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WASHINGTON, D.C.: THE CAPITAL OF FAIR HOUSING ACT VIOLATIONS

by Arielle Aboulafia*

INTRODUCTION

Amid the ongoing COVID-19 pandemic, the United States is battling yet another deadly emergency: a crisis of unhoused people. The rate of unhoused people and homeless individuals in the United States has steadily increased in recent years, affirming that the country is neither properly addressing the causes of this issue nor the needs that stem from it.¹ Now, over two years into the pandemic, high rates of unemployment and evictions throughout the

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¹ *State of Homelessness in America: 2021 Edition*, NAT'L ALL. TO END HOMELESSNESS, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-2021/> (last visited Apr. 17, 2022) (the contemporary era of the homelessness crisis in the United States emerged in the 1980s because of government inaction and inattentiveness to public health concerns and social services).

nation—especially in the nation's capital—indicate that the homelessness crisis will only worsen.² This crisis, which implicates the human right to housing,³ requires immediate attention and action.

While local government agencies are in a unique position to assist unhoused people,⁴ frequently, some agencies use methods that can cause significantly more harm than relief.⁵ In Washington, D.C. (“D.C.”)—the city with the highest per-capita rate of unhoused individuals in the country⁶—the Office of the Deputy Mayor for Health and Human Services (DMHSS), is one such agency and the Coordinated Assistance and Resources for Encampments Pilot Program (Pilot Program) is one such method of harm.

This Article will examine how DMHSS's Pilot Program is not just harmful to unhoused people but illegal under U.S. federal law. DMHSS and the Pilot Program violate Title VIII of the Civil Rights Act of 1968 when the agency conducts encampment evictions before securing alternative, permanent housing for subsequently displaced persons. Moreover, because most encampment residents are

² Emily Benfer et al., *The COVID-19 Eviction Crisis: An Estimated 30-40 Million People in America Are at Risk*, ASPEN INST. (Aug. 7, 2020), <https://www.aspeninstitute.org/blog-posts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk/>.

³ International Convention on the Elimination of All Forms of Racial Discrimination, United Nations, ART. V, Dec. 21, 1965 (while this Article examines domestic law, the right to housing also implicates U.S. compliance with international human rights law under the International Convention on the Elimination of All Forms of Racial Discrimination).

⁴ *Programs and Services: Encampments*, OFF. DEPUTY MAYOR FOR HEALTH & HUM. SERV., <https://dmhhs.dc.gov/page/encampments> (last visited Apr. 17, 2022).

⁵ *Why People Experiencing Homelessness Don't Accept Shelter*, PALLET (May 20, 2020), <https://palletshelter.com/blog/2020-5-20-why-the-homeless-dont-accept-shelter/>.

⁶ *State of Homelessness in 2021: Statistics, Analysis, & Trends*, SECURITY.ORG. (Apr. 12, 2021), <https://www.security.org/resources/homeless-statistics/>.

Black,⁷ DMHSS effectively makes housing unavailable to encampment residents on the basis of race.

I. BACKGROUND

A. *The United States' Homelessness Crisis*

According to the Department of Housing and Urban Development's (HUD) 2021 Annual Homeless Assessment Report, there were 326,126 "sheltered homeless"⁸ people living in the United States during a single night in January 2021.⁹ Disturbingly, the actual number of total unhoused people living in the United States is certainly much higher.¹⁰ First, because the report does not include the number of *unsheltered* persons living throughout the country, second, because the pandemic caused significant disruptions to the counting process, and finally, because housing experts estimate that HUD's methodology, generally, undercounts people by a significant margin.¹¹ While the sheer number of unhoused people is alarming, of significant concern is that homelessness disproportionately impacts minority populations.¹²

⁷ Annemarie Cuccia & Sarah Watson, *D.C.'s New Approach to Public Spaces Leaves Out Encampment Residents*, GEO. VOICE (Sept. 25, 2021), <https://georgetownvoice.com/2021/09/25/d-c-s-new-approach-to-public-spaces-leaves-out-encampment-residents/>.

⁸ The term "sheltered homeless" refers to people who are staying in emergency shelters, transitional housing programs, or safe havens; it does not include people whose primary nighttime location is a public or private place not designated for, or ordinarily used as, a regular sleeping accommodation for people (for example, the streets, vehicles, or parks).

