DOUBLED-UP: HOW HUD MISTAKENLY EXCLUDES A VULNERABLE POPULATION

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I. INTRODUCTION

Cindy, Mark, and their two young children, Theo and Grace, shared a two-bedroom apartment with Mark's grandmother, sister, and brother-in-law.[1] Cindy, Mark, Theo, and Grace were evicted from their apartment after Mark was laid off from his job as a security guard. The family lived in their car for a couple of weeks, but Mark's grandmother eventually learned of the family's situation and invited them to stay with her until they could get back on their feet. However, despite Mark's two new jobs in the service industry and Cindy's job as a pharmacy technician, the family was still unable to find a new home. Even if they could find a landlord to rent to them with an eviction on their record, they could not afford the combined cost of a security deposit, the first and last month's rent, and the current month's rent all at once. So, they continued to live with Mark's grandmother. However, this family would not qualify for housing assistance because they do not fit the homeless definition used by many housing service providers. Excluded from this narrow definition of homelessness are most individuals and families who are doubled-up—those temporarily living with someone else without any property interest in the home (i.e., as a co-renter or owner). Doubling-up shares many of the same causes and social impacts as more traditional understandings of homelessness, but some federal regulators

 Stetson University College of Law, 2021; B.A. in Public Policy Studies, Duke University, 2013. Thank you to Professor Louis Virelli for his invaluable feedback while writing this Article. Also, thank you to Notes & Comments Editor, Claire McQueen and Articles & Symposia Editor, Jennifer Rex for their guidance and assistance throughout the writing and editing processes. Lastly, thank you to all the hard-working editors and associates from *Stetson Law Review* who helped make this Article possible.

1. This is the story of a family the author met while working at a homelessness nonprofit. Identifying information has been changed to protect the family's identity. For another example of a similar situation, see Safia Samee Ali, *Homeless but Hidden, Some Americans Families are Disqualified from Crucial Aid*, NBC NEWS, https://www.nbcnews.com/news/us-news/homeless-doubled-families-living-other-households-may-fall-aid-blind-n1251446 (last updated Dec. 18, 2020, 2:48 PM EST).

unjustifiably overlook it. This is especially true of the agency most directly empowered to combat homelessness in America, the United States Department of Housing and Urban Development (HUD).

While the causes of any one individual's homelessness can be many and complex, homelessness is generally the product of several factors: lack of affordable housing, limited housing assistance programming, underemployment, lack of employment opportunities, decline in public assistance, lack of affordable health care, domestic violence, mental illness, and addiction.[2] The most straightforward definition of homelessness is "having no home or permanent place of residence."[3] There are three subtypes of homelessness within this broader definition: (1) chronic homelessness, which makes up a small percentage of the overall homeless population but is most similar to the stereotype of an older individual living perpetually on the streets; (2) transitional homelessness, which accounts for the majority of those experiencing homelessness and is typically a younger person that becomes homeless only once and for a short period; and (3) episodic homelessness, which is usually a younger person who is in and out of homelessness and more likely to experience chronic unemployment and medical issues than the transitional homeless.[4]

Since the 1980s, the federal government has been developing programs to help protect homeless individuals and combat the phenomenon of homelessness more broadly. The government's primary approach to addressing homelessness has been through grant support to non-profit service providers and states, and HUD is the primary source of federal grant funding for homeless service providers.[5] HUD disperses this funding through its programming, including the Continuum of Care (CoC) Grant Program.[6] The CoC Program provides the opportunity for homeless service organizations to collaborate and create a coordinated system of services that strategically addresses

2. *Homelessness in America*, NAT'L COALITION FOR THE HOMELESS, https://nationalhomeless.org/about-homelessness/ (last visited Jan. 8, 2021).

3. *Homeless*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/homeless (last visited Jan. 8, 2021).

4. *Homelessness in America*, *supra* note 2.

5. *Federal Funding for Homelessness Programs*, NAT'L ALLIANCE TO END HOMELESSNESS, https://endhomelessness.org/ending-homelessness/policy/federal-funding-homelessness-programs/ (last visited Jan. 8, 2021).

6. *Continuum of Care (CoC) Program*, HUD EXCHANGE, https://www.hudexchange.info/programs/coc/ (last visited Jan. 8, 2021) [hereinafter *CoC Program Overview*]; *Homeless Assistance Programs*, HUD EXCHANGE, https://www.hudexchange.info/homelessness-assistance/ (last visited Jan. 8, 2020).

homelessness in the CoC's own community.[7] CoCs are also tasked by HUD to conduct an official annual count of the homeless throughout the country.[8]

If a CoC receives HUD funding, it is limited to serving those that HUD considers homeless under its own definition, which is supposed to be based on the statutory definition of homelessness in the Homeless Emergency Assistance and Rapid Transition to Housing (HEARTH) Act of 2009.[9] When conducting the annual survey of how many people are experiencing homelessness in the country, CoCs only count those who meet HUD's definition of homelessness.[10]

Currently, between HUD's more narrow definition of homelessness and its eligibility requirements, the majority of the doubled-up population is excluded from both the annual count and programs like the CoC.[11] In fact, HUD's interpretation is inconsistent with the relevant statutory authority because the HEARTH Act expanded the statutory definition of homelessness to include circumstances like being doubled-up, so HUD's regulatory definition of homelessness should also be broad enough to include the same population.

The doubled-up's exclusion from HUD's homelessness definition also has serious implications in light of the recent COVID-19 pandemic. In April 2020, the United States hit its highest unemployment rate since the Great Depression: 14.8%.[12] While the United States is facing the most immediate impacts of the pandemic,[13] Americans do not yet have the benefit of hindsight to understand every way in which their lives are

7. *Introductory Guide to the Continuum of Care (CoC) Program: Understanding the CoC Program and the Requirements of the CoC Program Interim Rule*, U.S. DEP'T OF HOUS. AND URBAN DEV. 1 (July 14, 2012), https://files.hudexchange.info/resources/documents/CoCProgramIntroductoryGuide.pdf [hereinafter Guide to CoC].

8. *What is a Point-in-Time Count?*, NAT'L ALLIANCE TO END HOMELESSNESS (Sept. 7, 2012), https://endhomelessness.org/resource/what-is-a-point-in-time-count/; *State of Homelessness: 2020 Edition*, NAT'L ALLIANCE TO END HOMELESSNESS, https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-report/ (last visited Jan. 8, 2021).

