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Sexual Orientation, Gender Identity, and Homelessness Post-*Bostock*

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SEXUAL ORIENTATION, GENDER IDENTITY, AND HOMELESSNESS POST-*BOSTOCK*

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ABSTRACT

Housing discrimination on the basis of sexual orientation and gender identity is a critical problem facing LGBTQ+ people in the United States. In addition, LGBTQ+ people, particularly transgender people, disproportionately suffer from homelessness and face discrimination by homeless shelters on the basis of sexual orientation and gender identity. This homelessness and discrimination both disproportionately affect transgender people of color. This Note makes two contributions that would enable courts to grant meaningful relief in these contexts. First, it argues that "sex" in the Fair Housing Act includes sexual orientation and gender identity after the holding in Bostock v. Clayton County. Second, it argues that the Fair Housing Act applies to homeless shelters. These two arguments enable LGBTQ+ people to sue under the Fair Housing Act for the discrimination they experience in homeless shelters.

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INTRODUCTION

Angel, a 22-year-old transgender man, tried to stay in a shelter when he started experiencing homelessness.[1] However, once there, the shelter staff and other residents discriminated against him.[2] He said,

> The intake worker refused to respect my gender identity. I showed her that I had a male ID, but she said it didn't make a difference, that my wanting to be respected as a male was bullshit. They put me in a female dorm. One of the other girls there said I couldn't use the bathroom unless I payed [sic] her $40! She raised her fist to me and threatened me for $40!! I couldn't deal with it, so I decided to sleep in the subway. I slept in the subway for two weeks. I found the whole thing so stressful that I couldn't eat.[3]

These experiences Angel shared in an interview with Carl Siciliano of the Ali Forney Center are all too common. In fact, 70% of transgender people who attempt to stay in shelters are "harassed, sexually or physically assaulted," or thrown out of the shelter for being transgender.[4] Relatedly, transgender people in the United States face serious housing discrimination on the basis of sexual orientation and gender identity.[5]

From a legal perspective, one barrier to combatting these problems has been the unwillingness of federal courts to recognize discrimination on the basis of sexual orientation or gender identity as "discrimination on the basis of sex" within the meaning of the Fair Housing Act (FHA). The FHA is a federal law prohibiting housing discrimination on the basis of race, sex, and other protected characteristics. Courts are currently divided on whether the FHA prohibits discrimination on the

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1. Carl Siciliano, *Three LGBT Youths Describe Being Homeless in NYC*, ADVOCATE (Dec. 21, 2015, 6:02 AM), https://www.advocate.com/commentary/2015/12/21/three-lgbt-youths-describe-being-homeless-nyc [https://perma.cc/S8PJ-4GDH].

2. *Id.*

3. *Id.*

4. SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA'AYAN ANAFI, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 13 (2016).

5. *See infra* section I.A.

basis of sexual orientation or gender identity, and on whether the FHA applies to homeless shelters. This Note argues in the affirmative for both. This interpretation makes it possible for advocates to use the FHA to counter widespread anti-LGBTQ+[6] discrimination in housing, including discrimination by homeless shelters.

Legal scholarship addressing housing discrimination has largely overlooked discrimination in homeless shelters. The scholarship that does exist is either outdated in light of the Supreme Court's 2020 decision in *Bostock v. Clayton County*[7] or lacks the depth of discussion provided in this Note. For instance, over a decade ago, Greg Cheyne wrote a Comment exploring the consequences of shelter admissions policies and discussing judicial frameworks addressing discrimination by homeless shelters.[8] However, he did not advocate for a particular judicial approach or discuss discrimination against LGBTQ+ people specifically. Others who addressed the issue in 2008 and 2009 argued against applying the FHA to homeless shelters.[9] After *Bostock*, Rigel Oliveri argued that case's reasoning should also apply to the FHA,[10] but she did not mention homeless shelters. This Note addresses the questions these existing pieces of scholarship leave unanswered by analyzing the FHA in the context of sexual orientation and gender identity discrimination and applying the FHA to homeless shelters. It also provides concrete litigation strategies for practitioners while updating past scholarship on these subjects by putting scholars in dialogue with each other. Finally, it offers solutions to the problems it explores.

To accomplish these goals, this Note analyzes the text, structure, and purpose of the FHA, explores precedent, and discusses policy concerns. Part I illuminates the scope of anti-LGBTQ+ discrimination by housing providers, explains the need for urgent intervention, and directs focus on LGBTQ+ people of color. Part II analyzes *Bostock* and argues that, in the aftermath of that case, the FHA bars discrimination on

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6. I use LGBTQ+ to acknowledge that limitless sexual orientations and gender identities exist.

7. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

8. Greg C. Cheyne, Comment, *Facially Discriminatory Admissions Policies in Homeless Shelters and the Fair Housing Act*, U. CHI. LEGAL F. 459 (2009).

9. *E.g.*, Karen Wong, Comment, *Narrowing the Definition of Dwelling Under the Fair Housing Act*, 56 UCLA L. REV. 1867, 1883–84 (2009) (arguing that discrimination by homeless shelters should fall under Title II of the Civil Rights Act of 1964 instead of the FHA); Katherine Brinson, Note, *Justifying Discrimination: How the Ninth Circuit Circumvented the Intent of the Fair Housing Act*, 38 GOLDEN GATE U.L. REV. 489, 489 (2008) (arguing that applying the FHA to homeless shelters would lead to the elimination of single-sex shelters, which the Note claims would be undesirable).

10. *See generally* Rigel C. Oliveri, *Sexual Orientation and Gender Identity Discrimination Claims Under the Fair Housing Act After* Bostock v. Clayton County, 69 U. KAN. L. REV. 409 (2021) (concluding that the reasoning of *Bostock* should apply to the FHA).

the basis of sexual orientation and gender identity. Part III argues that precedent, the text of the FHA, and the purpose of the FHA require the FHA to apply to homeless shelters. Additionally, Part III dispels some counterarguments made by scholars who oppose applying the FHA to homeless shelters.

I. ANTI-LGBTQ+ DISCRIMINATION AND THE FAIR HOUSING ACT

This Part details the scope of sexual orientation and gender identity discrimination by housing providers, particularly homeless shelters. It highlights the negative impacts this discrimination has on LGBTQ+ people, especially LGBTQ+ people of color. Finally, it discusses the FHA and prepares for Part II's *Bostock* analysis by providing an overview of preceding case law.

A. *Sexual Orientation and Gender Identity Discrimination in Housing*

LGBTQ+ people often face discrimination when looking for a place to live. The United States Department of Housing and Urban Development (HUD) found that different-sex couples are over 15% more likely to get positive responses to inquiries about advertised rental housing than same-sex couples.[11] "When exploring . . . mov[ing] to an independent living, [assisted living, or] continuing care . . . facility," 48% of same-sex couples experience discrimination.[12] Despite having largely positive views towards home ownership, only 49% of LGBTQ+ households own a home, which is well below the national average of 64.3%.[13] Housing discrimination is particularly pronounced against transgender individuals. Because of discrimination on the basis of gender identity, "one in ten" transgender individuals "have been evicted from their homes," and "[o]ne in five . . . ha[ve] been discriminated against when seeking a home."[14]

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11. SAMANTHA FRIEDMAN, ANGELA REYNOLDS, SUSAL SCOVILL, FLORENCE R. BRASSIER, RON CAMPBELL & MCKENZIE BALLOU, AN ESTIMATE OF HOUSING DISCRIMINATION AGAINST SAME-SEX COUPLES vi (2013).

12. Kyle C. Velte, *Straightwashing the Census*, 61 B.C. L. REV. 69, 100 (2020).

13. *LGBT Homeownership Rates Lag Behind General Population*, FREDDIE MAC (Oct. 1, 2018), http://www.freddiemac.com/research/consumer-research/20181001_lgbt_homeownership.page [https://perma.cc/K4E3-D5NC].

14. *Housing & Homelessness*, NAT'L CTR. FOR TRANSGENDER EQUAL., https://transequality.org/issues/housing-homelessness [https://perma.cc/AT5T-PXSY] (last visited Mar. 6, 2021).

In addition to disproportionately facing housing discrimination, the LGBTQ+ population is also disproportionately affected by homelessness.[15] Approximately 33% of youth experiencing homelessness identify as LGBTQ+.[16] At some point in their lives, 30% of transgender individuals have experienced homelessness.[17] That number increases to 42% for Black transgender individuals.[18] Furthermore, the number of transgender individuals experiencing homelessness is rising, with an increase of 88% since 2016.[19] This rise is particularly concerning because homeless shelters often discriminate against, and fail to adequately serve, transgender people.[20] For example, one study found that only 30% of homeless shelters housed transgender women with other women while 21% of them refused admission to all transgender women.[21] This discrimination poses a huge problem, because 87% of LGBTQ+ people said it would be impossible or difficult "for them to find an alternative homeless shelter if they were refused" admission.[22]

Living without shelter poses great risks to transgender people, especially transgender people of color. For instance, 26% of unsheltered white transgender people and 56% of unsheltered Black transgender

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15. Some argue that the terms "houseless" and "houselessness" should be used instead of "homeless" and "homelessness." *See, e.g.*, Scott Kerman, *Homeless, Houseless, and Unhoused: A Glossary of Terms Used to Talk about Homelessness*, BLANCHET HOUSE (Dec. 6, 2022), https://blanchethouse.org/homeless-houseless-unhoused-glossary-about-homelessness/ [https://perma.cc/25L4-PYDL] . Using "houseless" and "houselessness" recognizes that someone can view a city, place, or land as their home but still be unhoused. *See id.* Those terms also promote "a social and moral assumption that everyone should be housed" and avoid the derogatory connotations attached to "homeless" and "homelessness." *Why Unhoused?*, UNHOUSED.ORG, https://www.unhoused.org/overview [https://perma.cc/A6TW-2HWY] (last visited Apr. 28, 2021). I agree that all three of these reasons are important reasons to use "houseless" and "houselessness." I use "homeless" and "homelessness" in this Note since those terms are the terms currently used most frequently in the law and research about homelessness.