⁹ Meghan Henry et al., *The 2021 Annual Homeless Assessment Report (AHAR) to Congress—Part 1: Point-in-Time Estimates of Sheltered Homelessness*, U.S. DEP'T OF HOUSING & URBAN DEV. (Feb. 2022), <https://www.huduser.gov/portal/sites/default/files/pdf/2021-AHAR-Part-1.pdf>.

¹⁰ Alison Boone, *Is There a Better Way to Count the Homeless?*, BLOOMBERG CITYLAB, (March 4, 2019, 1:15 PM), <https://www.bloomberg.com/news/articles/2019-03-04/the-problem-with-hud-s-point-in-time-homeless-count>.

¹¹ *The Pitfalls of HUD's Point-in-Time Count*, SCHOOL HOUSE CONNECTION, (Jan. 7, 2020), <https://schoolhouseconnection.org/the-pitfalls-of-huds-point-in-time-count/>.

¹² *Racial Inequalities in Homelessness, by the Numbers*, NAT'L ALL. TO END HOMELESSNESS (June 1, 2020), <https://endhomelessness.org/resource/racial-inequalities-homelessness-numbers/>.

Notably, Black people account for more than forty percent of the unhoused people in the United States, despite making up just thirteen percent of the general population.¹³

B. *Unhoused Persons in the Nation's Capital*

The rates of unhoused people in Washington, D.C.—and the accompanying racial disparities—are especially troubling. Per capita, Washington, D.C. has the highest rate of unhoused people in the country at two times the national average.¹⁴ Further, while Black people make up 46.6 percent of D.C.'s population, they make up 86.4 percent of the city's unhoused population.¹⁵ Due to a severe lack of affordable housing, and unsafe and restricting conditions within homeless shelters, many unhoused people in D.C. reside in encampments throughout the city.¹⁶ According to the most recent data, there are 199 encampments, including 327 tents, across D.C.¹⁷

¹³ *Id.*

¹⁴ NAT'L ALL. TO END HOMELESSNESS, *State and CoC Ranking 2020*, TABLEAU (June 25, 2021), <https://public.tableau.com/app/profile/naeh1302/viz/2021SOHRanking-byRateandTotal/StateCoCRanking>; *About Homelessness*, CENT. UNION MISSION, <https://www.missiondc.org/learn/about-homelessness/> (last visited Apr. 17, 2022) (treating D.C. as a state in making its analysis).

¹⁵ Kate Akalonu, *Homelessness & Racial Inequity*, EVERYONE HOME DC (June 11, 2021), <https://everyonehomedc.org/homelessness-racial-inequity/>.

¹⁶ *Homeless Encampments Organizational Values Statement*, PATHWAYS TO HOUSING DC, <https://pathwaystohousingdc.org/wp-content/uploads/2021/08/Pathways-to-Housing-DC-Encampment-Statement-2021.pdf> (last visited Apr. 17, 2022); Amanda Michelle Gomez, *'I Don't Want to Go Back to That Hell Hole'*, WASH. CITY PAPER (May 28, 2020), <https://washingtoncitypaper.com/article/304507/after-temporary-hotel-stays-related-to-covid19-many-homeless-residents-are-hesitant-to-return-to-the-shelter-system/>.

¹⁷ Martin Austermuhle, *D.C. Is Making a Push to House Residents at Three Encampments Before Closing Them Down*, NPR (Sept. 16, 2021), <https://www.npr.org/local/305/2021/09/16/1037925052/d-c-is-making-a-push-to-house-residents-at-three-encampments-before-closing-them-down>.

II. DMHSS' PILOT PROGRAM—A FAILED RESPONSE TO D.C.'S HOMELESSNESS CRISIS

A. Aspirational in Theory; A Deceptive Failure in Practice

In August 2021, in response to the high number of individuals living in encampments, DMHSS quietly unveiled its Pilot Program with the expressed “goal of relocating [encampment residents] to safer permanent housing options.”¹⁸ Conceptually, the Pilot Program was designed to permanently shut down encampment locations after DMHSS provided assistance to encampment residents.¹⁹ However, a closer look at the Pilot Program quickly reveals that only certain encampment residents may receive and benefit from the program’s services.²⁰ Those who are not eligible for assistance, those who chose not to participate in earlier outreach efforts, and those who did not have the opportunity to work with DMHSS’s outreach efforts have been and continue to be evicted by the agency without first receiving any means of alternative, permanent housing.²¹ Further, though some individuals who were eligible and willing to participate in the Pilot Program were connected with short-term housing, the Pilot Program has failed to secure alternative, permanent housing for even a single encampment resident thus far.²²

B. A Closer Look at The Harmful and Illegal Impacts of DMHSS's Pilot Program

In October 2021, DMHSS established the Pilot Program’s first target: the “NoMa encampment.”²³

¹⁸ *Id.*

¹⁹ *Encampment Pilot FAQ*, OFF. DEPUTY MAYOR FOR HEALTH & HUM. SERV, <https://dmhhs.dc.gov/sites/default/files/dc/sites/dmhhs/Encampment%20Pilot%20FAQ%20FINAL.pdf> (last visited Apr. 17, 2022).