9. Homeless Emergency Assistance and Rapid Transition to Housing: Defining "Homeless," 76 Fed. Reg. 75,994, 75,994–95, 76,913–14 (Dec. 5, 2011) (amending 24 C.F.R. pt. 91, 582, and 583); Homeless Emergency Assistance and Rapid Transition to Housing: Continuum of Care Program 77 Fed. Reg. 45,422, 45,422, 45,424. (July 31, 2012) (to be codified at 24 C.F.R. pt. 578).

10. *Don't Count on It: How HUD Point-in-Time Count Underestimates the Homelessness Crisis in America*, NAT'L LAW CTR. ON HOMELESSNESS & POVERTY 12–13 (2017), https://nlchp.org/wp-content/uploads/2018/10/HUD-PIT-report2017.pdf.

11. *See infra* pt. V (describing the two way in which those doubled-up could qualify for services and recommending that HUD amend its regulatory definition to include all of the doubled-up).

12. *Civilian Unemployment Rate*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm (last visited Jan. 8, 2021).

13. *Coronavirus Disease 2019 (COVID-19): United States COVID-19 Cases and Deaths by State*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last updated Jan. 8, 2021, 6:19 PM).

impacted, specifically the full effects on housing stability are yet to be seen.[14]

Eviction moratoriums and unemployment benefits help prevent millions of Americans from losing their housing so far.[15] However, these benefits may soon be coming to an end.[16] The federal eviction moratorium created by the Coronavirus Aid, Relief, and Economic Security (CARES) Act originally ended on July 24, 2020, but has been extended a few times, most recently until January. 31, 2021.[17] While increased unemployment benefits and eviction moratoriums are protecting housing for an estimated twelve million people, the expiration of these benefits before job losses are recovered will likely create a marked increase in the need for housing assistance.[18] Those once able to provide for themselves independently are now likely to need assistance to get back on their feet. Therefore, the need for assistance to those forced to double-up is especially important during this crisis because family members and support networks, who are also likely struggling, will be asked to fill in the gaps left by the government.

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14. A study conducted by Columbia University economist, Dr. Brendan O'Flaherty, in the early days of the pandemic estimated a homelessness increase of 40–45% (or about 800,000 Americans) by the end of the year based on unemployment. Harmeet Kaur, *The Pandemic Could Drive Homelessness Up As Much As 45%, an Economist Projects*, CNN, https://www.cnn.com/2020/05/15/us/homelessness-unemployment-increase-report-pandemic-trnd/index.html (last updated May 15, 2020, 1:08 PM ET); *see also Analysis on Unemployment Projects 40-45% Increase in Homelessness This Year*, COMMUNITY SOLUTIONS (May 11, 2020), https://community.solutions/analysis-on-unemployment-projects-40-45-increase-in-homelessness-this-year/ (detailing methodology and providing the raw data from the study). However, since this study, unemployment benefits were increased and eviction moratoriums were put in place, so fortunately this projection has yet to be realized. *See infra* note 15 and accompanying text.

15. Renae Merle, *A Federal Eviction Moratorium Has Ended. Here's What Renters Should Know*, Aug. 4, 2020, WASH. POST, https://www.washingtonpost.com/business/2020/07/24/faq-federal-eviction-moratorium/. Eviction moratoriums were implemented across the country from the beginning of the pandemic, including a federal moratorium enacted on March 27, 2020. The federal moratorium applied to housing with federally backed mortgages. *Protecting Renter and Homeowner Rights During Our National Health Crisis*, NAT'L HOUSING L. PROJECT (Jan. 4, 2021), https://www.nhlp.org/campaign/protecting-renter-and-homeowner-rights-during-our-national-health-crisis-2/.

16. *Protecting Renter and Homeowner Rights During Our National Health Crisis*, *supra* note 15. As of Dec. 3, 2020, fifteen states (plus Washington, D.C. and Puerto Rico) have some form of eviction protection. Emily A. Benfer, *COVID-19 Eviction Moratoria: Federal (CDC), State, Commonwealth, and Territory*, https://docs.google.com/spreadsheets/d/e/2PACX-1vTH8dUIbfnt3X52TrY3dEHQCAm60e5nqo0Rn1rNCf15dPGeXxM9QN9UdxUfEjxwvfTKzbCbZxJMdR7X/pubhtml (last visited Jan. 8, 2021).

17. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,292 (Sept. 4, 2020); *Protecting Renter and Homeowner Rights During Our National Health Crisis*, *supra* note 15. This date is current at the time this Article was written but may change as the pandemic continues.

18. Merle, *supra* note 15; *see also* Ali, *supra* note 1 (explaining how the pandemic has made doubling-up more challenging because of the added health concerns and how the risk of infection is deterring those in need from staying in shelters).

This Article argues that HUD mistakenly excludes many of those who are doubled-up, frustrating the purpose and efficiency of the CoC Program. First, this Article provides a history of homelessness in the United States, including federal responses and the political climate surrounding homelessness legislation, to argue that understandings of homelessness and its causes have evolved from a focus on healthcare to a more nuanced understanding that includes economic and other social causes. Second, it provides an overview of the doubled-up population and the effects of excluding them from services. Third, it analyzes understandings of homelessness relative to congressional intent to argue that inclusion of the doubled-up in HUD's definition was in fact Congress' intention. Finally, it discusses HUD's responses to comments about the doubled-up population and concludes that HUD mistakenly excludes most of those who are doubled-up but could remedy its mistake by amending its regulatory definition.

II. EVOLUTION OF HOMELESSNESS IN THE UNITED STATES AND FEDERAL RESPONSES

Homelessness has evolved over the course of American history, and it is important to understand the historical understandings of the homeless to understand why current federal definitions of homelessness exclude a large population of vulnerable people. The current phenomenon of doubling-up fits into our newest understanding of homelessness as being primarily a product of economic and social factors, not just the product of healthcare disparities. Congress and some administrative agencies have already recognized this new understanding, but HUD is failing to catch up.

