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 717 F. Supp. 2d 1101, 1109 (D. Idaho 2010).

Many have argued that to prevent discrimination in shelters, courts must make it clear that shelters fall within the reach of the FHA.¹⁸⁹ However, if the failure of courts to universally apply the FHA to shelters were the reason for continued discrimination against disabled people in shelters, one would expect to see much less discrimination against people with disabilities in jurisdictions where shelters are covered by the FHA. But there is no evidence to suggest this is the case. Additionally, even if it were true that jurisdictions whose courts did not apply the FHA to shelters experienced more discrimination, it would be hard to explain why the ADA had not prohibited this discrimination given that the two acts contain nearly the same substantial protections.

Overall, the fact that the FHA and ADA clearly prohibit much of the discriminatory actions carried out by shelters and that no legal theory sufficiently explains this failure suggests that the pervasiveness of discrimination against disabled people is not due to a shortcoming in the existing laws themselves. This failure is likely caused by the underenforcement of these laws due to the inaccessibility of the civil legal system. Thus, any solution to disability discrimination by shelters must take these issues into account. Part IV of this Note will explore the possibility of utilizing the Affirmatively Furthering Fair Housing (AFFH) mandate as a tool to counter discrimination by shelters. Part IV will discuss what the AFFH mandate is and how it could be used to counter discrimination by shelters. Importantly, Part IV will explain how this solution would avoid the problems faced by the ADA and FHA. Still, the AFFH comes with its own weaknesses. Part IV will conclude with a discussion of these shortcomings and how they might be addressed in order to maximize the mandate's effectiveness.

PART IV: THE AFFIRMATIVELY FURTHERING FAIR HOUSING MANDATE AS A COUNTER TO DISCRIMINATION BY SHELTERS

Given that the inability of the Americans with Disabilities Act (ADA) and Fair Housing Act (FHA) to stop disability discrimination by shelters may be attributable to the inaccessibility of the civil legal system, any legal solution that purports to end this discrimination must not depend on unhoused people bringing successful claims. While some have suggested we quell discrimination by clarifying the FHA's applicability to shelters,¹⁹⁰ this is unlikely to succeed. Because people experiencing houselessness face such significant barriers in both bringing and having their claims recognized in

189. See Greg C. Cheyne, *Facially Discriminatory Housing Policies in Homeless Shelters and the Fair Housing Act*, 2009 U. CHI. LEGAL F. 459 (arguing that making the FHA applicable to all shelters could be a solution to policies which discriminate on the basis of gender).

190. *Id.*

court, solutions which rely on this population bringing litigation are unlikely to have noticeable practical effect. This is especially demonstrated by the numerous instances unhoused people have reported having been discriminated against by shelters in manners which clearly violates the FHA or ADA but have been unable to obtain relief in court.¹⁹¹ Part IV will delineate how the Affirmatively Furthering Fair Housing (AFFH) mandate may be a solution to discrimination in the shelter system that avoids these underenforcement issues.

A) What is the AFFH Mandate?

The AFFH is a U.S. Department of Housing and Urban Development (HUD) mandate that requires housing providers receiving federal funds to take action to affirmatively further fair housing by “[addressing] significant disparities in housing needs and in access to opportunity . . . and fostering and maintaining compliance with civil rights and fair housing laws.”¹⁹² Pursuant to these obligations, the AFFH requires housing providers to submit certifications to HUD¹⁹³ that they are taking meaningful actions to affirmatively further fair housing before they can be approved to receive funding.¹⁹⁴ These certifications are known as “Equity Plans,” and require that housing providers evaluate existing housing inequities in their programs and lay out plans to address these inequities, although their plans are not

191. *Valder v. City of Grand Forks*, 217 F.R.D. 491, 493 (D.N.D. 2003) (denying a claim because the plaintiff brought suit against the wrong Defendant); *Stowell v. Open Door Mission*, No. 8:17CV75, 2017 WL 1380537 (D. Neb. Apr. 17, 2017) (dismissing claim by plaintiff whose requested accommodations were denied and was threatened when she continued to request them because she did not submit enough evidence to show her disability was covered by the FHA or ADA); *Lewis v. Joy Junction Homeless Shelter*, No. 09-269 LFG/WDS, 2009 WL 10708266 (D.N.M. Apr. 1, 2009) (dismissing plaintiff’s claim that a shelter discriminated against her by denying her due to her service dog on the basis that she did not prove the dog was qualified to be a service dog).

192. The AFFH specifies that these actions must be “significant actions that are designed and can be reasonably expected to achieve a material positive change that affirmatively furthers fair housing by, for example, increasing fair housing choice or decreasing disparities in access to opportunity.” 24 C.F.R. § 5.151 (2023).

193. Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516 (proposed Feb. 9, 2023) (to be codified at 24 C.F.R. pts. 5, 91, 92, 93, 570, 574, 576, 903, and 983).

194. These requirements cover recipients of the Community Development Block Grant (CDBG), Emergency Solutions Grant (ESG), HOME Investment Partnerships Program (HOME), and Housing Opportunities for Persons with AIDS (HOPWA) grants. The rule covers both recipients who receive funds directly from HUD and those who receive funds from state and local governments who have themselves received the funds from HUD to disperse. 24 C.F.R. § 5.152(d)(2) (2023). Additionally, “[t]he duty to affirmatively further fair housing extends to all of a program participant’s activities and programs relating to housing and urban development.” 24 C.F.R. § 5.151 (2023).

required to take any specific form.¹⁹⁵ HUD provides optional technical assistance to help providers complete these evaluations and construct fair housing plans.¹⁹⁶ If housing providers fail to meet their obligations under the AFFH, there are two means by which the mandate can be enforced: HUD is required to withhold funding from noncompliant providers and providers may be held liable for damages as well.¹⁹⁷

The AFFH is rooted in the FHA. The FHA imposes a duty on executive and administrative agencies to conduct their activities, including financial and housing programs, in ways that “affirmatively to further”¹⁹⁸ the Act’s purpose, which is “to provide, within constitutional limitations, for fair housing throughout the United States.”¹⁹⁹ In *N.A.A.C.P. v. Secretary of Housing and Urban Development*, the First Circuit articulated that the duty to affirmatively further fair housing is meant to require that “HUD do more than simply not discriminate itself . . . [but] use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”²⁰⁰ While the FHA places this duty on HUD, the agency extends it to all entities which receive HUD funding and assistance.²⁰¹ This includes subgrantees who have received HUD funding through distribution by state and local governments.²⁰²

This FHA requirement did not receive much attention until 1994 when President Clinton signed Executive Order 12,892, which clearly laid out the obligation of executive agencies to affirm fair housing through their programs and activities.²⁰³ Even then, for many years the duty to

195. Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8534 (proposed Feb. 9, 2023) (to be codified at 24 C.F.R. pts. 5, 91, 92, 93, 570, 574, 576, 903, and 983) (“... program participants have the flexibility to conduct their Equity Plan in a manner and format that best suits their local needs, so long as the required content is submitted to HUD.”).

196. 24 C.F.R. § 5.152(b) (2023).