²⁰ *Id.*

²¹ Spencer Donovan & Maydeen Merino, *DC Is Moving Some Encampment Residents into Housing. What About Those Not “On the List?”*, ST. SENSE MEDIA (Sept. 29, 2021), <https://www.streetsensemedia.org/article/dc-homeless-tent-pilot-noma/#.YZnKqBDMJO8>.

²² *Id.*

²³ Marissa J. Lang, *Deep Divides Over Program Meant to Move Homeless Out of Encampments Are on Display at D.C. Council Hearing*, WASH. POST (Nov. 9, 2021, 7:02 PM), <https://www.washingtonpost.com/dc-md-va/2021/11/09/dc-homeless-encampments-council-committee-hearing/>.

Previously located in the NoMa neighborhood at the K, L, and M Street underpasses, the NoMa encampment was among the most well-known in the city.²⁴ For well over a decade, an established community of unhoused individuals resided in the area, with up to sixty people living there at a time.²⁵ However, DMHSS—citing the Pilot Program—forcibly evicted encampment residents and did so without first guaranteeing alternative, permanent housing despite the agency’s promise that it would.²⁶

The NoMa encampment was not the only community of unhoused people to suffer due to DMHSS’s harmful program. Before the end of 2021, DMHSS forcibly evicted residents from at least one other encampment.²⁷ Additional evictions are scheduled for this year as well.²⁸

III. HOMELESSNESS IS A HUMAN RIGHTS ISSUE

Homelessness is not just a racial and socioeconomic justice issue; it is also an internationally fundamental human right. When the Universal Declaration of Human Rights was adopted in 1948, the right to adequate housing was officially recognized as a universally applicable and accepted principle of human rights law.²⁹ Further, in 1966, when the International Covenant on Economic, Social and Cultural Rights (ICESCR) was drafted in 1966,

²⁴ *Id.*

²⁵ Chelsea Cirruzzo, *D.C. to Permanently Clear NoMa Underpass to Make Way for Pedestrians*, WASH. CITY PAPER (Jan 7, 2020), <https://washingtoncitypaper.com/article/176938/dc-to-permanently-clear-noma-underpass-to-make-way-for-pedestrians/>; Marissa J. Lang, *D.C. Clears Longtime Encampment in NoMa in Kickoff to New Program to House the Homeless*, WASH. POST (Oct. 4, 2021, 9:46 PM), <https://www.washingtonpost.com/dc-md-va/2021/10/04/noma-homeless-encampment-eviction/>.

²⁶ *Id.*

²⁷ Maydeen Merino & Spencer Donovan, *DC Evicts More Than 30 Homeless Residents From Park at New Jersey and O NW, Surrounds the Site in Fences*, ST. SENSE MEDIA (Dec. 8, 2021), <https://www.streetsensemedia.org/article/dc-evicts-30-homeless-residents-park-new-jersey-o-nw-surrounds-fences/#.Yk84qRPMJO9>.

²⁸ *Encampment Pilot FAQ*, *supra* note 16, at 2.

²⁹ *Fact Sheet No. 21, The Human Right to Adequate Housing*, U.N., <https://www.un.org/ruleoflaw/files/FactSheet21en.pdf> (last visited Apr. 12, 2022).