A. The Early American Homeless: Tramps, Vagrants, and Transients

Homelessness is as old as the United States.[19] Prior to the 1820s, fewer than seven percent of Americans lived in urban areas, meaning that while homelessness likely existed in rural areas, its prevalence would have been less obvious than when concentrated in a city and therefore less quantifiable as a social issue.[20] The Industrial Revolution prompted the migration of many from rural areas to urban centers in

19. KENNETH L. KUSMER, DOWN & OUT, ON THE ROAD: THE HOMELESS IN AMERICAN HISTORY 3 (2002).

20. NAT'L ACADS. OF SCIS., ENG'G, & MED., *Appendix B: The History of Homelessness in the United States*, *in* PERMANENT SUPPORTIVE HOUSING: EVALUATING THE EVIDENCE FOR IMPROVING HEALTH OUTCOMES AMONG PEOPLE EXPERIENCING CHRONIC HOMELESSNESS 175 (2018) [hereinafter *History of Homelessness*].

search of work, where migrants likely lacked a support network and where the numbers of the homeless became concentrated.[21] By the 1850s, police stations designated rooms for vagrants, serving as one of the first shelter systems for the homeless.[22] And by the 1870s, the term "homelessness" was first used to describe vagrants, tramps, and transients.[23]

While originally confined to major urban centers at the heart of the Industrial Revolution, the post-Civil War Era facilitated nationalized homelessness through the construction of the national railroad system, continued urbanization and industrialization, and increased mobility.[24] This meant that the unemployed homeless were no longer confined to the urban centers to which they migrated, but could travel nationally between cities in search of work or other opportunities.[25] Vagrants and transients were generally disfavored among society and seen as lazy and poor.[26] They were typically young, able-bodied white men who represented a counterculture that rebelled against societal norms and the constraints that industrial work represented.[27] At that point in time, tramps were able to "rid[e] the rails" nationally in search of work.[28] This societal disdain for tramps was likely the beginning of the stereotype that the homeless are lazy and should be feared because tramps were seen as a threat to the established norms of society.[29]

From the late 1880s, which was the first time the term "hobo" was used to describe the homeless, until the beginning of World War II (WWII), the idea of the hobo softened the image of the homeless.[30] Writers like Walt Whitman and Jack London romanticized hobo culture, or life on the road, as "an escape from the oppression and monotony of factory work."[31] This romanticization of hobo culture faded as seasonal farm work began to go to immigrants, companies began to value longevity from employees, and the economy boomed after WWII.[32] Then, from WWII to the 1980s, while the typical face of homelessness remained disproportionately white and male, they were typically over

21. *Id.*
22. *Id.*
23. *See* KUSMER, *supra* note 19, at 3; *History of Homelessness*, *supra* note 20, at 175.
24. *History of Homelessness*, *supra* note 20, at 175.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *See generally* KUSMER, *supra* note 19, at 3–11.
30. *History of Homelessness*, *supra* note 20, at 176.
31. *Id.*
32. *Id.*

fifty years old, disabled, and on welfare or social security.[33] These men typically lived in either flophouses (essentially a cheap hotel) or single room occupancy hotels (SROs) in low-income and depressed areas in urban centers.[34]

B. Recognition of Homelessness as a National Crisis

The 1980s brought about another evolution of homelessness in the United States.[35] Large cuts in government funding for HUD, other safety net programs, and research grants combined with the Reagan administration's reluctance to acknowledge homelessness as a federal issue, state closure of mental hospitals, and a major recession[36] contributed to reframing the understanding of homelessness from that of the hobo to that of a mentally ill person plagued by schizophrenia or drug addiction.[37] By 1985, there were between 250,000 and 3,000,000 homeless people in the United States.[38] The average age of the homeless tended to be younger, around thirty-five years old.[39] Instead of being predominately older, white men, the population now included more minorities (especially African Americans), women, and children.[40]

During his 1980 presidential campaign, President Reagan made a promise to "get government off our backs and out of our pockets"[41] by

33. *Id.*

34. *Id.* Under the current HUD definition of homelessness, those men who lived in flophouses and in SROs would not be classified as homeless. *Id.*

35. *Id.*

36. The recession in the 1980s caused high unemployment rates, so when HUD and other federal safety net program funding was cut, the effects of the recession were amplified. *Id.* at 176–77. *See* Marian Moser Jones, *Creating a Science of Homelessness During the Reagan Era*, 93 MILBANK Q. 139, 140–66 (2015).

37. *History of Homelessness*, *supra* note 20, at 176; NAT'L ACADS. OF SCIS., ENG'G, & MED., *Addressing Homelessness in the United States*, *in* PERMANENT SUPPORTIVE HOUSING: EVALUATING THE EVIDENCE FOR IMPROVING HEALTH OUTCOMES AMONG PEOPLE EXPERIENCING CHRONIC HOMELESSNESS 25 (2018). Most government and privately funded research conducted about homelessness in the 1980s focused on mental and behavioral health. In fact, the Reagan administration opposed social research, like that of the systemic relationship between homelessness and factors such as housing and employment. Jones, *supra* note 36, at 151.

38. GEN. ACCOUNTING OFFICE, *HOMELESSNESS: A COMPLEX PROBLEM AND THE FEDERAL RESPONSE*, H.R. REP. NO. GAO/HRD-85-40, at i (1985). There was no dispute among federal agencies and local service providers that the homeless population was increasing. *Id.* at ii. However, because their methods for counting the population varied so widely, so did estimations of the rate of growth of these populations. *Id.* So, combining each estimation reflects an estimated increase of 10–38% per year from 1980 to 1983. *Id.*

39. *Id.*

40. *Id.;* Jones, *supra* note 36, at 141. Part of the reason for this change in demographics was the demolition of SROs and tenement-like housing in the 1980s, forcing the poor who lived in these structures onto the street and creating a much more visible homeless population. Jones, *supra* note 36, at 149.

41. *Id.* at 150.

reducing overall federal spending. During the years of the Reagan administration, HUD's authorized budget was cut by seventy-eight percent, from $32.2 billion to a mere $6.9 billion.[42] Additionally, public assistance and income support were cut while housing costs were increasing, so "[w]hen public assistance decreased, affordable housing became increasingly scarce for the extremely poor."[43] Of this $25.3 billion cut, $12 billion was directly cut from housing assistance and subsidized housing.[44] During this same period, there was also a drastic reduction in new public housing construction.[45] In 1979, 55,000 new units of public housing were authorized, but by 1984 this number was cut to zero.[46] The Reagan administration's later reluctance to address homelessness is directly tied to the administration's cuts to government spending. Between the cuts to HUD funding and the cessation of new housing construction there was little ability to address the homelessness crisis even if the will existed.