197. Austin W. King, *Affirmatively Further: Reviving the Fair Housing Act’s Integrationist Purpose*, 88 N.Y.U. L. REV. 2182, 2190 (2013) (“If HUD knows that a grantee has violated the requirement, it is required under 42 U.S.C. § 3805(d)(5) to seek compliance and even compel it through withdrawal of funds.”); *United States v. Inc. Vill. of Island Park*, 888 F. Supp. 419, 442–43 (E.D.N.Y. 1995) (ordering a housing provider that received the CDBG grant and failed to meet its AFFH obligations to return its CDBG funds for multiple years).

198. 42 U.S.C. § 3608(d).

199. 42 U.S.C. § 3601.

200. *NAACP v. Sec’y. of Hous. and Urb. Dev.*, 817 F.2d 149, 155 (1st Cir. 1987).

201. Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30779 (proposed July 31, 2021) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903).

202. King, *supra* note 197; 24 C.F.R. § 570.496(b)(1)(i) (2023).

203. Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 17, 1994); King, *supra* note 196.

affirmatively further fair housing went underenforced and was largely seen by housing providers as “irrelevant.”²⁰⁴ This is because the reporting requirements under the 1994 rule were weak and nonspecific, essentially allowing housing providers to certify their compliance without any close evaluation or documentation of the actual inequities in their jurisdictions or the formulation of concrete plans to address these problems.²⁰⁵ To make matters worse, HUD did little to crack down on this behavior.²⁰⁶

However, under the Obama Administration in 2015, HUD passed a rule which standardized the reporting and planning requirements of the AFFH for recipients of agency funds, aiming to promote compliance.²⁰⁷ The implementation of this mandate caused housing providers to take the duty to affirmatively further fair housing more seriously.²⁰⁸ Unfortunately, the impact of the rule was stymied when the Trump Administration suspended the 2015 AFFH mandate in 2018, before finally repealing it in 2020.²⁰⁹ However, the mandate was restored when the Biden Administration issued its Interim Final Rule (IFR) in 2021, reinstating the key provisions of the 2015 rule before more recently proposing a final AFFH rule in February of 2023.²¹⁰

204. Justin Steil & Nicholas Kelly, *The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance*, 29 HOUS. POL'Y DEBATE 1, 87 (2018); Jonathan J. Sheffield, *At Forty-Five Years Old the Obligation to Affirmatively Further Fair Housing Gets a Face-Lift, but Will it Integrate America's Cities?*, 25 U. FLA. J.L. & PUB. POL'Y 51, 52-3 (2014) (“... the 1995 rule has failed, in large part, to influence city and regional planning. This failure has allowed local governments and developers to undermine the AFFH mandate, with only occasional challenges brought by HUD or individual private lawsuits.”).

205. Steil & Kelly, *supra* note 204, at 87 (citing the results of a Government Accountability Office report which found that under the 1995 Rule, “nearly one out of every three [AFFH submissions] was out of date. The report also found that the vast majority of [AFFH submissions] had no time frame for implementing their recommendations and were not signed by the local executive officials responsible for implementation.”).

206. King, *supra* note 197, at 2191 (“Advocates and a report from the Government Accountability Office have lambasted HUD oversight of the AFFH requirement as weak... despite this longstanding lack of rigor in localities’ fair housing efforts, HUD traditionally brought very few enforcement actions.”).

207. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42271 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903).

208. Steil & Kelly, *supra* note 204, at 87.

209. *Trump Administration Eliminates Affirmatively Furthering Fair Housing Rule, NLIHC and Other Advocates Condemn Action, Rhetoric*, NAT’L LOW INCOME HOUS. COAL. (Jul. 27, 2020), <https://nlihc.org/resource/trump-administration-eliminates-affirmatively-furthering-fair-housing-rule-nlihc-and-other> [<https://perma.cc/FUJ8-VHH8>].

210. Press Release, *HUD Restores Affirmatively Furthering Fair Housing Requirement*, U.S. DEPT. OF HOUS. AND URB. DEV., (June 10, 2021), <https://archives.hud.gov/news/2021/pr21-098.cfm> [<https://perma.cc/2237-9MQK>]. Whereas the 2015 rule required that housing providers submit specific forms of fair

If properly enforced, the AFFH has the potential to be a powerful mandate. It not only requires that housing providers be aware of the inaccessibility of their programs for protected groups, but also that they take active steps to address these inequities and uphold compliance with the FHA in order to keep their funding.²¹¹ Because “every state and virtually every urban and suburban county and major municipality . . . accepts HUD funds,” the AFFH’s reach is “extraordinary.”²¹² This is particularly true as state and local governments that distribute HUD funds to housing providers can be held liable for their sub-grantees’ noncompliance.²¹³ Because the denial of HUD funds would “represent a significant financial burden for localities,” the AFFH mandate is “potentially an effective deterrent.”²¹⁴

Of course, as demonstrated by the failure of the 1994 AFFH regulations, the power of the mandate in part relies on HUD’s willingness to enforce compliance. Without HUD enforcement, the mandate would depend entirely on housing providers to develop their own compliance plans and hold themselves accountable, a strategy that has proven unsuccessful in the past.²¹⁵ Nevertheless, for the short period of time that the more recent, stronger AFFH mandate has been in place, it has resulted in positive outcomes. For one, the AFFH’s requirement that housing providers evaluate the existing disparities in their programs resulted in the collection of data which highlighted and spread awareness of inequities.²¹⁶ Additionally, during the few years it was in effect before being suspended in 2018, the 2015 regulations generated concrete commitments and planning efforts to address fair housing issues by those jurisdictions that underwent AFFH

housing plans and evaluations, the IFR did not require any specific type of fair housing planning, so long as providers complete some type of planning and submit these plans along with their certifications to HUD. The more recently proposed final rule does not require plans to take a specific form, it does require that plans address certain topics or questions. Both the IFR and the new proposed rule also provide that HUD will offer technical assistance and support to housing providers in completing their fair housing plans and evaluations. Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30779 (proposed July 31, 2021) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903); Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516 (proposed Feb. 9, 2023) (to be codified at 24 C.F.R. pts. 5, 91, 92, 93, 570, 574, 576, 903, and 983).

211. 24 C.F.R. § 5.151 (2023).

212. King, *supra* note 197, at 2190.

213. 24 C.F.R. §570.496(b)(1)(i) (2023)

214. Justin Steil & Nicholas Kelly, *Survival of the Fairest: Examining HUD Reviews of Assessments of Fair Housing*, 29 HOUS. POL’Y DEBATE 736, 740 (2019).

215. Steil & Kelly, *supra* note 204, at 86.

216. 1 JOHN RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL § 2:17, Westlaw (database updated December 2022).

scrutiny.²¹⁷ This suggests that the recent restoration of the AFFH mandate could offer significant potential for the future of fair housing.