16. *See* SOON KYU CHOI, SERVING OUR YOUTH 2015: THE NEEDS AND EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH EXPERIENCING HOMELESSNESS 4 (2015).

17. SANDY E. JAMES ET AL., *supra* note 4.

18. NAT'L CTR. FOR TRANSGENDER EQUAL., 2015 U.S. TRANSGENDER SURVEY: REPORT ON THE EXPERIENCES OF BLACK RESPONDENTS 13 (2015).

19. NAT'L ALL. TO END HOMELESSNESS, TRANSGENDER HOMELESS ADULTS & UNSHELTERED HOMELESSNESS: WHAT THE DATA TELL US 1 (2020) (finding also that the number of unsheltered transgender people experiencing homelessness has increased by 113% since 2016).

20. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 14; SANDY E. JAMES ET AL., *supra* note 4.

21. CAITLIN ROONEY, LAURA E. DURSO & SHARITA GRUBERG, DISCRIMINATION AGAINST TRANSGENDER WOMEN SEEKING ACCESS TO HOMELESS SHELTERS 2 (2016).

22. Theo Santos, Lindsay Mahowald & Sharita Gruberg, *The Trump Administration's Latest Attack on Transgender People Facing Homelessness*, CTR. FOR AM. PROGRESS (Sept. 3, 2020), https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/09/03/490004/trump-administrations-latest-attack-transgender-people-facing-homelessness/ [https://perma.cc/U3X6-S7WA].

people have been attacked while experiencing homelessness.[23] Living without shelter also increases the risk of contact with police and time in jail or prison, particularly for unsheltered Black transgender people.[24] This in turn exposes Black transgender people to greater risk of racial discrimination and violence.[25]

As Ariana Aboulafia observes, laws that criminalize homelessness disproportionately impact LGBTQ+ individuals because LGBTQ+ individuals are disproportionately impacted by homelessness.[26] In this way, the criminalization of homelessness is a continuation of the United States' criminalization of LGBTQ+ people for being LGBTQ+.[27] For example, LGBTQ+ individuals were criminalized in the past through sodomy laws, which did not explicitly mention LGBTQ+ people as targets, but disproportionately impacted them.[28] Similarly, laws criminalizing homelessness have the effect of targeting LGBTQ+ people because that population experiences higher rates of homelessness than others.[29]

B. *The Fair Housing Act and Pre-Bostock Case Law*

Although the FHA has the potential to end discrimination for LGBTQ+ individuals experiencing homelessness, it was created in the specific context of the civil rights movement. After failed Congressional efforts to pass a fair housing bill in 1966 and 1967, Congress passed the FHA in 1968 during a wave of support for civil rights legislation after Martin Luther King Jr.'s assassination. The statute promised hope to civil rights advocates as a way to end housing segregation.[30]

Today, the FHA prohibits housing discrimination against any person "because of race, color, religion, sex, familial status, or national origin."[31] Sexual orientation and gender identity are not explicitly listed

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23. NAT'L ALL. TO END HOMELESSNESS, *supra* note 19, at 3.

24. *See id.* (finding that unsheltered Black transgender people have, on average, 22.5 contacts with police and 8.9 stays in jail or prison, compared with 19.5 and 6.5 for unsheltered white transgender people, respectively).

25. NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, HATE VIOLENCE AGAINST TRANSGENDER COMMUNITIES (2017) (reporting that transgender people of color are six times more likely than white cisgender people to experience physical violence at the hands of the police).

26. Ariana Aboulafia, Note, *The New John Lawrence: An Analysis of the Criminalization of LGBTQ Homelessness*, 19 CONN. PUB. INT. L.J. 199, 209 (2019).

27. *See id.*

28. *Id.* at 210.

29. *Id.* at 209.

30. Douglas S. Massey, *The Legacy of the 1986 Fair Housing Act*, 30 SOCIO. F. 571, 571 (2015).

31. Fair Housing Act (FHA) of 1968, 42 U.S.C. § 3604 ("To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make una-

categories. In 2018, the Seventh Circuit became the first circuit[32] to hold, in *Hively v. Ivy Tech Cmty. College of Ind.*, that "sex" includes "sexual orientation" (in the context of Title VII).[33] Later that year in *Wetzel v. Glen St. Andrew Living Cmty., LLC*, the Seventh Circuit applied *Hively*'s holding in the context of the FHA.[34] In *Wetzel*, the Court's reasoning was not specific to the FHA, but instead incorporated *Hively*'s reasoning about the meaning of "sex" in general.[35] In contrast, some district courts have held sex does not include sexual orientation in the FHA.[36] Other appellate courts have not reached the question, so the Seventh Circuit remains the only circuit court to have held that "sex" includes sexual orientation discrimination in the context of the FHA.

In summary, LGBTQ+ people in the United States face serious housing discrimination based on sexual orientation and gender identity. In addition, LGBTQ+ people, particularly transgender people, disproportionately suffer from homelessness and face discrimination by homeless shelters on the basis of sexual orientation and gender identity. These effects are even more pronounced against transgender people of color. Before *Bostock*, some courts already held that the FHA prohibited discrimination on the basis of sexual orientation and gender identity. After *Bostock*, this should be universal.

II. POST-*BOSTOCK*, THE FHA PROHIBITS DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY

This Part argues that the Supreme Court's holding in *Bostock v. Clayton County*—which states that discrimination based on "sex" includes "homosexuality and transgender status" in the context of Title VII—applies with equal force in the context of the FHA. It first explains the Supreme Court's textual analysis of "because of sex" and explores a hy-

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vailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.").

32. Shane Stahl, Seventh Circuit Becomes First Federal Appellate Court to Rule that Discrimination Based on Sexual Orientation Violates Fair Housing Act, FREEDOM FOR ALL AMS. (Aug. 27, 2018, 6:38 PM), https://freedomforallamericans.org/7th-circuit-becomes-first-federal-appellate-court-to-rule-that-discrimination-based-on-sexual-orientation-violates-fair-housing-act/ [https://perma.cc/2KNY-AHJQ].

33. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 340 (7th Cir. 2017).

34. Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 862 (7th Cir. 2018).

35. *Id.* ("[our ruling in *Hively*], holding that discrimination based on sexual orientation qualifies as discrimination based on sex under Title VII, applies with equal force under the FHA.").

36. *See, e.g.*, Ordelli v. Mark Farrell & Assocs., No. 3:12-cv-1791-SI, 2013 U.S. Dist. LEXIS 36094, at *6 (D. Or. Mar. 15, 2013) ("While Oregon state law prohibits discrimination based on sexual orientation in the sale or rental of housing, the FHA does not.").

pothetical posed by the Court to illustrate its holding. It then argues that "sex" in the FHA includes sexual orientation and gender identity—regardless of whether one uses the reasoning in *Bostock* or a sex stereotyping approach—and explores post-*Bostock* case law.

A. *Bostock's Approach to "Because of Sex"*

Before examining the FHA, one must understand the Court's reasoning in *Bostock*. *Bostock* concerned alleged violations of Title VII, which prohibits employment discrimination against any person "because of such individual's race, color, religion, sex, or national origin."[37] The Court held that discrimination because of "sex" included discrimination on the basis of "homosexuality or transgender status."[38]

In reaching this conclusion, the Court consulted dictionaries that were roughly contemporaneous with the passage of Title VII, and it proceeded on the assumption that "sex" could be defined as a person's "status as either male or female [as] determined by reproductive biology."[39] It then consulted past case law and determined that the ordinary meaning of "because of" is "by reason of" or "on account of."[40] This means a defendant cannot avoid liability by citing a factor other than sex that influenced that defendant's challenged employment decision.[41] Thus, as long as sex is one but-for cause of the employer's challenged decision, the employer has violated Title VII.[42] Finally, the Court defined "discriminate" as "treating [an] individual worse than others who are similarly situated."[43] As the text of Title VII requires, courts must focus on discrimination against "individuals, not groups."[44]

After laying out these definitions, the Court explained that discrimination on the basis of "homosexuality or transgender status" is discrimination on the basis of "sex" for purposes of Title VII;[45] if the sexes of the employees in the case were different, the employers would have made different choices than the challenged employment decisions at

37. 42 U.S.C. § 2000e-2(a)(1).

38. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1742 (2020).

39. *Id.* at 1739 (adopting the employer's definition of sex but refusing to decide on a definition since the outcome of the case did not turn on whether the court adopted the employers' or employees' definition of sex).

40. *Id.* at 1742.

41. *Id.*

42. *Id.*

43. *Id.* at 1740.