When these cuts to HUD were combined with other cuts to Supplemental Security Income (SSI), including benefits for the disabled, and the passage of the Social Security Act of 1980, which made it harder to qualify for disability benefits, it meant that many with mental illness were pushed into homelessness.[47] The high level of visibility of those living on the street in urban areas meant that the face of homelessness became the mentally ill and helped perpetuate the understanding of homelessness as primarily a healthcare issue without the economic and social understandings we have today.[48]

On January 31, 1982, a *New York Times* story about a sixty-one year old African American woman, Rebecca Smith, who was found frozen to death in a cardboard box in New York City, sparked a national

42. William Tucker, *Cato Institute Policy Analysis No. 127: The Source of America's Housing Problem: Look in Your Own Back Yard*, CATO INST. (Feb. 6, 1990), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa127.pdf.

43. Victoria C. Spetter, *As Government Assistance Decreases, Homelessness Increases: A Closer Look at Welfare, Housing, and Homelessness*, 3 PENN. L. LEGAL SCHOLARSHIP REPOSITORY 111, 113–114 (1996).

44. GEN. ACCOUNTING OFFICE, *HOMELESSNESS: A COMPLEX PROBLEM AND THE FEDERAL RESPONSE*, H.R. REP. NO. GAO/HRD-85-40, at ii; *History of Homelessness*, *supra* note 20, at 177.

45. GEN. ACCOUNTING OFFICE, *HOMELESSNESS: A COMPLEX PROBLEM AND THE FEDERAL RESPONSE*, H.R. REP. NO. GAO/HRD-85-40 at 25.

46. Tucker, *supra* note 42.

47. *History of Homelessness*, *supra* note 20, at 177.

48. *Id.* at 178. Interestingly, also in the 1980s, public inebriation was decriminalized in many U.S. cities, so those once arrested and jailed for drunkenness were now on the streets or in homeless shelters, further adding to the visibility of homelessness (and driving the drunken stereotypes of the homeless) during this time. *Id.* at 177.

conversation about the homelessness crisis.[49] Ms. Smith represented the new face of homelessness in the United States because, while she was the valedictorian of her college class, she suffered from schizophrenia and landed on the streets following a ten-year hospitalization for her condition.[50] It was after the start of this national conversation that activists, major city mayors, and some Congress members began calling the homelessness issue a national crisis.[51] However, it would be 1984 before the Reagan administration broke its silence.[52]

While the federal government was barely funding research in the 1980s, let alone homelessness research, the National Institute of Mental Health (NIMH) managed to begin researching the intersections between homelessness and mental illness in 1982.[53] This research was incredibly important, and because it was the only research being done about homelessness, it had a huge impact on the federal response.[54] This research was yet another driver of the perception that addressing healthcare disparities would solve homelessness—the theme of the 1980's federal homelessness policy.[55]

Then, in 1983, due to public outcry and support of some Republican legislators, the first federal task force dedicated to supporting state and local governments' efforts to address homelessness was created, but the Reagan administration still declined to publicly recognize homelessness as a national issue.[56] The Federal Task Force on the Homeless was created within the U.S. Department of Health and Human Services (HHS) to provide local governments with information about how to obtain surplus federal property.[57] This task force did not address homelessness through programmatic or policy-driven solutions; the idea behind the task force was to educate local governments about non-monetary

49. Robin Herman, *One of City's Homeless Goes Home – In Death*, N.Y. TIMES, Jan. 31, 1982, at 34; Jones, *supra* note 36, at 141.

50. Herman, *supra* note 49, at 34.

51. Jones, *supra* note 36, at 141.

52. *Id.*

53. *Id.* at 152.

54. *Id.* at 159.

55. *Id.* at 162.

56. *McKinney-Vento Act: NCH Fact Sheet #18*, NAT'L COALITION FOR THE HOMELESS (June 2006), https://www.nationalhomeless.org/publications/facts/McKinney.pdf [hereinafter *McKinney-Vento Act Fact Sheet*].

57. *Implementation of the McKinney Homeless Assistance Act by the Interagency Council on the Homeless: Joint Hearing Before the Gov't Activities and Transportation Subcomm. and the Employ. and Housing Subcomm.*, 101st Cong. 35 (1989) (statement of Dana H. Harris) [hereinafter *Implementation of McKinney Act*]; *United States Interagency Council on Homelessness Historical Overview*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, https://www.usich.gov/resources/uploads/asset_library/USICH_History_final.pdf (last visited Jan. 8, 2021); *McKinney-Vento Act Fact Sheet*, *supra* note 56.

resources available from the federal government that localities could utilize in whatever way they needed.[58]

January 1984 finally brought President Reagan's first public comment about homelessness in the form of a response to a reporter's criticism of the President's policies favoring the rich.[59] President Reagan stated, "the people who are sleeping on the grates, the homeless, who are homeless you might say by choice."[60] This sentiment, coupled with the administration's belief that the closure of state-run mental hospitals was the primary driver of homelessness, provided the justification the administration needed to remain inactive.[61] To the administration, homelessness was solely an issue for the states because they are the ones who closed the hospitals, so the federal government had no business interfering. Therefore, if the states were responsible or homelessness was actually just a choice, then there was no actual crisis. However, this position would soon change as the political landscape changed.

After President Reagan won reelection in 1984 by a landslide, Republicans had some political flexibility to acknowledge the homelessness crisis among the mentally ill.[62] But it was not until Democrats, supporters of a federal response to homelessness, gained control of the House and Senate in 1986 that the federal response to homelessness finally changed.[63] The first attempt at legislation, the Homeless Persons' Survival Act, was introduced in both the Senate and the House and contained both long- and short-term measures to

58. *Implementation of McKinney Act*, *supra* note 57, at 35.

59. *World News Tonight* (ABC television broadcast Jan. 31, 1984).

60. *Id.*

61. Jones, *supra* note 36, at 160. In a Feb. 23, 1984, memo, Donald Clarey, one of President Reagan's aides, outlined the administration's reasoning behind its silence on the homelessness crisis:

> The whole question of the homeless, in my opinion, should be addressed from a different angle, namely, that well over 50 percent of these people are released mental patients and victims of terrible neglect by states (New York is by far the worst). Most of the others are alcoholics and drug abusers. Very few are there as a result of unemployment alone. These states have found it expedient to let them roam the streets with no supervision or support mechanisms because it is cheaper to put them on SSI (federal disability benefits). Most of the people who sleep on grates are eligible for SSI but probably don't want to participate.

Id. (citing Clarey, D. Memorandum for Craig L. Fuller: HHS Homeless Program. (Feb. 23, 1984) (copy on file with Ronald Reagan Library, Simi Valley CA)).

62. *Id.* at 162.