B) How the AFFH Could be Used to End Discrimination by Shelters

1) The AFFH's Applicability to Shelters

The AFFH may provide a mechanism to crack down on discrimination by shelters against people with disabilities. As a preliminary matter, most shelters would fall under the reach of the AFFH because most shelters receive HUD funding, either directly or from state or local authorities who have received those funds to distribute.²¹⁸ Specifically, HUD's Emergency Solutions Grant (ESG) and Continuum of Care (CoC) programs constitute key components of funding for temporary shelters,²¹⁹ with the ESG being dedicated exclusively to providing funds for shelters.²²⁰ Of course, there are some shelters that operate solely off of private funds.²²¹ As such, these shelters would not be covered by the AFFH. However, given that the "vast majority" of shelters do receive government funding,²²² very few would be exempted from the AFFH's obligations. Even those shelters which are privately funded may fall under the AFFH's reach indirectly if they are located in jurisdictions which themselves receive government funding and are responsible for eliminating inequities in access to housing in their localities.²²³

This means that shelters, or the local or state governments distributing funds to shelters, are obligated to evaluate how their programs are excluding disabled individuals and formulate concrete steps to make shelters more accessible. If they fail to meet these obligations, they can be

217. *Id.*

218. Igor Popov, *supra* note 104.

219. *Federal Funding for Homelessness Programs*, NAT'L. ALL. TO END HOMELESSNESS (2023), <https://endhomelessness.org/ending-homelessness/policy/federal-funding-homelessness-programs/> [<https://perma.cc/W22G-GY6R>].

220. U.S. DEPT. OF HOUS. AND URB. DEV., *Emergency Solutions Grants Program*, HUD (June 15, 2023), https://www.hud.gov/program_offices/comm_planning/esg. [<https://perma.cc/M85J-SMST>]. Recipients of the ESG are explicitly stated as one of the entities covered by the AFFH's regulations. 24 C.F.R. § 5.152(d)(2).

221. For example, the shelter in *Defiore* operated purely off of private funding. *Defiore v. City Rescue Mission of New Castle*, 995 F. Supp. 2d 413 (W.D. Pa. 2013).

222. Popov, *supra* note 104.

223. Interim Final Rule, 86 Fed. Reg. 30779 (proposed July 31, 2021) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903) (requiring localities which accept federal funds to address housing inequities in their jurisdiction). *See also* King, *supra* note 196, at 2190.

barred from receiving HUD funds.²²⁴ This represents a potentially powerful mechanism for inducing compliance, given that government funds constitute the primary source of income for most shelters.²²⁵ In addition, failure to meet obligations under the AFFH opens up housing providers to liability for damages. Examining HUD's enforcement of the AFFH through the denial of funds as well as litigation under the AFFH illustrates how this mandate may provide a solution to disability discrimination by shelters.

a) Enforcing the AFFH through HUD denial of government funds

While the AFFH can be enforced either through the denial of government funds or litigation, the former represents the predominant means by which the mandate has been effectuated.²²⁶ Although the AFFH mandate has not been in place for enough time to fully test its effectiveness, preliminary data shows promising results. After analyzing HUD's examination of AFFH certifications and fair housing plans between 2015 and 2017, experts found that HUD "engaged in intensive and thorough enforcement" which prompted jurisdictions and housing providers to better analyze existing inequities and develop detailed, realistic plans to redress them.²²⁷

While the 2015 HUD rule was in effect, the agency refused to accept 35 percent of the fair housing plans submitted to it.²²⁸ Each of these applicants were given detailed feedback on why their fair housing plans were denied and guidance on how these plans could be amended to meet the requirements of the AFFH.²²⁹ HUD also offered technical assistance to these applicants to help them improve their analyses of impediments to fair housing in their jurisdiction and fortify their plans to address these impediments.²³⁰ Frequent reasons applications were rejected by HUD included the failure to set out concrete, measurable goals that were reasonably likely to address housing inequities in the given jurisdiction and a failure to properly analyze the factors contributing to these inequities in the first place.²³¹ With HUD's feedback and guidance, a number of applicants whose fair housing plans were denied under the AFFH mandate amended

224. See *supra* text accompanying note 197.

225. Culhane & An, *supra* note 71, at 9–10 (finding that on average, government grants constitute 38 percent of the typical shelter's income).

226. Steil & Kelly, *supra* note 214, at 740.

227. *Id.* at 749.

228. *Id.* at 742.

229. *Id.* at 744–47.

230. *Id.* at 743.

231. *Id.* at 744–45.

their plans and successfully reapplied for funding.²³² This data illustrates how HUD's enforcement of the AFFH mandate helped compel housing providers to become aware of and address the housing inequities in their programs.

On several occasions, HUD used its enforcement power under the AFFH to counter discrimination and barriers to accessing housing specifically in the context of disability and houselessness. For example, HUD denied a fair housing plan submitted by Lake County, Ohio in part because the locality failed to analyze "the extent to which persons with different disabilities apply for and are able to access publicly supported housing" and other places of public accommodation.²³³ In order to obtain HUD funding, the County responded to HUD's denial by conducting this missing analysis²³⁴ and revising its fair housing plans to include goals which were likely to further disability rights.²³⁵ Similarly, after HUD passed its 2015 mandate, Wilmington, North Carolina submitted fair housing plans which included concrete commitments to expanding housing access for people with disabilities—these were in contrast to their previous AFFH certifications, which failed to seriously address issues of disability rights.²³⁶ Lastly, Philadelphia's AFFH plans submitted after the 2015 rule included goals for both addressing houselessness and housing accessibility for disabled people, and discussed the intersection between those issues.²³⁷

These examples illustrate how HUD's enforcement of the AFFH through threatening to deny funds has compelled housing providers and jurisdictions to make serious commitments to redressing housing disparities

232. *Id.* at 746–47.

233. *Id.* at 745.

234. It is important to note that the 2015 Rule explicitly required housing providers to analyze and address issues of disability and housing accessibility in their fair housing plans. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42271, 42283. This is because the 2015 Rule required applicants to go through a more standardized process of identifying housing inequities and drafting goals to address them (applicants all had to create an Analysis of Fair Housing document). *Id.* at 42275. Under the IFR implemented by the Biden administration, housing providers are not required to complete their fair housing analyses in any specific manner. Interim Final Rule, 86 Fed. Reg. 30779 (proposed July 31, 2021) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903). This means that there are no explicit requirements that applicants discuss housing accessibility issues as they relate to people with disabilities in their AFFH submissions. Of course, this requirement would be implied by the IFR's restoration of the mandate that providers identify all existing inequities and make plans to address them. *Id.*

235. Steil & Kelly, *supra* note 204, at 87.

236. David Rammner, *After the Superstorm*, 26 POVERTY & RACE J. 7, 13 (2017).

237. CITY OF PHILA. & PHILA. HOUS. AUTH., ASSESSMENT OF FAIR HOUSING 271 (2016), http://www.pha.phila.gov/media/170834/assessment_of_fair_housing_2016-web.pdf [<https://perma.cc/3GSX-ZLUF>].

in their programs. HUD's enforcement of the AFFH has even induced improvements in the contexts of disability and houselessness in several jurisdictions. HUD enforcement of the AFFH through rejecting applications for funds or conditioning the acceptance of applications on certain actions being taken is not the only way the mandate has been enforced. In addition to authorizing HUD enforcement, the AFFH also opens noncompliant housing providers and jurisdictions up to civil liability. Still, HUD enforcement through conditional funding may actually be a more desirable mechanism for implementing the AFFH, as it avoids costly lawsuits and can lead to housing providers and jurisdictions complying voluntarily, rather than having to pay huge damages that could endanger their ability to offer housing services.

b) Enforcing the AFFH Against Shelters Through Litigation

Although a denial of funds by HUD represents the primary means by which the AFFH has been enforced, compliance with the mandate has also been compelled through legal action.²³⁸ In several cases, the government has successfully convinced courts that housing providers can be held liable for breaching their AFFH obligations under the False Claims Act.²³⁹ The False Claims Act (FCA) prohibits knowingly submitting false statements or records to the government²⁴⁰ and allows for the recovery of monetary damages against those who do.²⁴¹ Suits under the FCA can be initiated by both the federal government and private individuals.²⁴²