44. *Id.*

45. *Id.* at 1741.

issue.[46] The Court explained that "homosexuality and transgender status are inextricably bound up with sex . . . because to discriminate on these grounds requires an employer to intentionally treat individual employees differently in part because of their sex."[47] One hypothetical the Court provided involved an employer who fires all gay employees. If an employee introduced Susan, the employee's wife, to that employer, whether the employee will be fired depended on the employee's sex.[48] Thus, the Court saw including "homosexuality or transgender status" in Title VII's definition of "sex" as a "straightforward application of legal terms with plain and settled meanings."[49]

B. *Bostock's Relevance to the FHA*

Although Bostock only concerned Title VII,[50] the structure of the Civil Rights Act indicates that the analysis in *Bostock* and other circuit courts' sex stereotyping approaches under Title VII should also be applied to the FHA. Title VII is part of the Civil Rights Act of 1964[51] and the FHA, also known as Title VIII, is part of the Civil Rights Act of 1968.[52] Thus, both come from the federal government's effort to end discrimination and ensure civil rights for all.[53] To work towards meeting that goal, the Supreme Court held in *Trafficante v. Metropolitan Life Ins. Co.* that both the FHA and Title VII must be construed broadly.[54]

These similarities between the two laws and the relative abundance of case law under Title VII compared to the FHA have caused many circuit courts to look to Title VII when deciding FHA cases.[55] For example,

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46. *Id.* at 1742.

47. *Id.*

48. *Id.*

49. *Id.* at 1743.

50. *Id.* at 1753 ("[t]he employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination . . . [b]ut none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.").

51. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e-17).

52. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3619).

53. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 935 (2d Cir. 1988).

54. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209–10 (1972) (holding that there was "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution" in the context of Title VII and the FHA, at least "insofar as tenants of the same housing unit that is charged with discrimination are concerned").

55. *See, e.g.*, Harris v. Itzhaki, 183 F.3d 1043, 1051 (9th Cir. 1999) (quoting Gamble v. City of Escondido, 104 F.3d 300, 304 (9th Cir. 1997)) ("We apply Title VII discrimination analysis in examining Fair Housing Act discrimination claims."); Holt v. JTM Indus., 89 F.3d 1224, 1229 (5th Cir.

Title VII's prima facie case structure for disparate treatment and disparate impact discrimination claims has been incorporated into the FHA.[56] Additionally, the Seventh Circuit in *Wetzel* drew on *Hively*, a Title VII case, to conclude that "sex" in the FHA included "sexual orientation."[57] Other scholars have also noted this trend of courts looking to Title VII to interpret the other civil rights acts.[58] Rigel Oliveri observes that the Supreme Court has occasionally found it inappropriate to use Title VII to interpret the FHA when there are differences in the underlying legal doctrine, such as using the standard for employer liability for employee-on-employee harassment as the standard for landlord liability for tenant-on-tenant harassment.[59] However, as Oliveri argues, there are no such underlying differences with respect to the interpreta-

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1996) (quoting EEOC v. Mississippi Coll., 626 F.2d 477, 482 (5th Cir. 1980)) ("[T]he strong similarities between the language, design, and purposes of Title VII and the Fair Housing Act require that the phrase 'a person claiming to be aggrieved' in § 706 of Title VII must be construed in the same manner that *Trafficante* construed the term 'aggrieved person' in § 810 of the Fair Housing Act."); Graoch Assocs. #33 L.P. v. Louisville/Jefferson Cnty. Metro Hum. Rels. Comm'n, 508 F.3d 366, 372 (6th Cir. 2007) ("[W]e generally should evaluate claims under the FHA by analogizing them to comparable claims under Title VII."); *Huntington Branch*, 844 F.2d at 935 ("[J]ust as the Supreme Court held that Title VII is violated by a showing of discriminatory effect, we hold that a Title VIII violation can be established without proof of discriminatory intent."); *see also* Christopher P. McCormack, *Business Necessity in Title VIII: Incorporating an Employment Discrimination Doctrine into the Fair Housing Act*, 54 FORDHAM L. REV. 563, 564 (1986) ("Interpretation of the Fair Housing Act has . . . developed through analogy to Title VII doctrine."); *The Supreme Court's Ruling on Sexual Orientation and Gender Identity*, FAIR HOUS. INSTITUTE (June 23, 2020), https://www.fairhousinginstitute.com/supreme-courts-ruling-sexual-orientation-and-gender-identity/ [https://perma.cc/L38F-22ZH] ("Employment discrimination cases are filed and litigated at a much higher rate than housing cases, which is why courts often apply the legal analyses from employment cases to Fair Housing Act cases.").

56. *See, e.g.*, *Graoch Assocs.*, 508 F.3d at 371 ("We imported this [FHA disparate-treatment] framework from our disparate-treatment cases under Title VII.").

57. Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 862 (7th Cir. 2018) ("[The defendant] agrees that our ruling in Hively v. Ivy Tech Community College of Indiana, 853 F.3d 339 (7th Cir. 2017) (en banc), holding that discrimination based on sexual orientation qualifies as discrimination based on sex under Title VII, applies with equal force under the FHA.").

58. *E.g.* Stuart Biegel, *School Choice Policy and Title VI: Maximizing Equal Access for K-12 Students in a Substantially Deregulated Educational Environment*, 46 HASTINGS L.J. 1533, 1548 (1995) ("Not only has Title VII jurisprudence been deemed applicable in Title VI disputes, but also in construing the parameters of Title VIII (The Fair Housing Act)."); Sidney D. Watson, *Reinvigorating Title VI: Defending Health Care Discrimination – It Shouldn't be So Easy*, 58 FORDHAM L.R. 939, 964 (1990) ("[C]ourts have tended to look to Title VII in developing evidentiary standards for claims involving disproportionate adverse impact under other civil rights statutes."); Joseph J. Railey, Note, *Married on Sunday, Evicted on Monday: Interpreting the Fair Housing Act's Prohibition of Discrimination "Because of Sex" to Include Sexual Orientation and Gender Identity*, 36 BUFF. PUB. INT. L.J. 99, 125 (2019) (stating before *Bostock* "[a]s federal courts often look to Title VII case law to resolve novel issues under the Fair Housing Act, an expansion of the meaning of sex could be incorporated to the Fair Housing Act relatively easily and without further action by the Supreme Court.").

59. Oliveri, *supra* note 10, at 435.

tion of "because of sex."[60] Because courts already look to Title VII to interpret the FHA, including sexual orientation and gender identity in the meaning of "sex" in the FHA can hopefully be achieved universally without any action by the Supreme Court.[61]

Applying *Bostock*'s analysis to the FHA leads to the conclusion that the FHA also includes sexual orientation and gender identity discrimination. Since the FHA was passed just four years after Title VII,[62] it is logical that the same dictionary definition of "sex" from *Bostock* should apply to it.[63] As the Court held in *Bostock*, the ordinary meaning of "because of" is "by reason of" or "on account of."[64] Thus, one discriminates on the basis of sex when they "refuse to sell or rent after the making of a bona fide offer, or [] refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny" someone housing because of their "homosexuality or transgender status."[65] How does *Bostock*'s hypothetical about an employer who fires all gay employees work in this context?[66] Consider a landlord who refuses to rent to anyone who is gay. A potential renter introduces Susie, the renter's wife, to the landlord when looking at an apartment. Whether the landlord will refuse to rent the apartment depends, in part, on the potential renter's sex.

The conclusion that the FHA includes discrimination on the basis of sexual orientation and gender identity is also supported by the U.S. Department of Housing and Urban Development (HUD). HUD has said that using the FHA to combat sexual orientation and gender identity discrimination is "the correct reading of the law after *Bostock*."[67] In

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60. *Id*. at 435–36.

61. *See* FAIR HOUS. INSTITUTE, *supra* note 55 ("[W]e can confidently assume that courts in future FHA (Fair Housing Act) cases will also extend legal protections to individuals on the basis of sexual orientation and gender identity.").

62. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17); Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3619).

63. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020).

64. *Id*.

65. 42 U.S.C. § 3604.

66. The Supreme Court has not ruled on what causation standard should be used in the context of the FHA, but nine circuit courts currently use standards that are easier for plaintiffs to meet than the but-for standard. Robert G. Schwemm, *Fair Housing and the Causation Standard After Comcast*, 66 VILL. L. REV. 63, 110–11 (2021). *Comcast Corporation v. National Association of African-Owned Media* suggests that perhaps a but-for standard must now be used in the FHA context. 140 S. Ct. 1009, 1014–15 (2020). However, there are strong counterarguments against that interpretation, so it is possible that the more lenient standards will continue to prevail. *Id*. at 1015.

67. Memorandum from Jeanine M. Worden, Acting Assistant Sec'y for Fair Hous. & Equal Opportunity, to Off. of Fair Hous. & Equal Opportunity, Fair Hous. Assistance Prog. Agencies, and Fair Hous. Initiatives Prog. Grantees 2 (Feb. 11, 2021), https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf [https://perma.cc/56YT-Y23H]; *see also* U.S. DEP'T HOUS. & URB. DEV., *Housing Discrimination and Persons Identifying as Lesbian, Gay, Bisexual, Transgender, and*

reaching this conclusion, HUD noted that the text and purpose of Title VII and the FHA are comparable.[68] This interpretation should receive *Chevron* deference from courts.[69] However, practitioners should rely more on the above analysis based on *Bostock* and the text of the FHA itself since *Chevron* deference is not absolute and HUD's interpretation may change when a new administration takes office. Regardless of what HUD does, courts are required to apply *Bostock*.