63. *Id.*

programmatically address homelessness, but only a small portion of the bill was enacted.[64]

Then, in late 1986, Title I of the original Homeless Persons' Survival Act was introduced to Congress as the Urgent Relief for the Homeless Act, which had provisions for emergency housing, healthcare, food, and some transitional housing.[65] When the chief Republican sponsor Stewart McKinney passed away in May 1987, Congress renamed the bill the Stewart B. McKinney Homeless Assistance Act both to honor Rep. McKinney and to put pressure on President Reagan to sign the legislation, which he reluctantly did on July 22, 1987.[66] The Stewart B. McKinney Homeless Assistance Act was the first major piece of legislation to address homelessness on the federal level.[67]

The McKinney-Vento Act was the first and only major piece of legislation to provide federal funding for homeless programs.[68] Title IV of the McKinney-Vento Act authorized HUD to implement the Emergency Shelter Grant program, the Supportive Housing Demonstration Program, Supplemental Assistance for Facilities to Assist the Homeless, and the Section 8 Single Room Occupancy Moderate Rehabilitation program.[69]

The McKinney-Vento Act established the first statutory definition of homelessness, which included only those who were literally homeless.[70]

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64. *McKinney-Vento Act Fact Sheet*, *supra* note 56. One portion that was passed was the Homeless Eligibility Clarification Act of 1986, which removed the permanent address requirement from other programs, like Supplemental Social Security Income, Food Stamps, and Medicaid. The other portion passed was the Homeless Housing Act, which created the Emergency Shelter Grant and a transitional housing program to be administered by HUD. *Id.*

65. *Id.*

66. Jones, *supra* note 36, at 163.

67. *Id.* When Representative Bruce Vento, another key supporter of the Act, died in 2000 President Bill Clinton renamed the Act the McKinney-Vento Act. *McKinney-Vento Act Fact Sheet*, *supra* note 56.

68. *Id.* While the McKinney-Vento Act was reauthorized by the Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009, there has been no other major piece of independent legislation to address homelessness on the federal level. *See* 42 U.S.C. §§ 11301 et seq. (2018)

69. *Best Practices in Interagency Collaboration Brief Series: Housing and Education Collaborations to Serve Homeless Children, Youth, and Families*, NAT'L CENTER FOR HOMELESS EDUC. AT SERVE (Spring 2013), https://nche.ed.gov/wp-content/uploads/2018/10/hud.pdf [hereinafter Collaboration Brief Series]; *McKinney-Vento Act Fact Sheet*, *supra* note 56. Other titles within the Act authorized other agencies to implement their own programming.

70. 42 U.S.C. § 11302 (1987). The statute, in relevant part defined "homeless" and "homeless individual or homeless person" as:

> (1) an individual who lacks a fixed, regular, and adequate nighttime residence; and
>
> (2) an individual who has a primary nighttime residence that is—
>
> (A) a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);

Literal homelessness includes living on the street or in a car, as well as living in temporary accommodations, like homeless shelters and welfare hotels.[71] At this time, there is seemingly little contemplation of homelessness beyond an individual living on the street or in a shelter. This is unsurprising because of the aforementioned visibility of those living in these conditions and the focus on healthcare as the driver of homelessness because it was the only research being done about the population. Because the administrative and congressional understanding of homelessness did not include other economic or social drivers, it is reasonable that the definition of homelessness would be interpreted narrowly by HUD to address primarily the mental healthcare of single people living on the street. However, as the nation faced a different crisis, the understanding of homelessness evolved to include those economic and social drivers.

C. The Housing Crisis of 2008: The First Major Reauthorization of the McKinney-Vento Act

The collapse of Lehman Brothers on September 15, 2008 marked the day the United States plunged into its largest financial crisis since the Great Depression.[72] At the heart of the Great Recession was one of the largest housing crises in the nation's history.[73] Over the course of the crisis, 8.7 million people lost their jobs, causing about 10 million people to lose their homes.[74] Families were foreclosed on at alarming rates, many of them with children[75]—a population everyone can agree needs a safe and stable home. So, in response to the crisis, the federal government reauthorized and expanded the McKinney-Vento Act

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(B) an institution that provides a temporary residence for individuals intended to be institutionalized; or

(C) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

Id.

71. *Id.* Welfare hotels provide temporary housing until more permanent housing becomes available for those receiving welfare benefits. *See* Philip Shenon, *Welfare Hotel Families: Life on the Edge*, N.Y. TIMES, Aug. 31, 1983, at B1.

72. Jim Puzzanghera, *A Decade After the Financial Crisis, Many Americans are Still Struggling to Recover*, SEATTLE TIMES, https://www.seattletimes.com/nation-world/a-decade-after-the-financial-crisis-many-americans-are-still-struggling-to-recover/ (last updated Sept. 11, 2018).

73. *Id.*

74. *Id.*

75. Barbara Sard, *Number of Homeless Families Climbing Due to Recession: Recovery Package Should Include New Housing Vouchers and Other Measures to Prevent Homelessness*, CENTER ON BUDGET AND POL'Y PRIORITIES 2 (Jan. 8, 2009), https://www.cbpp.org/research/number-of-homeless-families-climbing-due-to-recession.

through the Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009 (HEARTH Act).[76]

The HEARTH Act was signed into law on May 20, 2009, eight months after the collapse of Lehman Brothers, as part of the Helping Families Save Their Homes Act of 2009.[77] The HEARTH Act was a fundamental shift in the federal government's approach to homelessness;[78] most notably because it solidified federal support for Housing First programming[79] and greatly expanded the definition of homelessness.[80] Housing First is an evidence-based approach to homelessness that prioritizes getting individuals and families into permanent housing quickly and then working with them to address the reasons they originally became homeless.[81] Housing First is based on the fundamental belief that people have basic needs that must be met, like food and housing, before ancillary needs, like employment and

76. *Summary of HEARTH Act*, NAT'L ALLIANCE TO END HOMELESSNESS (Oct. 21, 2008), https://endhomelessness.org/resource/summary-of-hearth-act-2/. The HEARTH Act was originally introduced by Democrats in the House as a stand-alone bill in February 2007 but failed to pass in the Senate before the end of the 2008 session. *Id.* The Act was later attached to the Helping Families Save their Homes Act, which passed both Houses with bipartisan support on April 2, 2009. *Id.; see also Final Vote Results for Roll Call 271*, CONGRESS (May 19, 2009), http://clerk.house.gov/evs/2009/roll271.xml (showing a final House vote of 367-54, with 244 Democrats and 123 Republicans voting "yea" and 3 Democrats and 51 Republicans voting "nay."). Although there were minor revisions and reauthorizations to the McKinney-Vento Act from 1987 to 2009, the HEARTH Act was the first major reauthorization and amendment to the McKinney-Vento Act. *HEARTH Act Section-by-Section Analysis*, NAT'L ALLIANCE TO END HOMELESSNESS (June 17, 2009), https://endhomelessness.org/resource/hearth-act-section-by-section-analysis/ [hereinafter *HEARTH Act Section-by-Section Analysis*].