In *U.S. ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester County*, the federal government brought an FCA suit against a county government that had certified its compliance with the AFFH in order to receive HUD grants even though it knew it had not taken action to address the barriers to fair housing in its jurisdiction.²⁴³ The government argued that its certifications of compliance constituted false claims, making the county

238. Steil & Kelly, *supra* note 204, at 88.

239. *U.S. v. Incorporated Vill. of Island Park*, 888 F. Supp. 419 (E.D.N.Y. 1995) (finding a housing provider liable for AFFH violations under the FCA); *U.S. ex rel. Anti-Discrim. Ctr. of Metro N.Y. v. Westchester Cnty., N.Y.*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (refusing to dismiss a claim against Westchester County for false AFFH certifications under the FCA). *Westchester* ultimately ended in settlement. Settlement at 1, *Westchester*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (No. 06 Civ 2860).

240. 31 U.S.C. § 3729(a)(1)(A)-(B).

241. 31 U.S.C. § 3729(a)(1) (providing that those held liable under the FCA must pay a civil penalty of "not less than \$5,000 and not more than \$10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 . . . plus 3 times the amount of damages which the Government sustains because of the act of that person").

242. 31 U.S.C. § 3730(a)-(b).

243. 668 F. Supp. 2d 548 (2009).

liable under the FCA.²⁴⁴ The fair housing inequities which the county had failed to address included significant racial disparities in access to and ownership of housing, a lack of housing resources for physically disabled people, and a lack of resources to assist the county's unhoused population.²⁴⁵ After the District Court denied the county's motion to dismiss, the case ended in a settlement which required the county to invest \$51.6 million into expanding the jurisdiction's available affordable housing.²⁴⁶

The government brought a similar FCA claim against a municipality in *United States v. Incorporated Village of Island Park*.²⁴⁷ In that case, the government won damages, including the repayment of HUD grants, from a multi-year period after the municipality submitted false certifications that it had complied with its AFFH obligations.²⁴⁸ While the municipality certified to HUD that it was addressing the inequities in its housing programs, it was actually using HUD grants to fund racially discriminatory housing developments.²⁴⁹ Similarly, the federal government filed suit against the City of Los Angeles in *United States ex rel. Ling v. City of Los Angeles* after the city submitted certifications of its compliance with the AFFH and federal accessibility laws while knowingly using HUD grants to fund housing projects that discriminated against people with disabilities.²⁵⁰

Lastly, in *United States ex rel. Freedom Unlimited, Inc. v. City of Pittsburgh*, the Third Circuit rejected a city's motion to dismiss an FCA suit brought by the government after the city falsely certified that it was abiding by the AFFH when it had not even undertaken a formal analysis of the impediments to fair housing in its jurisdiction or drafted concrete plans to address them.²⁵¹ These cases illustrate how the FCA has provided a mechanism for the government to hold housing providers liable for damages when they have not met their obligations under the AFFH.²⁵² Because the FCA

244. *Id.* at 550.

245. *Id.* at 553, 558.

246. The settlement order requires the county to invest \$51.6 million in affordable housing over the next seven years and to undertake and fund marketing, public education, and other outreach efforts to promote fair and affordable housing. Sheffield, *supra* note 204, at 66.

247. 888 F. Supp. 419 (E.D.N.Y. 1995).

248. *U.S. v. Inc. Vill.* 888 F. Supp. at 443.

249. *U.S. v. Inc. Vill.* 888 F. Supp. at 443.

250. *United States ex rel. Ling v. City of Los Angeles*, 389 F. Supp. 3d 744, 750 (C.D. Cal. 2019). In *Ling*, compliance with federal accessibility laws was an express condition of the grant the city received. *Id.* at 754.

251. 728 F. App'x 101, 105 (3d Cir. 2018).

252. Not all FCA suits against housing providers under the AFFH have been successful. *See, e.g., United States ex rel. Hanna v. City of Chicago*, 834 F.3d 775, 779–80 (7th Cir. 2016) (dismissing an FCA claim based on false AFFH certifications because the

authorizes damages awards, it could be seen as providing a stronger enforcement mechanism than the AFFH itself, as the AFFH only authorizes HUD to deny future funds to housing providers.²⁵³

However, the FCA is not the only type of claim that has been brought against housing providers over noncompliance with the AFFH: plaintiffs have brought several Section 1983 claims against housing providers in this context as well.²⁵⁴ In *Langlois v. Abington Housing Authority* and *Wallace v. Chicago Housing Authority*, courts allowed plaintiffs to sue public housing administrators for violating their civil rights by failing to meet their obligations to affirmatively further fair housing.²⁵⁵ In *Langlois*, a court found that plaintiffs stated a valid Section 1983 claim against public housing authorities after they enacted policies which favored white housing applicants and discriminated against applicants from marginalized racial groups in violation of the AFFH.²⁵⁶ The *Wallace* court similarly concluded that plaintiffs could hold a public housing officer liable after he violated the AFFH by administering relocation services in a way that furthered a segregated housing pattern.²⁵⁷

Because utilizing Section 1983 to enforce the AFFH relies on individual plaintiffs bringing lawsuits, this provision does not provide as advantageous of an enforcement mechanism as does the FCA, as it would likely lead to the same underenforcement problems identified in the ADA and FHA context.²⁵⁸ Regardless, claims brought under either Section 1983 or the FCA for noncompliance with the AFFH show that civil legal action provides another mechanism by which the mandate can be enforced. Still, this may not be as attractive as HUD enforcement through a denial or conditioning of

plaintiffs did not plead with particularity which regulatory provisions the city violated or how the city had violated them).

253. 31 U.S.C.A. § 3729(a)(1); *Cf. King, supra* note 197, at 2190 (explaining that the AFFH is enforced through HUD's denial of government funds).

254. 42 U.S.C.A. § 1983 is a federal civil rights statute that creates a private right of action in certain cases when an individual's civil rights have been violated. In the fair housing context, courts have found that Section 1983 creates a right for individuals to sue public housing authorities when these authorities have violated their civil rights. Because Section 1983 allows plaintiffs a private right of action, they can claim monetary damages even in cases where the statutes they claim have been violated would not ordinarily give plaintiffs damages. The act also allows plaintiffs to hold officials liable in their individual capacities; *see also* *Churches United for Fair Hous., Inc. v. De Blasio*, 119 N.Y.S. 3d 467 (N.Y. App. Div. 2020) (holding that the AFFH does not normally recognize a private right of action).

255. 234 F. Supp. 2d 33 (D. Mass. 2002); *Wallace v. Chi. Hous. Auth.*, 298 F. Supp. 2d 710 (N.D. Ill. 2003).

256. *Langlois*, 234 F. Supp. 2d at 37.

257. *Wallace*, 298 F. Supp. 2d at 714–15.