Applying Title VII's sex stereotyping analysis that some courts have adopted instead of *Bostock*'s textual analysis to the FHA would also lead to the conclusion that the FHA prevents discrimination on the basis of sexual orientation and gender identity. This sex stereotyping approach prohibits discrimination based on sexual orientation and gender identity by reasoning that this type of discrimination is impermissible sex stereotyping of how people of certain genders should act. Before *Bostock*, several circuit courts used this approach to determine whether sex included sexual orientation and gender identity discrimination in the context of Title VII.[70] The Court in *Bostock* did not take a sex stereotyping approach but doing so would reach the same result.

Courts using a sex stereotyping argument pre-*Bostock* drew on the Supreme Court case *Price Waterhouse v. Hopkins*. The *Price Waterhouse* plurality held that Title VII's prohibition on sex discrimination included an employer's negative employment action based on the employee's refusal to conform with sex stereotypes.[71] In the context of sexual orientation, the Second Circuit in *Zarda v. Altitude Express, Inc.* held that same-sex sexual orientation was "'the ultimate case of failure to conform to gender stereotypes.'"[72] In that case, the stereotype was that "real" men should date women.[73] With respect to gender identity, the Sixth Circuit held in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* that requiring a transgender woman to dress as a man was "unlawful sex stereotyping,"

/or Queer/Questioning (LGBTQ), https://www.hud.gov/program_offices/fair_housing_equal_opp/housing_discrimination_and_persons_identifying_lgbtq [https://perma.cc/DW5Y-AEKB] (last visited Jan. 29, 2022).

68. Memorandum from Jeanine M. Worden, *supra* note 67.

69. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council., 467 U.S. 837, 842–44 (1984) (stating that where Congress has not directly spoken to the precise question at issue, the agency's interpretation of a statute should be upheld by the courts as long as it is reasonable).

70. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 345 (7th Cir. 2017); EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 571–72 (6th Cir. 2018); Zarda v. Altitude Express, Inc., 883 F.3d 100, 112 (2d Cir. 2018).

71. 490 U.S. 228, 228, 250–52 (1989).

72. 883 F.3d at 121 (quoting *Hively*, 853 F.3d at 346). This case was consolidated, along with *R.G. & G.R. Harris Funeral Homes, Inc.*, into Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020).

73. *Id*.

and thus a violation of Title VII.[74] This reasoning is equally applicable in the context of the FHA. If a landlord refuses housing to an LGBTQ+ person due to the landlord's stereotypes about how people of certain genders should dress and behave, the landlord has engaged in sex stereotyping. This stereotyping is equally impermissible under both Title VII and the FHA.

The outlined sex stereotyping approach is preferable because it makes clear that discrimination on the basis of all sexual orientations and gender identities, not just "homosexuality and transgender status," is discrimination on the basis of sex under the FHA.[75] As Jeremiah Ho has argued, *Bostock*'s textualist approach ignores sex stereotypes and their harmful effects on queer minorities.[76] By ignoring sex stereotypes, their causes, and their harms, *Bostock* upholds the heteronormative status quo.[77] While this section focuses primarily on *Bostock*'s approach, because *Bostock* was a Supreme Court case and is therefore more persuasive, attorneys should be attentive to the harmful impacts of *Bostock* when choosing a litigation strategy. They should start with *Bostock's* textualist approach linking sex to "homosexuality and transgender status" and build on that to develop a more inclusive sex stereotyping approach.[78] *Bostock* has not precluded the sex stereotyping approach, but instead has made it more viable.[79]

Since *Bostock*, courts have not squarely addressed whether the FHA includes sexual orientation or gender identity. However, they appear to be on the edge of recognizing that the reasoning of *Bostock* also applies to the FHA. For example, before *Bostock*, the District Court of Montana held in 2019 that sex did not include sexual orientation in the FHA.[80] That court followed the Eighth Circuit, which at that time did not recognize discrimination on the basis of sex to include discrimination on the basis of sexual orientation in the context of Title IX.[81] After *Bostock*,

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74. *Id.* at 574.

75. On its terms, *Bostock* addresses "homosexuality or transgender status." 140 S. Ct. 1731, 1735–37 (2020). This language raises complicated questions about whether other gender identities besides transgender, such as nonbinary gender identities, and whether other sexual orientations besides gay, such as bisexual, are included in the logic of the case. These questions are beyond the scope of this Note.

76. Jeremiah A. Ho, *Queering Bostock*, 29 AM. U.J. GENDER SOC. POL'Y & L. 283, 355 (2021).

77. *Id.* at 354.

78. *See id.* at 365.

79. *See id.* (arguing that *Bostock* has lessened concerns about bootstrapping that previously made some courts hesitant to apply the sex stereotyping approach).

80. Walsh v. Friendship Vill. Of S. Cnty., 353 F. Supp. 3d 920, 926 (D. Mont. 2019).

81. *Id.* (quoting Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990), *and abrogated by* Horton v. Midwest Geriatric Mgmt., LLC, 963 F.3d 844 (8th Cir. 2020)).

the Eighth Circuit vacated the district court's judgment and remanded the case "for further proceedings in light of *Bostock*."[82] Another example of *Bostock* beginning to make a difference is *Birdo v. Duluky*, where the District Court of Minnesota assumed without deciding that the FHA applies to sexual orientation discrimination and cited to *Bostock* for that statement.[83] Courts also appear to be allowing sex stereotyping approaches to survive *Bostock*'s textualism in the context of Title VII.[84]

Bostock's Title VII reasoning should apply to the FHA. Either through *Bostock*'s reasoning or a sex stereotyping approach, the FHA includes discrimination on the basis of sexual orientation and gender identity. Interpreting the FHA in this way can combat the immense problem of housing discrimination against LGBTQ+ people.

III. THE FHA APPLIES TO HOMELESS SHELTERS

The FHA does not explicitly cover homeless shelters, and courts are divided about whether it should. There has been little scholarship about discrimination by homeless shelters since 2009, and what scholarship does exist overlooks LGBTQ+ discrimination. This Part fills that gap. Part II established that the FHA applies to discrimination on the basis of sexual orientation and gender identity, and this Part argues that it should also cover such instances of discrimination specifically in homeless shelters.

A. *Text and United States v. Hughes Memorial Home*

Whether the FHA applies to homeless shelters turns on the question of what constitutes a dwelling. The stated purpose of the FHA is "to provide . . . for fair housing throughout the United States."[85] As the Supreme Court has noted, Congress held this policy goal to be of the highest priority.[86] The main operative provision of the FHA makes it unlawful

82. Walsh v. Friendship Vill. Of S. Cnty, No. 19-1395, 2020 U.S. App. LEXIS 28609 (8th Cir. July 2, 2020).

83. Birdo v. Duluky, No. 20-CV-1108, 2020 U.S. Dist. LEXIS 170242, at *7 (D. Minn. Aug. 27, 2020).

84. Ho, *supra* note 76, at 365 (describing a federal district court decision that permitted a gender stereotyping theory to survive a motion to dismiss shortly after *Bostock*).

85. 42 U.S.C. § 3601.

86. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972).

> [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a *dwelling* to any person because of race, color, religion, sex, familial status, or national origin.[87]

"Dwelling" is defined in the FHA as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families."[88] The word "family" is defined to include a single individual.[89] Thus, whether the FHA extends to discrimination because of sex in homeless shelters depends on whether homeless shelters count as dwellings within the meaning of the FHA.

When determining what counts as a dwelling, courts have followed the framework established by the Western District of Virginia in *United States v. Hughes Memorial Home* in 1975.[90] *Hughes* began its FHA analysis by noting the Supreme Court's precedent that the FHA must be constructed generously to implement a policy that Congress considered to be of the highest priority.[91] *Hughes* said that whether a structure was a dwelling depended on whether it was "occupied as . . . a residence" within the meaning of the FHA.[92] The court determined the ordinary meaning of "residence," which is not defined in the FHA itself, by looking at its definition in Webster's Third New International Dictionary.[93] The court adopted that dictionary's definition of "residence" as "a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit."[94]

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87. 42 U.S.C. § 3604 (emphasis added).

88. 42 U.S.C. § 3602(b) (stating also that "any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof" is also a "dwelling").

89. 42 U.S.C. § 3602(c).

90. *See, e.g.*, Smith v. Salvation Army, No. 12-144-J, 2015 U.S. Dist. LEXIS 113680, at *10 (W.D. Pa. Aug. 20, 2015) (calling *Hughes Memorial Home* an "often-followed decision" and following its framework for analysis); *see also* Renee Williams, *Shelters and the Definition of "Dwelling" Under the Fair Housing Act*, 43 HOUS. L. BULL. 230, 230 (2013) ("Many courts examine the question of the FHA's applicability to a given facility by employing the analysis in *United States v. Hughes Memorial Home*.").

91. United States v. Hughes Mem'l Home, 396 F. Supp. 544, 548 (W.D. Va. 1975).

92. *Id.* at 549 (stating the FHA definition of dwelling is "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families").

93. *Id.* The court did not explain why it chose this particular dictionary, although it could be because it was published within ten years of when the FHA was passed. Webster's Third New International Dictionary was originally published in 1961, which is in the same decade that the FHA was passed. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1st ed. 1961).