77. *The HEARTH Act – An Overview*, NAT'L L. CENTER ON HOMELESSNESS & POVERTY, https://web.archive.org/web/20101008230454/http://www.nlchp.org/content/pubs/HEARTH_Act_Overview_for_Web1.pdf (last visited Jan. 8, 2021).

78. While the McKinney-Vento Act officially declared homelessness a federal issue, it primarily focused on those experiencing chronic homelessness, targeting the most visible of the homeless population: those living on the streets and in shelters. Homeless Emergency Assistance and Rapid Transition to Housing: Defining "Homeless," 76 Fed. Reg. 75,994, 75,994–76,019 (Dec. 5, 2011) (amending 24 C.F.R. pt. 91, 582, and 583). This is admittedly an overgeneralization of an enormous piece of legislation. But until the HEARTH Act embraced the Housing First model and contemplated providing services to individuals and families who had physical shelter but were still precariously housed, this group did not have many federally funded options available until they completely lost their housing.

79. Josh Leopold, *Five Ways the HEARTH Act Changed Homelessness Assistance*, URB. INST. (May. 9, 2019), https://www.urban.org/urban-wire/five-ways-hearth-act-changed-homelessness-assistance.

80. *Id.* The McKinney-Vento Act provided a separate definition for those at-risk for homelessness and differentiated this from the definition of homeless, but the HEARTH Act went further to actually include those at *imminent* risk of losing housing in the definition of homeless. 42 U.S.C. § 11302(a)(5)(A) (2018). While this may seem like semantics, it is Congress opening the door to allow those still physically housed to be considered "homeless," granting them access to a wider range of services, like the CoC Program, not available to those considered only "at-risk of homelessness."

81. *Housing First*, NAT'L ALLIANCE TO END HOMELESSNESS (Apr. 20, 2016), https://endhomelessness.org/resource/housing-first/.

budgeting, can be addressed.[82] One of the most significant interventions within the Housing First approach is Rapid Re-Housing.[83]

Rapid Re-Housing recognizes that granting clients some choice in their new housing preserves some of their dignity, which makes it more likely that the client is successful in maintaining their new housing because they finally have some autonomy over their own rehousing process.[84] There are three core components to Rapid Re-Housing: (1) housing identification, which involves the nonprofit recruiting landlords who are willing to rent to those in the program and then allowing clients the opportunity to choose their new home; (2) rent and move-in assistance, which subsidizes the upfront costs associated with moving and helps the client cover their rent until they can improve their housing stability; and (3) case management, which involves the nonprofit's case manager working with the client to help them access additional services or troubleshoot housing issues to insure housing stability.[85] While available to all who qualify as "homeless," this approach's flexibility lends itself particularly well to families and individuals who lost housing due to economic hardship.[86]

This type of client may only have limited needs, like being undereducated or underemployed, which under prior homeless service models, would have kept the client in homelessness until they completed a degree program or improved their employment.[87] However, with Rapid Re-Housing, they would first be placed in permanent housing, and

82. Id.

83. *Rapid Re-Housing: A History and Core Components*, NAT'L ALLIANCE TO END HOMELESSNESS (Apr. 22, 2014), https://endhomelessness.org/resource/rapid-re-housing-a-history-and-core-components/.

84. *Id. But see* Stefan Kertesz, et al., *Housing First and the Risk of Failure: A Comment on Westermeyer and Lee (2013)*, 203 J. NERVOUS AND MENTAL DISEASE 559 (2015) (A commentary that is critical of the methods of the VA study on Housing First, but supported the VA's finding that Housing First could be ineffective for veterans who need clinical care for certain issues, specifically substance use. However, the commentary also acknowledged that the program could be successful with additional guidance from clinical staff.); Pat LaMarche, *Housing First Doesn't Work: The Homeless Need Community Support*, HUFFINGTON POST, https://www.huffpost.com/entry/housing-first-doesnt-homelessness_b_4611639 (last updated Mar. 18, 2014) (discussing Ralph Nunez's, President and CEO of the Institute for Children, Poverty, and Homelessness, critiques of Housing First as being too simplistic for the complicated nature of homelessness because, while counterintuitive, housing alone may not solve homelessness for all who experience it).

85. *Rapid Rehousing Works*, NAT'L ALLIANCE TO END HOMELESSNESS, https://endhomelessness.org/rapid-re-housing-works/ (last visited Jan. 8, 2021). While working in homelessness nonprofits, the author ran a volunteer program in which volunteers would help a family or individual move from homelessness to housing, which was one of the most effective ways to change the public's preconceptions about the homeless.

86. *Housing First*, *supra* note 81.

87. *Id.*

then work toward stability by addressing their other needs.[88] The housing subsidy is then decreased as the client develops their own independent housing stability.[89]

Rapid Re-Housing makes more sense for those whose homelessness is caused by economic and social factors, like underemployment, lack of affordable housing, and having an eviction on their record. People in this situation, with some help, are able to achieve housing stability more quickly compared to someone with an untreated drug addiction or other mental illness, who might not be able to immediately enter independent housing.[90] Furthermore, under the former models, while someone's situation would be moving in the right direction as they complete program requirements, they were still unnecessarily subjected to the instability and trauma associated with homelessness.[91] However, with Rapid Re-Housing, the family is able to move in the right direction without the additional negative side effects of homelessness. Furthermore, and importantly, most of those affected by the housing crisis would not likely have qualified for services under the McKinney-Vento Act's definition because they were not yet literally homeless.[92] The incorporation of this model into the HEARTH Act signals a recognition by Congress of the complexity of homelessness and a shift in the federal government away from solutions rooted only in healthcare to those addressing the economic and social systemic issues that also drive the issue.

To further demonstrate the evolution of Congress' understanding of homelessness, it stated two findings for the HEARTH Act's reauthorization and expansion of the McKinney-Vento Act: (1) the primary causes of homelessness are the lack of affordable housing and the limited scale of then-current housing assistance programs, and (2) homelessness is a complicated issue that affects all types of

88. *Id.*

89. *Rapid Re-Housing: A History and Core Components*, *supra* note 83.