258. *See infra* Appendix I.

government funds. Litigation is expensive, and holding just one housing provider or jurisdiction liable may not result in broader change.²⁵⁹ HUD's denial of funding to one jurisdiction may likewise be insufficient to spur change in another. But whereas HUD would be unlikely to have the resources to bring litigation against all those violating the AFFH, it could utilize the denial of funds to enforce the AFFH more broadly. This enforcement mechanism also provides a means to achieve voluntary compliance by housing providers, as illustrated by HUD's AFFH funding decisions thus far.

Overall, both civil legal action and the denial of government funds provide ways to compel housing providers to address the inequities in their programs that do not rely on individual plaintiffs to bring claims.²⁶⁰ Because of this, the AFFH may be able to avoid the limitations faced by the FHA and ADA. Whereas individual enforcement has failed to prevent housing discrimination,²⁶¹ the AFFH may prove more successful since it is "centered not just on individual, antidiscrimination enforcement, but on harnessing a broad range of federal administrative tools including conditioned spending and formal and informal regulation to engage states and localities to promote fair housing."²⁶²

In fact, in other contexts where statutory schemes have failed to hedge discrimination, such as with racial disparities in incarceration rates for juveniles, regulations requiring entities to take affirmative actions to become aware of disparities and correct them have proved more

259. Robert G. Schwemm, *Why Do Landlords Still Discriminate (and What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 509 (2007) (explaining that liability for housing providers under the FHA has failed to end racial and national origin discrimination in housing).

260. Of course, individual plaintiffs would still have the option of bringing claims. Not only could they bring claims under the ADA or FHA, but they could also bring claims under Section 1983 or the FCA. In some cases, the Government has joined FCA suits brought by individual plaintiffs in the context of AFFH violations. See *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009). Relatedly, HUD's AFFH regulations have expanded opportunities for individual members of the public to have a say on fair housing issues through the AFFH certification process. Under the 2015 Rule, applicants for HUD funding had to give members of the public sufficient opportunity to provide feedback on fair housing issues and their plans to address existing inequities. *Affirmatively Furthering Fair Housing*, 88 Fed. Reg. 8516-01 at 42, 273 (proposed Feb. 9, 2023) (to be codified at 24 C.F.R. pts. 5, 91-93, 570, 574, 576, 903, 983). HUD took this requirement seriously: in at least one case, the agency even denied funds to a jurisdiction on the basis that they failed to address or acknowledge the housing issues that members of the public had brought up to them at their public hearing on their AFFH plans. Steil & Kelly, *supra* note 214, at 745.

261. Johnson, *supra* note 148, at 1194 (contending that "individualized enforcement is too limited a mechanism to achieve fair housing").

262. *Id.* at 1196.

promising.²⁶³ These kinds of regulations provide a way to “interrupt . . . the ‘[r]outine, [o]rdinary [g]eneration of [i]nequality’ by institutions” that creates discriminatory outcomes such as the lack of access to shelter for people with disabilities.²⁶⁴ For these reasons, the AFFH may provide a much more effective tool to prevent disability discrimination by shelters than both the ADA and FHA.

C) Potential Challenges to Using the AFFH to Stop Discrimination by Shelters

Nevertheless, the AFFH has its own shortcomings. Two potential challenges may interfere with the AFFH’s ability to stop discrimination against disabled people in the shelter system. First, while the AFFH does not depend on individual plaintiffs for enforcement, its effectiveness would depend on the government’s willingness to take action against noncompliant housing providers. Second, given that many shelters have responded to ADA and FHA suits by claiming they do not have the resources to make accommodations or alterations, it must be considered whether denying shelters HUD funds or demanding damages will actually lead shelters to shut down or limit their provision of services.

1) The potential for AFFH underenforcement

To start, the AFFH will not provide an effective solution to discrimination by shelters if the government does not take action to enforce its mandate. One of the primary reasons why the AFFH mandate was ineffective for most of its history was HUD’s failure to enforce its requirements against grant recipients.²⁶⁵ This problem was most severe prior to the 2015 rule enacted by HUD.²⁶⁶ Before 2015, HUD “rarely if ever”

263. The Disproportionate Minority Contact Standard (DMC) is a law requiring states that receive federal funding for their juvenile prison systems to take actions to racial reduce disparities in their juvenile detention populations. Act of Nov. 4, 1992, Pub. L. No. 102-586, § 2(f)(3)(A)(ii), 106 Stat. 4982, 4993–94 (codified as amended at 34 U.S.C.A. § 11133). This law has proved more successful in inducing change as compared to typical civil rights legislation. Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 411 (2007).

264. Johnson, *supra* note 263, at 416.

265. James Robert Breymaier, *The Need to Prioritize the Affirmative Furthering of Fair Housing: A Case Statement, Symposium: New Strategies in Fair Housing*, 57 CLEV. ST. L. REV. 245, 247 (2009); King, *supra* note 197, at 2191–92.

266. As of 2009, HUD had never denied funds to a housing provider for violating the AFFH. “Indeed, it [had] rarely required [a housing provider] to begin actively pursuing integration efforts rather than passively and quietly undertaking ineffective activities.” Breymaier, *supra* note 265, at 249. During a 2008 press conference, a HUD official stated

reviewed housing providers' AFFH planning documents, causing many providers and jurisdictions to see the AFFH as irrelevant.²⁶⁷ Additionally, there were no substantial requirements regarding the reporting that housing providers had to submit to HUD.²⁶⁸ Combined with HUD's inaction, this allowed housing providers to submit AFFH certifications which were not backed by any significant analysis of fair housing issues or concrete plans to address these issues.²⁶⁹

This history makes the AFFH enforcement issue particularly concerning because, while HUD's newly proposed rule restores most of its 2015 rule, it does not revive the former rule's specific reporting requirements: the proposed rule does not require that fair housing analyses or "Equity Plans" take any specific form, so long as the plans address five broad topics or questions designated by HUD.²⁷⁰ The history of the AFFH prior to 2015 suggests that if the government does not take the initiative to verify AFFH certifications and crack down on noncompliant housing providers, the AFFH mandate will be little more than words on paper.

Fortunately, there are steps that should be taken to minimize the risk of underenforcement. First, HUD should reinstate specific reporting requirements much like those in the 2015 AFFH mandate. These reporting requirements "[clarified] federal objectives and [provided] a more rigorous structure for plan compliance."²⁷¹ In this way, they helped ensure applicants thoroughly analyzed housing disparities and drafted fair housing plans that were measurable, specific, and achievable.²⁷² While it may be true that the specific requirements of the 2015 rule proved onerous for some housing

that he could only recall three times the agency had sought AFFH compliance from a housing provider. King, *supra* note 196, at 2191–92.

267. Justin Steil & Nicholas Kelly, *Snatching Defeat from the Jaws of Victory: HUD Suspends AFFH Rule that was Delivering Meaningful Civil Rights Progress*, 26 POVERTY & RACE 1, 12 (2017).

268. Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30779 at 30779 (proposed June 10, 2021) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

269. King, *supra* note 197, at 2191–92 (noting that a HUD study found that providers' analyses of fair housing "tended to be outdated, incomplete, and lacking in concrete time frames for implementation").

270. Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516-01 (proposed Feb. 9, 2023) (to be codified at 24 C.F.R. pts. 5, 91–93, 570, 574, 576, 903, 983) ("The specific required questions are codified in this section, but program participants have the flexibility to conduct their Equity Plan in a manner and format that best suits their local needs, so long as the required content is submitted to HUD.").