94. *Id.*

Using this definition, *Hughes* concluded that a private children's home for disadvantaged children was a "dwelling" under the FHA.[95] The home housed children from ages six to eighteen years old in dormitories.[96] In determining that the home was a dwelling, the Court emphasized that the home's officials referred to the children as "residents" and said that the home was "far more than a place of temporary sojourn."[97]

B. *What Courts are Doing*

Courts following *Hughes* have developed their own tests to define "dwelling." For example, in *Lakeside Resort Enterprises, LP v. Bd. of Supervisors* in 2006, the Third Circuit created a two-part test for whether a structure constituted a dwelling: (1) does the structure house people for "any significant period of time," and (2) do the inhabitants view the structure as a place to return to?[98] The Eleventh Circuit developed its own two-part test in *Schwarz v. City of Treasure Island* in 2008, which used slightly different language but encapsulated the same idea. Like *Lakeside*, the court in *Schwarz* emphasized the length of stay, holding that the longer residents usually live in the structure, the more likely it is to be a dwelling.[99] Unlike *Lakeside*, the court in *Schwarz* worded the second prong slightly differently, saying that a structure is more likely to be a dwelling when residents treat it like their home, which can be indicated by residents cooking, cleaning, doing laundry, and spending time in common areas.[100] While applying these or similar tests, courts have held that jails,[101] hotels,[102] a homeowner's association clubhouse,[103] a bed-and breakfast,[104] a grocery store,[105] and a parcel of vacant land

95. *Id.* at 549–50.
96. *Id.* at 547.
97. *Id.* at 549–50.
98. Lakeside Resort Enters., LP v. Bd. of Supervisors, 455 F.3d 154, 158 (3d Cir. 2006).
99. Schwarz v. City of Treasure Island, 544 F.3d 1201, 1214–15 (11th Cir. 2008).
100. *Id.*
101. See, e.g., Garcia v. Condarco, 114 F. Supp.2d 1158, 1163 (D.N.M. 2000).
102. *See, e.g.*, Patel v. Holley House Motels, 483 F. Supp. 374, 381 (S.D. Ala. 1979). It is not clear whether courts would consider extended stay hotels to be dwellings within the meaning of the FHA. *See* Doohan v. Doohan, No. 4:09-CV-20, 2010 U.S. Dist. LEXIS 79977, at *2 (M.D. Ga. Aug. 9, 2010) (assuming at the summary judgment phase that an extended stay hotel was a dwelling, but not deciding because the plaintiff's claims failed for other reasons).
103. Sanzaro v. Ardiente Homeowners Ass'n, LLC, No. 2:11-cv-01143, 2017 U.S. Dist. LEXIS 195862, at *22–23 (D. Nev. Nov. 29, 2017).
104. Schneider v. Cnty of Will, 190 F. Supp.2d 1082, 1087 (N.D. Ill. 2002).
105. Matsunaga v. Century 21, No. 84 C 11018, 1985 U.S. Dist. LEXIS 20039, at *2–3 (N.D. Ill. May 7, 1985).

held for commercial use are not dwellings.[106] In contrast, a cooperative apartment building,[107] housing for migrant workers,[108] halfway houses,[109] a home for AIDS patients,[110] drug and alcohol treatment centers,[111] a timeshare,[112] and nursing homes[113] are dwellings. Although courts are mostly in agreement about whether those kinds of structures count as dwellings, courts are divided on whether homeless shelters are dwellings.[114]

When determining whether a shelter is a dwelling, courts usually consider some mix of the following three factors: (1) length of stay,[115] (2) whether the shelter residents have somewhere else to go,[116] and (3) whether the shelter residents are able to treat the shelter as a home[117] (which some courts have said includes whether the shelter residents view the shelter as their home).[118] Courts differ as to which of these factors should be considered and given more weight. For example, in *Intermountain Fair Housing Council v. Boise Rescue Mission Ministries*, an Idaho District Court held that a homeless shelter was not a dwelling bebecause the length of stay was seventeen days for all seasons other than winter and the residents were not able to treat the shelter as a home.[119] That court held that the fact that the residents had nowhere else to go should not be given more weight than the length of stay when determining whether the shelter is a dwelling.[120] In contrast, the Southern

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106. United States v. Mintzes, 304 F. Supp. 1305, 1310 (D. Md. 1969).

107. Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1036 (2d Cir. 1979).

108. *See, e.g.*, Lauer Farms. Inc. v. Waushara Cty. Bd. of Adjustment, 986 F. Supp. 544, 559 (E.D. Wis. 1997).

109. Schwarz v. City of Treasure Island, 544 F.3d 1201, 1216 (11th Cir. 2008).

110. Baxter v. Belleville, 720 F. Supp. 720, 731 (S.D. Ill. 1989).

111. *See, e.g.*, Lakeside Resort Enters., LP v. Bd. of Supervisors, 455 F.3d 154, 160 (3d Cir. 2006); *see also* Conn. Hosp. v. City of New London, 129 F. Supp. 2d 123, 132–34 (D. Conn. 2001) (holding housing for people recovering from substance abuse while they attend an outpatient recovery program was a dwelling under the FHA).

112. La. Acorn Fair Hous. v. Quarter House, 952 F. Supp. 352, 359–60 (E.D. La. 1997).

113. *See, e.g.*, Hovsons, Inc. v. Twp. of Brick, 89 F.3d 1096, 1102 (3d Cir. 1996).

114. *Compare* Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1052 (9th Cir. 2007) (applying the FHA to a homeless shelter), *with* Smith v. Salvation Army, No. 12-144-J, 2015 U.S. Dist. LEXIS 113680, at *19 (W.D. Pa. Aug. 20, 2015) (holding a homeless shelter did not qualify as a dwelling within the meaning of the FHA).

115. Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries, 717 F. Supp. 2d 1101, 1111–12 (D. Idaho 2010).

116. Woods v. Foster, 884 F. Supp. 1169, 1173–74 (N.D. Ill. 1995).

117. *Intermountain*, 717 F. Supp. 2d at 1111–12.

118. Defiore v. City Rescue Mission of New Castle, 995 F. Supp. 2d 413, 419 (W.D. Penn. 2013).

119. *Intermountain*, 717 F. Supp. 2d at 1111–12 (noting that residents were not guaranteed the same bed each night they return, were required to leave the shelter every morning by 8:00 a.m., could not return until 4:00 p.m., and could not personalize their bed areas or leave belongings there).

120. *Id*. at 1112 .

District of New York in *Jenkins v. New York City of Homeless Services* suggested at the motion to dismiss stage that a shelter may be a dwelling because its residents had nowhere else to go.[121]

Courts have taken a fact-based approach to determining whether homeless shelters are dwellings for the purposes of the FHA.[122] For example, in *Community House v. City of Boise*, the Ninth Circuit applied the FHA to a homeless shelter and held that only admitting men to the shelter was facially discriminatory.[123] However, the court explicitly declined to say whether the FHA applied to all homeless shelters.[124] The court said that the shelter provided more than "transient overnight housing," noting that it leased forty-nine transitional housing units.[125] Although the leases for the units designated the facility as an "emergency homeless shelter," the average length of stay was a year and a half.[126] Thus, the court said there was "little trouble" concluding that this particular shelter qualified as a dwelling under the FHA.[127]

C. What Courts Should Do

When considering whether a structure is a dwelling, this Note argues that courts should focus on whether residents have somewhere else to go and should not look to length of stay as a factor. *Hughes*, the text of the FHA, and the purpose of the FHA all support this approach. *Hughes* itself does not require analyzing length of stay. The dictionary definition in *Hughes* considers that a residence can be "temporary" without being "transient."[128] In the context of homeless shelters, this

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121. Jenkins v. N.Y. City Dep't of Homeless Servs., 643 F. Supp. 2d 507, 518 (S.D.N.Y. 2009), *overruled by* Jenkins v. N.Y. City Dep't of Homeless Servs. 391 Fed. Appx. 81, 83 (2d Cir. 2010) (holding that the district court should not have reached the question of whether the shelter was a dwelling since the plaintiff failed to state a claim under the FHA); *see also Defiore*, 995 F. Supp. 2d at 419 (holding a shelter was a dwelling, even though many of the same restrictions that prevented residents from treating the shelter as a home in *Intermountain* were also present, because the residents could stay for a significant period of time and viewed the shelter as a home).

122. *See, e.g.*, Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1060 (9th Cir. 2007); *see also* Williams, *supra* note 90, at 231 (asserting that whether something is a dwelling is a very fact-based determination).

123. *Cmty. House*, 490 F.3d at 1060.

124. *Id.* at 1048 n.2.

125. *Id.*

126. *Id.*

127. *Id.*

128. Woods v. Foster, 884 F. Supp. 1169, 1174 (N.D. Ill. 1995). In *Hughes*, the dictionary definition of a residence was "a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit[.]" United States v. Hughes Mem'l Home, 396 F. Supp. 544, 549 (W.D. Va. 1975).

means that a stay can be "temporary" and still qualify as a residence under the *Hughes* dictionary definition. When determining whether the children's home was a dwelling, *Hughes* did not comment at all on the average length of stay.[129] Instead, it focused on the conclusion that the children *live* at the home, rather than "sojourn[ing]" there.[130] Thus, a test focusing on whether residents have somewhere else to go is consistent with the analysis of *Hughes*. Although this is a natural reading of *Hughes*, courts have sometimes strayed from this method of analysis when basing their reasoning instead on cases like *Schwarz* and *Lakeside* that draw on *Hughes* without explicitly following it.