90. *See* Rick Cohen, *Stories of those Homeless Who Don't Fit the "Housing First" Model*, NONPROFIT Q. (Oct. 28, 2015), https://nonprofitquarterly.org/what-is-homelessness-those-who-dont-fit-the-housing-first-model/ (quoting Gunther Stern, executive director of the Georgetown Ministry Center as saying, "The people that I work with are mostly missed by [Housing First] for two different reasons . . . they don't get hit because they are too low functioning. Or the second is that they are too low functioning that they are unsuccessful once they receive housing.").

91. *See Talk of the Nation: Why Some Homeless Choose the Streets Over Shelters* (Nat'l Pub. Radio Broadcast Dec. 6, 2012) (transcript and audio at https://www.npr.org/2012/12/06/166666265/why-some-homeless-choose-the-streets-over-shelters) (explaining the issues with living in a shelter).

92. *See infra* pt. III.A. (describing the doubled-up population following the 2008 housing crisis).

communities.[93] Congress also created a federal goal that no individual or family would be homeless for more than thirty days.[94] To accomplish these goals, the HEARTH Act expanded the federal approach to solving homelessness by combining several separate homeless assistance programs from the McKinney-Vento Act into the CoC Program to create a more efficient funding process and encourage more localized, strategic, and collaborative solutions.[95] One such example is the incorporation of Rapid Re-Housing programming into the CoC Program.[96] The HEARTH Act also expanded the definition of homelessness to include those at imminent risk of becoming homeless and those who qualify as homeless under other enumerated statutes.[97] The adoption of the CoC Program and the expansion of this definition is indicative of congressional intent to open the door to housing services for more people experiencing housing instability, not just those literally living on the street or in a shelter.[98]

Interestingly, the HEARTH Act maintained a 2002 amendment to the McKinney-Vento Act's Education of Homeless Children and Youth Program, administered by the Department of Education (DOE), which defines "homeless children and youth."[99] This definition includes children and families with children who are doubling up with other individuals or families in the same housing and migratory children.[100]

93. Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009 (HEARTH), 42 U.S.C. § 11301 (2018).

94. *Id.* § 11301(b).

95. *Summary of HEARTH Act*, *supra* note 76. The programs combined by the HEARTH Act were the Shelter Plus Care program, the Supportive Housing Program, and the Moderate Rehabilitation/SRO programs. *Id.*

96. *Id.*

97. 42 U.S.C. § 11302; Leopold, *supra* note 79.

98. Leopold, *supra* note 79.

99. 42 U.S.C. § 11434a(2) (2018); *The McKinney-Vento Homeless Assistance Act*, NAT'L CENTER FOR HOMELESS EDUC., https://nche.ed.gov/mckinney-vento/ (last visited Jan.8, 2021). This program was reauthorized in December 2015 by the Every Student Succeeds Act, replacement legislation for the infamous No Child Left Behind Act. 20 U.S.C. § 6301 (2018).

100. 42 U.S.C. § 11434a(2). In relevant part, the statutory definition reads:

> (2) The term "homeless children and youths'—
> (A) means individuals who lack a fixed, regular, and adequate nighttime residence (within the meaning of section 11302(a)(1) of this title); and
> (B) includes—
> (i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement;
> (ii) children and youths who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings (within the meaning of section 11302(a)(2)(C) of this title);

While added by Congress much earlier than the passage of the HEARTH Act,[101] Congress' use of such a broad definition of homelessness in another statute, albeit one addressing educational disparities, is further indicative of an evolution in its understanding of homelessness as more than just those who are mentally ill living on the street. An early adoption of an expanded definition makes sense for children because of the important interest in preventing homelessness from precluding a child from attending school.[102] However, several years later, Congress opened the door to extending this concern to others in the HEARTH Act, but HUD has not followed suit.[103]

The current regulatory definition of homelessness used by HUD is based on the HEARTH Act's statutory definition.[104] The HEARTH Act

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(iii) children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and

(iv) migratory children (as such term is defined in section 6399 of Title 20) who qualify as homeless for the purposes of this part because the children are living in circumstances described in clauses (i) through (iii).

Id.

101. No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2002).

102. 42 U.S.C. § 11431 (2018).

103. DOE operates the Education of Homeless Children and Youth Program under the statutory definition. McKinney-Vento Education for Homeless Children and Youths Program, 67 Fed. Reg. 10,697, 10,698 (Mar. 8, 2002).

104. 24 C.F.R. § 582.5 (2020). HUD's regulatory definition of "homeless" is:

(1) An individual or family who lacks a fixed, regular, and adequate nighttime residence, meaning:

(i) An individual or family with a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings, including a car, park, abandoned building, bus or train station, airport, or camping ground;

(ii) An individual or family living in a supervised publicly or privately operated shelter designated to provide temporary living arrangements (including congregate shelters, transitional housing, and hotels and motels paid for by charitable organizations or by federal, state, or local government programs for low-income individuals); or

(iii) An individual who is exiting an institution where he or she resided for 90 days or less and who resided in an emergency shelter or place not meant for human habitation immediately before entering that institution;

(2) An individual or family who will imminently lose their primary nighttime residence, provided that:

(i) The primary nighttime residence will be lost within 14 days of the date of application for homeless assistance;

(ii) No subsequent residence has been identified; and

(iii) The individual or family lacks the resources or support networks, e.g., family, friends, faith-based or other social networks, needed to obtain other permanent housing;

(3) Unaccompanied youth under 25 years of age, or families with children and youth, who do not otherwise qualify as homeless under this definition, but who:

(i) Are defined as homeless under section 387 of the Runaway and Homeless Youth Act (42 U.S.C. 5732a), section 637 of the Head Start Act (42 U.S.C. 9832), section 41403 of the

essentially separates those experiencing homelessness into four categories: (1) literally homeless; (2) those who will be imminently homeless within fourteen days; (3) those who are "unaccompanied youth or families with children" that "meet the homeless definition under another federal statute," plus three additional requirements; and (4) those fleeing or attempting to flee domestic violence.[105]