271. Steil & Kelly, *supra* note 204, at 85; Johnson, *supra* note 148, at 1231 ("Fair housing groups . . . are active players in the ongoing effort to strengthen HUD's AFFH rules.").

272. Steil & Kelly, *supra* note 214, at 748.

providers,²⁷³ giving providers more direction in drafting their Equity Plans could improve compliance. At a minimum, specifically requiring housing providers and jurisdictions to report certain metrics in their AFFH certifications generates important data on housing inequities²⁷⁴ that can be used to raise awareness about existing disparities and generate public pressure for change. Thus, reinstating these specific requirements could help limit the prospect of AFFH underenforcement.

Second, and relatedly, galvanizing public pressure against noncompliant housing providers could help boost AFFH enforcement. In jurisdictions where community advocates, impacted individuals, and government officials inspired community engagement around issues of housing discrimination, AFFH plans included more specific and ambitious goals.²⁷⁵ This was also true of jurisdictions that had more liberal populations overall.²⁷⁶ In New York State's Westchester County, for example, fair housing groups were essential parties in convincing HUD to bring an enforcement action against the local government.²⁷⁷ The fact that housing providers are "more likely to comply after . . . external pressure from stakeholders" suggests that community advocacy plays a key role in ensuring AFFH enforcement.²⁷⁸ This may be especially true under the new proposed rule, as it contains provisions allowing members of the public to submit complaints about AFFH compliance to HUD directly for the agency to investigate, and also requires that fair housing data and Equity Plans be made accessible to the public.²⁷⁹ These provisions may open up new opportunities for public pressure to influence the implementation of the AFFH mandate.

This provides another reason why HUD should reinstate more specific reporting requirements. Under the 2015 mandate, not only did housing providers have to include certain information in their fair housing plans, but they had to show proof that they solicited community engagement and commentary before they could obtain HUD approval.²⁸⁰ By requiring jurisdictions and housing providers to submit this documentation—such as

273. Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516-01 (proposed Feb. 9, 2023) (to be codified at 24 C.F.R. pts. 5, 91-93, 570, 574, 576, 903, 983) ("By streamlining the written analysis, HUD believes the proposed rule will reduce burden for program participants in conducting their Equity Plans.").

274. Data reported in the AFFH planning documents under the 2015 Rule was important to boosting AFFH compliance. Steil & Kelly, *supra* note 204, at 101.

275. *Id.*

276. *Id.*

277. Johnson, *supra* note 148, at 1231.

278. Steil & Kelly, *supra* note 204, at 88.

279. Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516-01 (proposed Feb. 9, 2023) (to be codified at 24 C.F.R. pts. 5, 91-93, 570, 574, 576, 903, 983).

280. Steil & Kelly, *supra* note 214, at 739.

transcripts from public hearings, for instance—HUD was able to closely scrutinize whether applicants actually gave an opportunity for the public to participate in their fair housing plans and analyses.²⁸¹ Enabling communities to participate in the AFFH process is essential to documenting community concerns about housing inequities and ensuring that housing providers are adequately reporting and addressing the disparities in their programs. For example, in one instance, HUD denied a jurisdiction's grant application because the transcript from its public hearing on its AFFH plans revealed that it had failed to address certain fair housing concerns a member of the public had raised at the hearing.²⁸²

Finally, AFFH underenforcement can be avoided by holding HUD liable for failing to cut off funding to noncompliant housing providers and jurisdictions.²⁸³ Numerous courts have recognized the validity of such claims.²⁸⁴ For example, the Eighth Circuit found HUD liable in *Clients' Council v. Pierce* after two Black women sued the agency for breaching its AFFH duties.²⁸⁵ In that case, HUD had continued to provide funds for the plaintiffs' public housing authority despite the fact that this authority was administering its programs in a way that furthered segregation and discriminated against Black residents.²⁸⁶ So, in a jurisdiction where underenforcement makes the agency vulnerable to liability, HUD has an incentive to take action to uphold the AFFH mandate.

Still, this incentive isn't perfect. For one, it relies on individual plaintiffs to bring claims. Another concern is that several of the suits finding HUD liable for failing to enforce the AFFH occurred prior to 2015.²⁸⁷ This suggests that the suits did not have a strong impact on HUD's enforcement

281. *Id.* at 745.

282. *Id.*

283. *Anderson v. City of Alpharetta*, 737 F.2d 1530, 1537 (11th Cir. 1984) (HUD's affirmative obligation under the FHA may subject it to liability "when HUD is aware of a grantee's discriminatory practices and has made no effort to force it into compliance with the Fair Housing Act by cutting off existing federal financial assistance to the agency in question.").

284. *See, e.g., NAACP v. Sec'y of HUD*, 817 F.2d 149, 161 (1st Cir. 1987); *Young v. Pierce*, 544 F. Supp. 1010, 1015 (E.D. Tex. 1982); *Thompson v. HUD*, 348 F. Supp. 2d 398, 409 (D. Md. 2005).

285. *Clients' Council v. Pierce*, 711 F.2d 1406, 1406–08 (8th Cir. 1983).

286. *Id.* The public housing authority had completely segregated their units, and the units given to Black residents were in significantly worse condition than the units given to white occupants. HUD was aware of the ongoing discrimination but did not force the PHA into compliance. So, HUD could be held liable for breaching its duty to conduct its programs "affirmatively to further" fair housing. *See also* 42 U.S.C.A. §§ 3608(d), 3601 (setting forth HUD's FHA obligations to affirmatively further fair housing).

287. *Clients' Council*, 711 F.2d 1406; *Thompson*, 348 F. Supp. 2d 398 (2005).

activities.²⁸⁸ Of course, as more data on fair housing issues is made available under the proposed rule and opportunities for public pressure expand,²⁸⁹ it may be easier to identify when HUD should have known about a grantee's AFFH noncompliance, meaning that it could become easier to bring suits holding HUD liable. However, it is unclear whether this would be enough to spur the agency into action. So, while the AFFH has the potential to fill gaps in existing legislation covering disability discrimination by shelters, the potential for underenforcement will pose a serious challenge.²⁹⁰ Nevertheless, reinstating the specific reporting requirements of the 2015 AFFH mandate, generating public pressure, and influencing HUD through litigation offer ways to limit the risk of underenforcement, although none of these alone are sufficient to guarantee effectiveness.

2) The risk that shelters will shut down or limit their operations

The second potential challenge to the AFFH's ability to curb shelter discrimination is the risk that denying government funds to shelters or holding them liable for damages will force them to shut down or limit their operations. This is especially concerning given that government funds are the primary source of income for most shelters²⁹¹ and that shelters have cited this concern as a reason for not making their programs more accessible in the past.²⁹² However, in some cases, these concerns may be overstated. While most shelters do receive their primary source of income from government funds, some shelters generate profit. A number of shelter administrators have profited off of operating shelters by keeping living conditions poor and allegedly channeling funding into companies owned by the administrators themselves, such as security, janitorial, or food companies that provide

288. Breymaier, *supra* note 265, at 249 (explaining that as of 2009 there was not much enforcement activity by HUD under the AFFH).

289. *See supra* note 279 and accompanying text.

290. *See Johnson, supra* note 148, at 1192-1193.

291. *See Culhane & An, supra* note 71, at 10 ("Government grants account for the largest share of revenue, at 38%.").