Asking whether residents have somewhere else to go rather than focusing on length of stay is also consistent with the text of the FHA. The text itself makes no stipulations about the length of stay required to call a space a dwelling. The FHA defines "dwelling" as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence."[131] Because residents of homeless shelters have nowhere else to go, homeless shelters fit into this definition of dwelling. The Southern District of Florida recognized in a case about the Eighth Amendment that homelessness is involuntary, and that people experiencing homelessness have "no place else to go and no place else to be";[132] they are excluded from private property and may be arrested for sleeping, sitting down, or simply existing in public spaces.[133] The purpose of homeless shelters is to house people experiencing homelessness. Shelters are intended for occupancy as a residence. Thus, holding a shelter is not a dwelling because of a short length of stay is a departure from the plain text of the FHA.

Interpreting *Hughes* in a way that does not consider the length of stay and instead focuses on whether residents have somewhere else to go and whether they view the building as their home is also more consistent with the purpose of the FHA than the tests in *Lakeside* and *Schwarz*. As Greg Cheyne noted, the purpose of the FHA strongly suggests that homeless shelters should categorically be considered dwell-

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129. *See Hughes*, 396 F. Supp. at 549.

130. *Id.*

131. 42 U.S.C. § 3602(b).

132. Pottinger v. Miami, 810 F. Supp. 1551, 1564–65 (S.D. Fla. 1992) (holding that criminalizing life-sustaining acts, such as sleeping, in public places effectively criminalizes people experiencing homelessness for existing and constitutes cruel and unusual punishment under the Eighth Amendment).

133. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 7–9 (2014).

ings because the FHA was intended to be interpreted broadly.[134] By definition, people stay in homeless shelters because they are without homes. That is, the homeless shelter provides them with their only source of housing. If they are unfairly denied the opportunity to stay in a shelter, they have been denied fair housing. This outcome is inconsistent with the purpose of the FHA "to provide . . . for fair housing."[135] Thus if someone relies on a shelter as their home, it should be subject to the dwelling provisions of the FHA.

In addition, because people stay in homeless shelters as long as they need until they find another place to live, the time-dependent tests of *Lakeside* and *Schwartz* do not make sense in this context.[136] As the Supreme Court held, the language of the FHA is "broad and inclusive" and must therefore be constructed generously "to implement a policy that Congress considered to be of the highest priority."[137] Interpreting *Hughes* in a way that is not dependent on length of stay but rather prohibits housing discrimination against all people, including people experiencing homelessness, is more consistent with the FHA's purpose.

While determining what is a "dwelling" under the FHA, some courts have recognized the importance of how people experiencing homelessness have nowhere else to live besides shelters. For example, the Northern District Court of Illinois acknowledged this in *Woods v. Foster* when it primarily based its conclusion that a homeless shelter was a dwelling on the residents' lack of other places to live. It held that "transients" were people who planned to move to some other residence, and it contrasted "transients" with homeless shelter residents who may not move

134. Greg C. Cheyne, Comment, *Facially Discriminatory Admissions Policies in Homeless Shelters and the Fair Housing Act*, U. CHI. LEGAL F. 459, 497 (2009) ("A strong argument can be made that this expansive purpose of the FHA suggests a reading that includes homeless shelters regardless of how long occupants stay or how they treat the shelter.").

135. 42 U.S.C. § 3601.

136. Emphasizing length of stay promotes a very elitist view of what a home is. Length of stay may be a distinguishing factor for people with housing security because it can distinguish between their home and a hotel, for example. However, even if the stay is only one night long, homeless shelters are fundamentally different from hotels. Homeless shelter residents do not "sojourn" or vacation to homeless shelters in the same way that other people "sojourn" to hotels; homeless shelter residents live in homeless shelters because they have no home to return to. Thus, the test emphasizing length of stay reflects the fact that judges are economically comfortable and have likely not experienced homelessness. *See Judicial Compensation*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-compensation (last visited Feb. 28, 2021) (stating that federal district judges are paid $218,600 per year and circuit judges are paid $231,800 per year) [https://perma.cc/Z4A7-WTEA].

137. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209–11 (1972).

to another residence unless they find permanent housing.[138] While the court did mention that a 120-day stay limit was not "transient," it ultimately rested its argument on the fact that the shelter's residents had no other place to return to or reside in the way that people staying temporarily at a hotel do.[139] It emphasized that the residents intended to return because they had no place else to go.[140] As Cheyne argued, *Woods* makes it clear that categorically classifying homeless shelters as dwellings is not a departure from *Hughes*, but rather "an acceptance of the fact that if a person has no other structure to call home, then they necessarily treat what shelter they do have as a residence."[141]

Similarly, the Western District Court of Pennsylvania acknowledged in *Defiore v. City Rescue Mission* that a shelter was a dwelling because it was home to its residents. It acknowledged that the shelter was "not designed to be a place of permanent residence."[142] However, it rested its classification of the shelter as a dwelling on the fact that the shelter was intended to house people for "a significant period of time" ranging from one to ninety days, and that residents viewed the shelter as their home during their stay.[143] This analysis acknowledges that a shelter can be someone's home if they have nowhere else to go. Denying individuals the opportunity to live at the shelter is thus denying them fair housing within the scope of the FHA.

The District Court of Idaho in *Intermountain* rejected the approach proposed in this Note out of concerns that interpreting shelters to be dwellings based on whether the residents have nowhere else to return to would mean that "*any* building or structure in which a homeless person is sleeping and storing [their] possessions would be considered a 'dwelling' based simply on the intent and circumstances of the homeless person."[144] Even if this statement is true, the operative provision of the FHA would not apply to temporary self-made structures on the street, to individuals sheltering in unoccupied buildings, or to individuals sleeping in doorways.

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138. Woods v. Foster, 884 F. Supp. 1169, 1173–74 (N.D. Ill. 1995) ("As recognized by the *Hughes* and *Baxter* courts, the length of time one expects to live in a particular place does is [sic] not the exclusive factor in determining whether the place is a residence or a 'dwelling.'").

139. *Id.*

140. *Id.* at 1173.

141. Cheyne, *supra* note 134, at 497.

142. Defiore v. City Rescue Mission of New Castle, 995 F. Supp. 2d 413, 419 (W.D. Penn. 2013).

143. *Id.*

144. Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries, 717 F. Supp. 2d 1101, 1112 (D. Idaho 2010).

The FHA would not cover these situations because it prohibits the "refusal to sell or rent,"[145] and discrimination against a "buyer or renter."[146] The definition of rent includes "to lease, to sublease, to let and otherwise to grant for a consideration."[147] As the court recognized in *Woods*, this definition can include homeless shelters because it does not require the occupant to be the one paying the consideration.[148] The court held that there was "undoubtedly consideration" in that case because the defendant homeless shelter received a $125,000 grant from HUD.[149] In *Defiore*, the court similarly held that consideration in the context of homeless shelters could be federal funding, funding from other sources subsidizing the cost of housing for people experiencing homelessness, or consideration paid by the residents themselves.[150] In contrast, no monetary consideration exists when people experiencing homelessness construct dwellings in public places or stay in doorways or unoccupied buildings. Thus, the operative provision of the FHA would not apply to such structures, even though they would be considered dwellings under this interpretation of *Hughes*.[151]

Prioritizing length of stay and whether residents can treat the shelter as a home when determining what qualifies as a "dwelling" is also against the purpose of the FHA because it allows the homeless shelters themselves to decide whether the FHA applies to them. For example, in *Intermountain* and *Smith*, the courts applied the Third Circuit's test in *Lakeside* (derived from *Hughes*).[152] The *Intermountain* and *Smith* courts

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145. 42 U.S.C. § 3604(a).

146. 42 U.S.C. § 3604.

147. 42 U.S.C. § 3602(e).

148. Woods v. Foster, 884 F. Supp. 1169, 1175 (N.D. Ill. 1995).

149. *Id*.

150. Defiore v. City Rescue Mission of New Castle, 995 F. Supp. 2d 413, 418 (W.D. Penn. 2013); *see also* Anonymous v. Goddard Riverside Cmty. Ctr., 1997 U.S. Dist. LEXIS 9724, at *9 n.4 (S.D.N.Y. July 10, 1997) (assuming that federal funding given to the housing provider provides sufficient consideration for the purposes of the FHA); Hunter v. District of Columbia, 64 F. Supp. 3d 158, 177 (D.D.C. 2014) (holding that federal funding to a homeless shelter was adequate consideration to satisfy the FHA's definition of "to rent").

151. The court in *Jenkins* disagreed with the assertion that the consideration prong is met for homeless shelters. Jenkins v. N.Y. City Dep't of Homeless Servs., 643 F. Supp. 2d 507, 519 (S.D.N.Y. 2009) (holding that the consideration must be paid by the dwelling occupant in order to count as "rent" under the FHA). However, this case has little precedential value since the Second Circuit held the court erred in reaching that question and upheld the outcome in the district court on other grounds. Jenkins v. New York City Dep't of Homeless Servs., 391 Fed. Appx. 81, 83 (2d Cir. 2010). In addition, the district court's reasoning fails to uphold the broad purpose of the FHA and the Supreme Court's instructions to construe the statute broadly. 42 U.S.C. § 3601; Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209–10 (1972).

152. Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries, 717 F. Supp. 2d 1101, 1109–10 (D. Idaho 2010); Smith v. Salvation Army, No. 12-144-J, 2015 U.S. Dist. LEXIS 113680, at *10 (W.D. Pa. Aug. 20, 2015).

both held that the shelter was not a dwelling because the residents were not able to stay for long periods of time,[153] and because the residents were not able to treat the shelter as a home.[154] *Intermountain* held that the fact that the residents had nowhere else to go did not make the shelter a dwelling.[155] This analysis allows the shelters to decide whether the FHA will apply. Under this test, shelters can circumvent the FHA by limiting the number of days residents can stay, or by imposing restrictions prohibiting residents from staying at the shelter during the day, personalizing their rooms, and leaving their belongings in the shelter. Given the broad policy goals of the FHA to prevent housing discrimination,[156] it would be strange if Congress intended for building owners who are using their buildings to provide housing for others to be able to decide whether the FHA would apply to them. However, the analysis in cases like *Intermountain* allows shelter owners to do just that, thus thwarting the FHA's purpose.