Article 11.1 included the right to an adequate standard of living, including adequate housing, as a fundamental human right.³⁰ Though the United States is a signatory of the ICESCR, it has not joined the 108 states globally that have ratified the covenant.³¹ So, while the right to adequate housing as one of the most basic human needs is acknowledged internationally, the United States denies its citizens this right by refusing to recognize a legal right to housing at all.³²

Though the United States refuses to recognize the right to adequate housing, Title VIII of the Civil Rights Act of 1968, also referred to as the Fair Housing Act, emphasizes the importance of certain housing protections.³³ Specifically, 42 U.S.C. § 3604(a) dictates that “it shall be unlawful to . . . make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”³⁴ Despite this well-established law, the DMHSS—in evicting encampment residents before placing them in alternative, permanent housing—violates the Fair Housing Act because the Pilot Program both denies housing and makes housing unavailable to encampment residents. As Black people make up the majority of individuals living in and evicted from encampments, the evictions have a disparate impact³⁵ on Black individuals specifically.³⁶

³⁰ *Id.*

³¹ *Id.*; Martha F. Davis, *Bringing It Home: Human Rights Treaties and Economic, Social, and Cultural Rights in the United States*, AM. BAR ASS’N (Apr. 1, 2015), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2015--vol--41-/vol--41--no--2---human-rights-at-home/bringing-it-home--human-rights-treaties-and-economic-social--an/.

³² *Id.*

³³ 42 U.S.C. § 3604(a) 1968.

³⁴ *Id.*

³⁵ The United States Supreme Court held in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* that disparate impact claims are cognizable under the FHA. 576 U.S. 519, 545 (2015).

³⁶ Akalonu, *supra* note 12.

IV. ANALYSIS

A. Encampments Are Dwellings

Encampments are legitimate dwellings, and as such, the FHA applies. Although federal and local legislatures go to great lengths to criminalize unhoused people and restrict what can be classified as a dwelling, cases throughout the United States have ruled in a wide range of circumstances that tents, as structures intended to be used for human habitation, are dwellings.³⁷ In addition to the caselaw, DMHSS’ own definition of an encampment acknowledges that encampments are dwellings, stating that an encampment is “an *abode* such as a tent or unmovable structure”³⁸ Moreover, the experiences of encampment residents themselves further affirm that encampments are dwellings, protected under the FHA.³⁹ Countless individuals have lived in tents under the L Street underpass for years, some for over a decade. These people call the NoMa encampment home.⁴⁰

B. DMHSS Pilot Program Denies Housing to Persons Based on Race

The FHA further applies because DMHSS’ Pilot Program effectively denies housing to encampment

³⁷ *California v. Wilson*, No. A055665, 1992 Cal. App. LEXIS 1492, at 1489 (Cal. Dist. Ct. App. Dec. 29, 1992); Evanie Parr, Comment, *When a Tent Is Your Castle: Constitutional Protection Against Unreasonable Searches of Makeshift Dwellings of Unhoused Persons*, 42 SEATTLE UNIV. L. REV. 993, 995 (2016).

³⁸ *Encampment Protocol Engagement FAQ*, OFF. DEPUTY MAYOR FOR HEALTH & HUM. SERV 1, https://dmhhs.dc.gov/sites/default/files/dc/sites/dmhhs/page_content/attachments/Encampment%20Protocol%20Engagement%20FAQ.pdf (last visited Apr. 17, 2022).

³⁹ Austermuhle, *supra* note 14.

⁴⁰ *Id.*

residents based on race, given that the majority of encampment residents are Black.⁴¹ While no data currently exists regarding the precise racial makeup of encampment residents, the racial makeup of D.C.'s unhoused population supports the claim that the overwhelming majority of encampment residents are Black.⁴² Accordingly, because DMHHS evicts encampment residents, most of whom are Black, without first ensuring that individuals receive guaranteed, alternative permanent housing *before* evictions take place, the agency and its Pilot Program deny and make unavailable housing to persons on the basis of race.

V. RECOMMENDATIONS AND CONCLUSION

Ultimately, the existing legal protections under the Fair Housing Act that prohibit government agencies from denying a person a dwelling based on race protect encampment residents facing evictions. To ensure that DMHSS is compliant with the FHA and with the model standard set by ICESCR in recognizing a legal right to adequate housing, the agency must not close encampments until *after* encampment residents secure alternative, *permanent* housing.

⁴¹ Letter from Brian McClure, Director, Council Office of Racial Equity, to the Honorable Phil Mendelson, Chairman, Council of the District of Columbia (May 12, 2021), https://lms.dccouncil.us/downloads/LIMS/46864/Other/B24-0168-REIA_-_DOPA_Amendment_Act_of_2021.pdf (providing a survey of people experiencing homelessness conducted in January 2021, which found that 86.5% of the residents who experienced homelessness were Black or African American and that according to The Community Partnership for the Prevention of Homelessness, Black residents are disproportionately affected by homelessness in the District).

⁴² *Id.*