292. *See supra* note 174 and accompanying text.

services to the shelter.²⁹³ Some shelter administrators have even been caught offering themselves large compensation packages.²⁹⁴

Of course, these examples are by no means representative of all shelters,²⁹⁵ and in some cases losing government funding or owing a large amount in damages may legitimately put shelters at risk of shutting down. Fortunately, HUD's historical enforcement of the AFFH shows that this outcome can easily be avoided. Generally, when HUD has sought AFFH compliance from grantees, it has given them opportunities to make changes to their housing programs and plans before cutting off funding.²⁹⁶ For example, HUD has given applicants detailed feedback and an opportunity to revise their fair housing plans before deciding to withhold funds for AFFH noncompliance.²⁹⁷ Applicants who made the changes to their programs that HUD suggested were successful in ultimately obtaining funding.²⁹⁸ Additionally, even when the government has brought litigation against shelters, this litigation has generally ended in settlements that have mandated changes to housing policies rather than large damages claims.²⁹⁹ For example, HUD has negotiated settlements that require governmental grantees to change or enact laws and expand its availability of affordable housing.³⁰⁰

Lastly, most applicants for HUD grants who go through the AFFH process are local governments rather than individual housing providers.³⁰¹ This is because local governments frequently receive HUD funds directly and

293. For examples of shelter administrators that have engaged in this exploitative behavior, see James Barron, *The Homeless Shelter Executive Who Earns \$1 Million a Year*, N.Y. TIMES (Oct. 4, 2021), <https://www.nytimes.com/2021/10/04/nyregion/the-homeless-shelter-executive-who-earns-1-million-a-year.html> [<https://perma.cc/V7MX-WDZ6>]; Jocelyn Figueroa, *Are Private Companies Profiting from Homelessness?*, INVISIBLE PEOPLE (Nov. 10, 2019) [on file with the *Columbia Human Rights Law Review*]; Ben Hattern, *How Private Companies are Profiting from Homelessness in New York City*, VICE (Oct. 1, 2014), <https://www.vice.com/en/article/mbwwdb/how-private-companies-are-profiting-from-homelessness-in-new-york-city> [<https://perma.cc/A6ZC-BRME>]; Walker Bragman & Alex Kotch, *The Business of Homelessness*, THE AM. PROSPECT (Oct. 18, 2019), <https://prospect.org/infrastructure/housing/business-of-homelessness-nyc-biggest-shelter-contractor/> [<https://perma.cc/A6ZC-BRME>].

294. Barron, *supra* note 293.

295. See Culhane & An, *supra* note 71, at 11 (finding that the average salary for an executive director of a shelter is \$81,695).

296. Steil & Kelly, *supra* note 214, at 742–43.

297. *Id.*

298. *Id.*

299. See *supra* note 246 and accompanying text.

300. Sheffield, *supra* note 204, at 61.

301. Steil & Kelly, *supra* note 214, at 740.

then distribute these funds to housing providers in their jurisdiction.³⁰² This means that in most cases, HUD can take action to enforce the AFFH against local governments for shelters' noncompliance with the AFFH rather than targeting shelters themselves.³⁰³ The local government would be liable for any damages claims and would also be the entity facing the risk of losing funding if discriminatory conditions were not changed.³⁰⁴ This would help insulate shelters from huge financial liability while at the same time ensuring that changes are made, as local governments would have to take steps to work with shelters to end their discriminatory policies.³⁰⁵ This provides another avenue under which HUD could obtain AFFH compliance from shelters without risking the discontinuation of their services.

While roadblocks to using the AFFH to combat discrimination by shelters exist, they are not ones that lawmakers and advocates are without tools to overcome. External pressure through litigation and, more importantly, community engagement, must be exerted on HUD to ensure the agency will not allow the AFFH mandate to lie dormant. Additionally, more specific reporting requirements like those in HUD's 2015 AFFH rule should be reinstated.³⁰⁶ HUD must also continue to work with housing providers and jurisdictions to provide them opportunities to make corrective changes before being denied government funding. Despite these challenges, given that the AFFH requires housing providers to become aware of inequities and take affirmative steps to address them, and that its enforcement mechanisms do not rely on individual plaintiffs bringing claims, it holds significant potential to address the discriminatory behaviors of shelters that the ADA and FHA have failed to enjoin.

CONCLUSION

It is clear that discrimination against unhoused people with disabilities runs rampant, leaving countless individuals with no choice but to sleep outdoors and put their lives at risk. While ensuring access to emergency shelters is not an end-all solution to houselessness or the barriers to stable housing faced by disabled people in general, it is crucial to providing directly impacted individuals with a shield against the immediate and direct

302. Johnson, *supra* note 148, at 1225.

303. King, *supra* note 197; 24 C.F.R. § 570.487(b).

304. 24 C.F.R. § 570.496(b)(1)(i)

305. Johnson, *supra* note 148, at 1225 (noting that local governments which receive HUD grants "have tremendous power to shape housing markets through the decisions they make . . . and through the steps they take to address public and private barriers to fair housing choice as they develop those programs").

306. See *supra* note 271 and accompanying text.

harm they face otherwise. This is especially true as municipalities across the country continue to criminalize homelessness at increasing rates, further perpetuating cycles of poverty, health issues, and homelessness itself.³⁰⁷

Because so many of the discriminatory actions shelters regularly carry out are actually prohibited by the ADA and FHA, the key to ending shelter discrimination lies not in making legal arguments under these regulations but rather in overcoming an underenforcement problem rooted in the inaccessibility of the civil legal system. The recently restored AFFH may represent a solution to this problem, but even this will be ineffective unless authorities are pressured to dedicate resources to procuring housing providers' compliance with antidiscrimination laws.

Ultimately, inequities in access to shelter will be insurmountable without the voices of the unhoused, disabled community being heard. Thus far, the legal system has failed to listen. Unless we move to make a change, we risk allowing people to continue to be imprisoned, forcibly institutionalized, and put their lives at stake in our streets. In the words of an advocate who helped lead the Bronson Park Freedom Encampment, “[i]f one person is subjected to a lack of humility and humanity, we all are.”³⁰⁸

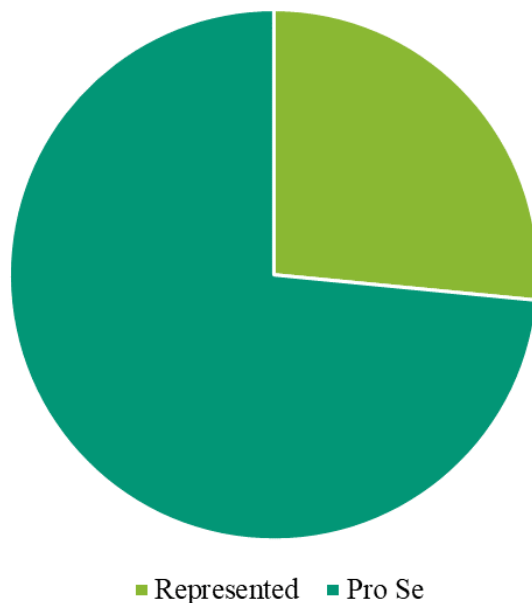
307. See generally HOUSING NOT HANDCUFFS, *supra* note 15 (describing the increase in criminalization of homelessness in the United States and its consequences).