Current HUD regulations support acknowledging that homeless shelters are dwellings within the meaning of the FHA. A January 28, 2020 HUD regulation about how to assess whether a request to have an animal is a reasonable accommodation under the FHA stated that examples of housing covered by the FHA included "group homes, domestic violence shelters, emergency shelters, [and] homeless shelters."[157] HUD has also said that, in the context of housing discrimination on the basis of disability, the FHA's definition of "dwelling" includes "sleeping accommodations in shelters intended for occupancy as a residence for homeless persons."[158] When choosing between multiple possible constructions of a statute, courts give great weight to the interpretation of the agency tasked with administering the statute.[159] In the case of the

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153. *Intermountain*, 717 F. Supp. 2d at 1111–12 (no more than seventeen days, except in winter when there is more flexibility); *Smith*, 2015 U.S. Dist. LEXIS 113680, at *13–17 (up to three days for out of county residents and up to thirty days for in-county residents).

154. *Intermountain*, 717 F. Supp. 2d at 1111–12 (noting residents could not personalize their bed areas, had to leave the shelter for part of the day, could not leave belongings in their bed area, and could not receive visitors, phone calls, or mail); *Smith*, 2015 U.S. Dist. LEXIS 113680, at *16–17 (noting residents stayed in military-style rooms, were not guaranteed the same bed or room each night, could not personalize their room, had to leave the shelter for most of the day and take their belongings with them, could not receive visitors, and had to comply with restrictions regarding noise and use of lights).

155. *Intermountain*, 717 F. Supp. 2d at 1112.

156. *See* 42 U.S.C. § 3601.

157. OFF. OF FAIR HOUS. AND EQUAL OPPORTUNITY, U.S. DEP'T OF HOUS. AND URB. DEV., FHEO-2020-01, SUBJECT: ASSESSING A PERSON'S REQUEST TO HAVE AN ANIMAL AS A REASONABLE ACCOMMODATION UNDER THE FAIR HOUSING ACT (2020), https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf [https://perma.cc/4EKD-PYYR].

158. 24 C.F.R.§ 100.201 (2021).

159. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 844 (1984).

FHA, that agency is HUD. The Supreme Court has held that HUD's interpretation of the FHA is entitled to "great weight."[160] Thus, HUD's interpretation is yet another reason that courts should interpret homeless shelters as dwellings within the meaning of the FHA.

In summary, both *Hughes* and the FHA's text and purpose indicate that homeless shelters should categorically be considered as "dwellings" within the meaning of the FHA. Some courts have strayed from the *Hughes* test and the text and purpose of the FHA by deciding whether homeless shelters are dwellings on a case-by-case basis and by prioritizing length of stay in their analysis. Instead of considering length of stay as a factor, courts should focus on whether residents have somewhere else to go.

D. *Common Counter Arguments*

The work of scholars such as Wong, Cheyne, and Brinson surface three counter arguments to the approach proposed here. First, Wong argues that homeless shelters should fall under Title II. Second, they suggest that the FHA might prohibit single-sex shelters if it applied to homeless shelters, which they assert would raise safety concerns. Third, the religious affiliation of 60% of homeless shelters raises the question of whether the FHA's religious exemption will or should apply in the case of LGBTQ+ access. Each argument against applying the FHA to homeless shelter discrimination on the basis of sexual orientation and gender identity fails.

1. Title II

Wong argues that homeless shelters should fall under Title II of the Civil Rights Act of 1964 instead of the FHA.[161] Title II guarantees "full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin."[162] The text defines "[p]ublic accommodation" as "any inn, hotel, motel, or other establishment which provides

160. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972).
161. *See, e.g.*, Wong, *supra* note 9, at 1883–84 (2009).
162. 42 U.S.C. § 2000a(a).

lodging to transient guests."[163] No court has held that homeless shelters are a place of "public accommodation" under Title II.[164]

Wong argues homeless shelters should fall under Title II instead of the FHA because the FHA dwelling test is too vague and inconsistently applied to homeless shelters, shelters do not involve the rental or sale of housing and therefore are not a concern of the FHA, and other policy reasons, such as a desire to continue the practice of single-sex shelters, require this.[165] However, the fact that there are problems with the dwelling test is a reason to fix it, as proposed above in Part III.C, not to remove homeless shelters from the FHA's reach entirely. The assertion that the FHA is only concerned with the sale and rental of housing is simply incorrect, because the definition of rent includes "to lease, to sublease, to let and otherwise to grant for a consideration," which can include homeless shelters.[166]

Finally, there are policy reasons that homeless shelters should fall under the FHA rather than Title II. For example, Title II does not prohibit discrimination on the basis of sex or familial status. This limitation means that, unlike the FHA, Title II cannot be used to stop discrimination in homeless shelters on the basis of sexual orientation or gender identity. In addition, the FHA has fewer procedural requirements that serve as barriers to relief for people experiencing homelessness, such as requiring the people affected to report the discrimination to the state or local authorities and wait thirty days before filing suit.[167] Finally, FHA plaintiffs can seek compensatory and punitive damages in addition to injunctive relief,[168] but only injunctive relief is available under Title II.[169] The ability to seek damages is a more effective limit on violators and also a greater incentive to bring suits.

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163. *Id*.

164. In *O'Neal*, the Western District of Wisconsin assumed that Title II applied to a homeless shelter but dismissed the case for other reasons. O'Neal v. Porchlight, Inc., No. 06-C-242-C, 2006 U.S. Dist. LEXIS 35750, at *19–22 (W.D. Wisc. May 30, 2006). In contrast, in *Quisenberry*, the Eastern District of Wisconsin said it was "questionable" whether Title II would apply to homeless shelters. Quisenberry v. New Cmty. Shelter, No. 09-C-280, 2009 U.S. Dist. LEXIS 23903, at *2 (E.D. Wisc. March 16, 2009).

165. Wong, *supra* note 9, at 1889–90.

166. 42 U.S.C. § 3602(e); *see supra* notes 147–151 and accompanying text.

167. 42 U.S.C. § 2000a-3(c); *see also* Cheyne, *supra* note 134, at 475–78 (describing drawbacks of applying Title II to homeless shelters instead of the FHA).

168. 42 U.S.C. § 3613(c).

169. 42 U.S.C. § 2000a-3.

2. Single-Sex Shelters

Second, Wong and others have claimed that, if the FHA applies to homeless shelters, it would prohibit single-sex shelters,[170] which is a common way homeless shelters limit the populations they serve.[171] Single-sex shelters often deny access to or discriminate against transgender and gender-diverse people.[172] However, Wong and others argue that eliminating single-sex shelters is undesirable because many shelter residents are recovering from intimate partner violence and thus need extra privacy and security.[173] In sum, shelters must "maintain[] the privacy rights of women and protect[] women and children from harassment, intimidation, and abuse through separate areas for women and men."[174] The argument goes that if shelters were classified as dwellings, then the FHA would force single-sex shelters "to integrate sex offenders, children, alcoholics, and battered women in the same facility."[175]

However, interpreting "dwelling" more broadly in the way Part III proposes will still permit single-sex shelters. Not all policies that are facially discriminatory would violate the FHA.[176] Courts generally look to Title VII when deciding if a facially discriminatory policy is permissible and are divided over how strict of a test to apply.[177] However, even under the Ninth Circuit's relatively strict test for evaluating a facially discriminatory policy,[178] such a policy is permissible if it is not harmful to the protected class or responds to legitimate safety concerns that are not based on stereotypes.[179]

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170. *See, e.g.*, Wong, *supra* note 9, at 1869; *see also* Brinson, *supra* note 9, at 489 (arguing for the importance of both women-only and men-only shelters due to a concern that allowing all genders might be difficult or costly for some shelters that are currently single-sex only).

171. *See* MARTHA R. BURT, LAUDAN Y. ARON, TOBY DOUGLAS, JESSE VALENTE, EGARD LEE & BRITTA IWEN, HOMELESSNESS: PROGRAMS AND THE PEOPLE THEY SERVE 66 (1999).

172. *See* Brodie Fraser, Nevil Pierse, Elinor Chisholm & Hera Cook, *LGBTIQ+ Homelessness: A Review of the Literature*, INT'L J. ENV'T RSCH. & PUB., July 2019, at 7–8; ROONEY ET AL., *supra* note 21.

173. Wong, *supra* note 9, at 1871–72.

174. *Id*.

175. *Id*. Although it is beyond the scope of this Note to address this additional counterargument in-depth, it is worth noting that some women who are survivors of sexual violence can also be classified as "sex offenders" and/or "alcoholics." Thus, many of these categories of people are currently housed together even in single-sex shelters.

176. Greg C. Cheyne, Comment, *Facially Discriminatory Admissions Policies in Homeless Shelters and the Fair Housing Act*, U. CHI. LEGAL F. 459, 486 (2009).

177. Cheyne, *supra* note 176, at 486; Brinson, *supra* note 9, at 494.

178. Brinson, *supra* note 9, at 510 (arguing that the Ninth Circuit's test is less flexible than the approaches of other circuits).

179. Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1050 (9th Cir. 2007). Using this test, the Ninth Circuit found at the preliminary injunction stage that a shelter's facially discriminatory male-only policy was not justified. The shelter argued that women and children who were excluded

Thus, a shelter housing only female victims of domestic violence could justify its facially discriminatory policy by introducing evidence that admitting men would raise a legitimate safety concern by triggering PTSD of female survivors.[180] However, a shelter would not be able to cite safety concerns to justify a facially discriminatory policy barring transgender women. Transgender women do not pose a threat to cisgender women.[181] Rather, discrimination increases safety risks for transgender women. The legislature recognized this fact in the Prison Rape Elimination Act, which acknowledged that transgender people face heightened safety risks compared with cisgender people.[182] Transgender people, especially transgender women of color, face a high risk of violence.[183] The disproportionate safety risks that transgender people face means an analysis based on legitimate safety concerns cannot exclude transgender women from women-only shelters.

Others have argued that requiring single-sex shelters without a justification for their facially discriminatory policy to accept people of

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were only temporarily disadvantaged because the shelter planned to create another shelter for women and children in the future. *Id.* at 1052. The court found that the plaintiffs raised serious questions about whether this additional shelter would ever be created, making the disadvantage much longer than temporary. *Id.* The shelter also argued that the male-only policy was justified by legitimate safety concerns. *Id.* at 1051. However, the court found insufficient evidence to support this assertion, since the shelter only submitted a statement by its executive director without any reference to facts establishing a legitimate safety concern. *Id.*

180. *See generally When the Feelings Rush Back*, DOMESTICSHELTERS.ORG (Jun. 27, 2016), https://www.domesticshelters.org/articles/taking-care-of-you/when-the-feelings-rush-back [https://perma.cc/5QWV-L8M8] (explaining that being in close proximity with a male can cause traumatic stress to some domestic violence survivors).

181. *See, e.g.*, LISA MOTTET & JOHN M. OHLE, TRANSITIONING OUR SHELTERS: A GUIDE TO MAKING HOMELESS SHELTERS SAFE FOR TRANSGENDER PEOPLE 13–14 (2003) (finding that transgender women are no more likely than cisgender women to physically or sexually assault other residents in women-only homeless shelters); Rishita Apsani, Note, *Are Women's Spaces Transgender Spaces? Single-Sex Domestic Violence Shelters, Transgender Inclusion, and the Equal Protection Clause*, 106 CALIF. L. REV. 1689, 1702, 1710 (2018) (pointing out that the claim that transgender women pose a safety threat to cisgender women in shelters rests on dangerous stereotypes and gender essentialism); Amira Hasenbush, Andrew R. Flores & Jody L. Herman, *Gender Identity Nondiscrimination Laws in Public Accommodations: A Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 SEXUALITY RES. & SOC. POL'Y 70 (2019) (finding that transgender people do not pose a threat to cisgender people in bathrooms). One could argue that transgender women may similarly trigger cisgender women's PTSD if the cisgender women misperceive them as men. However, transgender women would not raise that safety concern because transgender women are women.

182. *See* 28 C.F.R. § 319.76 (2021).

183. *See* HUM. RTS. CAMPAIGN FOUND., AN EPIDEMIC OF VIOLENCE: FATAL VIOLENCE AGAINST TRANSGENDER AND GENDER NON-CONFORMING PEOPLE IN THE UNITED STATES 2 (2020) (reporting that at least 37 transgender individuals were killed in 2020 alone due to anti-transgender hate, and that 66% of victims were Black transgender women); *see also* NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 14, at 3 (finding 53% of Black transgender individuals and 47% of transgender individuals overall have been sexually assaulted at some point in their lives).

more than one gender would be too costly. These scholars argue that the costs of restructuring and litigating may force many shelters to close, thus increasing the number of people living without shelter.[184] For instance, Brinson pointed out that applying the FHA to homeless shelters means that these shelters will no longer be able to "save money by decreasing the number of beds available to disabled persons because employing staff members who are qualified to care for them is doubly expensive."[185]

This section offers two responses to this cost argument. First, none of the articles provide any citations in their assertions about cost.[186] They provide no evidence that running a shelter in compliance with the FHA would be more expensive or force large numbers of shelters to close. Second, even if stopping discriminating adds costs for shelters, those costs do not justify continued discrimination. These scholars assume without proof that prohibiting discrimination in shelters will disadvantage people experiencing homelessness because it will result in fewer shelters. However, this argument fails to consider that allowing homeless shelters to continue discrimination already disadvantages people experiencing homelessness, especially LGBTQ+ people who are disproportionately impacted by homelessness.[187] Instead of allowing discrimination against the LGBTQ+ people experiencing homelessness to continue for the wrongly conceived "greater good" of the larger population experiencing homelessness, structural change is needed.

3. FHA Religious Exemption

Finally, even if courts apply the FHA to homeless shelters to prevent discrimination on the basis of sexual orientation and gender identity as this Note argues they should, there is likely to be religious opposition to such an application because nearly 60% of emergency shelter beds in the United States are provided by faith-based organizations.[188] For example, homeless shelters run by Christian faith-based organizations may claim that their religious beliefs give them the ability to legally discrim-

184. Wong, *supra* note 9, at 1890; Cheyne, *supra* note 176, at 491–92.

185. Brinson, *supra* note 9, at 489.

186. *See, e.g.*, Wong, *supra* note 9, at 1890; Cheyne, *supra* note 176, at 492 (stating without any citation that "[t]he rule as currently employed leaves shelters vulnerable to costly litigation, and the costs of litigating or restructuring would likely be enough to force the closure of many shelters, thus resulting in fewer shelters and services").

187. *See supra* section I.A.

188. BYRON JOHNSON, WILLIAM H. WUBBENHORST & ALFREDA ALVAREZ, ASSESSING THE FAITH-BASED RESPONSE TO HOMELESSNESS IN AMERICA: FINDINGS FROM ELEVEN CITIES 7 (2009).

inate on the basis of sexual orientation and gender identity. While it is beyond the scope of this Note to examine all possible religious exemptions, this section briefly addresses the religious exemption that is part of the FHA itself.

Shelters operated by religious organizations should not be able to claim a religious exemption to the FHA in order to discriminate against LGBTQ+ residents. The text of the religious exemption of the FHA says that religious organizations or affiliated nonprofits may limit "the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion" or give preference to people of that religion.[189] The exemption does not apply if "membership in such religion is restricted on account of race, color, or national origin."[190] One could argue that running a homeless shelter is not a "commercial purpose," so the exemption should apply. Furthermore, one could argue that religious organizations can discriminate on the basis of sex, because sex is not part of the "race, color, or national origin" list of prohibited discriminations.[191]

However, this exemption does not apply to religious shelters discriminating on the basis of sexual orientation and gender identity. That is because the exemption only applies to "limiting the sale, rental or occupancy [or giving preference] . . . to persons of the same religion."[192] In other words, religion must be the basis of discrimination.[193] As the Western District of Virginia held in *Hughes*, even if the home for children was a religious organization, the religious exemption did not apply because "religion [was] not the basis for discrimination."[194] Similarly, the Northern District Court of Ohio held in *United States v. Lorantffy Care Center* that the religious exemption did not apply because the defendant was accused of racial discrimination, not merely giving preference to members of its religion.[195] Interpreting the exemption otherwise

189. 42 U.S.C. § 3607(a).

190. *Id*.

191. *See, e.g.*, Michael P. Seng, *The Fair Housing Act and Religious Freedom*, 11 TEX. J. ON C.L. & C.R. 1, 11 (2005) (posing this hypothetical argument).

192. 42 U.S.C. § 3607(a).

193. Robert G. Schwemm & Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 IOWA L. REV. 121, 158–59 (2004) ("[The 3607(a)] exemption only authorizes a qualifying institution to discriminate in favor of its co-religionists and thus does not authorize racial or other non-religious types of discrimination.").

194. United States v. Hughes Mem'l Home, 396 F. Supp. 544, 550 (W.D. Va. 1975).

195. United States v. Lorantffy Care Ctr., 999 F. Supp. 1037, 1044 (N.D. Ohio 1998); *see also* Woods v. Foster, 884 F. Supp. 1169, 1170 (N.D. Ill. 1995) (applying the FHA to a homeless shelter operated by a group of religious organizations).

would be against the principle that exemptions to the FHA should be read narrowly in order to give the FHA a "generous construction."[196]

CONCLUSION

LGBTQ+ people face high levels of discrimination when renting or buying a home, and they account for a high proportion of people experiencing homelessness. When seeking shelter, LGBTQ+ people often face discrimination and violence. This disproportionately negatively impacts LGBTQ+ people of color. This Note proposes two interventions that can combat these problems. First, "sex" in the FHA includes sexual orientation and gender identity in light of *Bostock*. Second, homeless shelters are dwellings within the meaning of the FHA because people staying in homeless shelters have nowhere else to go. These two steps are a critical part of the road towards housing equality in the United States.

196. *See* United States v. Columbus Country Club, 915 F.2d 877, 883 (3d Cir. 1990) (quoting Trafficante v. Metro. Life Ins., 409 U.S. 205, 212 (1972); *see also* Seng, *supra* note 191 ("[B]ecause exemptions are to be narrowly construed, and because Congress has not articulated a sound policy reason that would allow religious organizations to discriminate on the basis of sex, handicap or familial status, this type of discrimination by religious organizations should be illegal under the Act.").