308. THE HOMEFRONT, *supra* note 1, at 18 (statement by Miranda Drake, an advocate who formerly experienced homelessness).

APPENDIX I³⁰⁹

Chart A

FHA/ADA Claims Brought by Unhoused Persons



309. Hunter on behalf of A.H. v. District of Columbia, 64 F. Supp. 3d 158 (D.D.C. 2014); Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries, 717 F. Supp. 2d 1101 (D. Idaho 2010); Jenkins v. N.Y.C. Dep't of Homeless Servs., 391 F. App'x 81 (2d Cir. 2010); Woods v. Foster 884 F. Supp. 1169 (N.D. Ill. 1995); Defiore v. City Rescue Mission of New Castle, 995 F. Supp. 2d 413 (W.D. Pa. 2013); McGee v. Poverello House, No. 118CV00768NONESAB, 2021 WL 3602157 (E.D. Cal. Aug. 13, 2021); Thomas v. The Salvation Army S. Territory, 841 F.3d 632 (4th Cir. 2016); Smith v. The Salvation Army, No.13-cv-114, 2015 WL 5008261 (W.D. Pa. Aug. 20, 2015); West v. City and Cnty. of S.F., No. 21-cv-02370-EMC, 2022 WL 1556415 (N.D. Cal. May 17, 2022); Jones v. Volunteers of Am. Greater N.Y., No. 1:20-cv-5581 (MKV), 2022 WL 768681 (S.D.N.Y. Mar. 14, 2022); George v. Grace Church Cmty. Ctr., No. 10 CV 5343 (VB), 2012 WL 859703, (S.D.N.Y. Feb. 17, 2012); White v. Bethesda Project Inc., 672 F. App'x 218 (3d Cir. 2017); Ortega v. Samaritan Vill. Myrtle Ave. Men's Shelter, No. 18-CV-5995, 2020 WL 6873428 (E.D.N.Y. Nov. 23, 2020); Madison v. Graham, No. 1:21-CV-4908, 2021 WL 2784763 (S.D.N.Y. July 1, 2021); Stone v. City of New York, No. 22-CV-8615 (LTS), 2022 WL 17822588 (S.D.N.Y. Dec.

19, 2022); Al-Qadaffi v. Acacia Network, No. 16-CV-05423 (BMC)(RLM), 2016 WL 6072374 (E.D.N.Y. Oct. 17, 2016); Miller v. N.W. CT YMCA, No. 3:18-CV-01136 (JCH), 2019 WL 13214773 (D. Conn. Apr. 23, 2019); Henderson v. Union Station Hous. Servs., No. CV 20-476 PSG (MRWx), 2021 WL 5037739 (C.D. Cal. Sep. 17, 2021); Lopez v. N.Y.C. Dept. of Homeless Servs., No. 17-CV-3014 (VEC), 2019 WL 4593611 (S.D.N.Y. Sept. 23, 2019); Milhouse v. Renaissance Men's Residence, No. 12-CV-6437 (DLI) (LB), 2013 WL 1811332 (E.D.N.Y. Apr. 29, 2013); Sullivan v. City of N.Y., No. 22-CV-8438 (LTS), 2022 WL 16837038 (Nov. 7, 2022); Brock v. City of N.Y., No. 21-CV-3087 (LTS), 2021 WL 1600098 (S.D.N.Y. Apr. 19, 2021); Kellier v. Billups, No. 21-CV-3921 (LTS), 2021 WL 2435556 (S.D.N.Y. June 14, 2021); Nachmenson v. Diaz, No. 17-CV-738 (LDH)(RML), 2017 WL 4736733 (E.D.N.Y. Oct. 19, 2017); Lord v. City of N.Y., No. 20-cv-03890 (LTS)(SDA), 2021 WL 1254366 (S.D.N.Y. Apr. 5, 2021); Jones v. Banks, No. 20-CV-6788 (LLS), 2020 WL 5038696 (S.D.N.Y. Aug. 26, 2020); Stowell v. Open Door Mission, No. 8:17CV75, 2017 WL 1380537 (D. Neb. Apr. 17, 2017); Wilmer v. Albany Cnty. Soc. Servs., No. 1:16-CV-00905 (NAM/CFH), 2016 WL 4386007 (N.D.N.Y. Aug. 17, 2016); Oslzlyk v. Thorne, No. 3:20-CV-445 (TJM/ML), 2020 WL 5633791 (N.D.N.Y. Sept. 21, 2020); Robinson v. Schlosser, No. 05-1335 (WPJ/RHS), 2006 WL 8444123 (D.N.M. June 27, 2006); Tasfay v. Ramos, No. 20-CV-5472 (PAE)(JLC), 2022 WL 2338323 (S.D.N.Y. June 29, 2022); Alvey v. Gualtieri, No. 15-cv-1861-T-33AEP, 2016 WL 6087874 (M.D. Fla. Oct. 18, 2016); Higgins v. Miami Dade Homeless Trust, No. 17-23728-CIV, 2018 WL 10799289 (S.D. Fla. Apr. 6, 2018); Lewis v. Joy Junction Homeless Shelter, No. CV 09-269 LFG/WDS, 2009 WL 10708266 (D.N.M. Apr. 1, 2009); Smith v. Khouzam, 33 F. App'x 809 (6th Cir. 2002); Carter v. City of Chicago, 520 F. Supp 3d 1024 (N.D. Ill. Feb. 17, 2021); Minor v. Salvation Army, No. 1:13CV750, 2013 WL 5216228 (M.D.N.C. Sept. 16, 2013); Anderson v. Usher, No. 12-7107, 2013 WL 1187399 (D.C. Cir. Mar. 4, 2013); Carter v. Renaissance [sic] Men's Shelter, No. 12 CIV. 5999 (BMC)(VMS), 2013 WL 30868 (E.D.N.Y. Jan. 25, 2013); Garcia v. Dept. of Hous. And Cmty. Dev., 480 Mass. 736, 108 N.E.3d 945 (2018); Oslzly v. Rosenblatt, No. 14-CV-3638, 2014 WL 4161347 (E.D.N.Y. Aug. 19, 2014); Unum *ex rel.* Neuro-Medical Diagnostic Care Servs. P.C. v. Dept. of Transitional Assistance, No. 13-cv-1593, 2014 WL 1572799 (N.D.N.Y. Apr. 18, 2014); GLD by GD v. City of N.Y., No. 19 Civ. 4314 (AT), 2020 WL 5076824 (S.D.N.Y. Aug. 27, 2020); Medina v. City of N.Y., No. 20-CV-3763, 2021 WL 638814 (S.D.N.Y., Apr. 29, 2021); Wright v. Giuliani, 230 F.3d 543 (2d Cir. 2000); Malloy v. City of N.Y. Dept. of Homeless Servs., No. 21-CV-4839, 2022 WL 4227262 (S.D.N.Y. Jul. 28, 2022); Jackson v. Salvation Army, No. 19-CV-2662, 2020 WL 1517673 (D. Minn. Feb. 12, 2020); Vazquez v. Astrue, No. 18-CV-1492, 2019 WL 4686440 (N.D.N.Y. Sept. 26, 2019); Valder v. City of Grand Forks, 217 F.R.D. 491 (D.N.D. 2003). For a description of the methods used to identify these cases, see *supra* note 145.

Chart B