> Violence Against Women Act of 1994 (42 U.S.C. 14043e–2), section 330(h) of the Public Health Service Act (42 U.S.C. 254b(h)), section 3 of the Food and Nutrition Act of 2008 (7 U.S.C. 2012), section 17(b) of the Child Nutrition Act of 1966 (42 U.S.C. 1786(b)), or section 725 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a);
>
> (ii) Have not had a lease, ownership interest, or occupancy agreement in permanent housing at any time during the 60 days immediately preceding the date of application for homeless assistance;
>
> (iii) Have experienced persistent instability as measured by two moves or more during the 60-day period immediately preceding the date of applying for homeless assistance; and
>
> (iv) Can be expected to continue in such status for an extended period of time because of chronic disabilities; chronic physical health or mental health conditions; substance addiction; histories of domestic violence or childhood abuse (including neglect); the presence of a child or youth with a disability; or two or more barriers to employment, which include the lack of a high school degree or General Education Development (GED), illiteracy, low English proficiency, a history of incarceration or detention for criminal activity, and a history of unstable employment; or
>
> (4) Any individual or family who:
>
> (i) Is fleeing, or is attempting to flee, domestic violence, dating violence, sexual assault, stalking, or other dangerous or life-threatening conditions that relate to violence against the individual or a family member, including a child, that has either taken place within the individual's or family's primary nighttime residence or has made the individual or family afraid to return to their primary nighttime residence;
>
> (ii) Has no other residence; and
>
> (iii) Lacks the resources or support networks, e.g., family, friends, and faith-based or other social networks, to obtain other permanent housing.

Id.; *see also* 42 U.S.C. § 11302 (2018).

105. 42 U.S.C. § 11302. In relevant part, the statutory definition of "homeless" in the HEARTH Act is:

> (a) In general
>
> For purposes of this chapter, the terms "homeless", "homeless individual", and "homeless person" means--
>
> (1) an individual or family who lacks a fixed, regular, and adequate nighttime residence;
>
> (2) an individual or family with a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings, including a car, park, abandoned building, bus or train station, airport, or camping ground;
>
> (3) an individual or family living in a supervised publicly or privately operated shelter designated to provide temporary living arrangements (including hotels and motels paid for by Federal, State, or local government programs for low-income individuals or by charitable organizations, congregate shelters, and transitional housing);
>
> (4) an individual who resided in a shelter or place not meant for human habitation and who is exiting an institution where he or she temporarily resided;
>
> (5) an individual or family who--
>
> (A) will imminently lose their housing, including housing they own, rent, or live in without paying rent, are sharing with others, and rooms in hotels or motels not paid for by Federal,

As previously discussed, the CoC Program is administered by HUD and was codified by the HEARTH Act.[106] The CoC Program consolidates three separate programs created by the McKinney-Vento Act—the Supportive Housing program, Section 8 Moderate Rehabilitation SRO, and Shelter Plus Care program—into a single program.[107] The goal of the consolidation was to:

> promote community-wide planning and strategic use of resources to address homelessness; improve coordination and integration with mainstream resources and other programs targeted to people experiencing homelessness; improve data collection and

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State, or local government programs for low-income individuals or by charitable organizations, as evidenced by--

(i) a court order resulting from an eviction action that notifies the individual or family that they must leave within 14 days;

(ii) the individual or family having a primary nighttime residence that is a room in a hotel or motel and where they lack the resources necessary to reside there for more than 14 days; or

(iii) credible evidence indicating that the owner or renter of the housing will not allow the individual or family to stay for more than 14 days, and any oral statement from an individual or family seeking homeless assistance that is found to be credible shall be considered credible evidence for purposes of this clause;

(B) has no subsequent residence identified; and

(C) lacks the resources or support networks needed to obtain other permanent housing; and

(6) unaccompanied youth and homeless families with children and youth defined as homeless under other Federal statutes who--

(A) have experienced a long term period without living independently in permanent housing,

(B) have experienced persistent instability as measured by frequent moves over such period, and

(C) can be expected to continue in such status for an extended period of time because of chronic disabilities, chronic physical health or mental health conditions, substance addiction, histories of domestic violence or childhood abuse, the presence of a child or youth with a disability, or multiple barriers to employment.

Id.

106. When the CoC Program was codified by the HEARTH Act, Congress provided that the purpose of the CoC Program is:

> (1) to promote community-wide commitment to the goal of ending homelessness;
>
> (2) to provide funding for efforts by nonprofit providers and State and local governments to quickly rehouse homeless individuals and families while minimizing the trauma and dislocation caused to individuals, families, and communities by homelessness;
>
> (3) to promote access to, and effective utilization of, mainstream programs described in section 11313(a)(7) of this title and programs funded with State or local resources; and
>
> (4) to optimize self-sufficiency among individuals and families experiencing homelessness.

42 U.S.C. § 11381 (2018). Essentially, the CoC Program was created to enable communities to strategically address homelessness by creating an efficient, comprehensive system of services that can be tailored based on the unique circumstances of each community. *Id.*

107. *Guide to CoC*, *supra* note 7.

> performance measurement; and allow each community to tailor its program to the particular strengths and challenges within that community.[108]

Under the CoC Program, communities are required to submit one grant application in order to receive Homeless Assistance grants.[109] Instead of having multiple organizations who serve the same community applying for Homeless Assistance funding individually, the CoC requires all of those organizations to submit a single application for their one community.[110] Then, that community's CoC becomes the planning body that coordinates all housing and homeless services in that particular community.[111]

The idea behind requiring a single application is to increase the efficiency of funding homelessness programs and incentivize service providers to collaborate to create strategic, tailored solutions for their homeless population.[112] However, the CoC is still restricted in who it can serve because it is governed by HUD's definition of homelessness, even though there could be organizations in the CoC who are governed by other agency definitions without the same eligibility requirements.[113]

HUD has identified seven necessary components of a CoC: (1) outreach and assessment; (2) prevention; (3) emergency shelter; (4) transitional housing; (5) permanent supportive housing; (6) permanent affordable housing; and (7) supportive services.[114] These seven components are designed to follow clients from homelessness to housing and provide tailored services to increase the likelihood of their maintaining that housing.[115] A key feature of the CoC is the coordinated intake process, which is a central intake system where the homeless are then referred to the programs or organizations that best suit their

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108. *Id.* at 1.

109. *What is a Continuum of Care?*, NAT'L ALLIANCE TO END HOMELESSNESS (Jan. 14, 2010), https://endhomelessness.org/resource/what-is-a-continuum-of-care/.

110. *Id.*

111. *Id.*

112. *Id.*

113. 24 C.F.R. § 578.3 (2020). Even though HUD and the HEARTH Act includes a list of statutes that, if a child or family with children qualifies as "homeless" under then they also may receive HUD services, there are also additional eligibility requirements that must be satisfied in order for someone to qualify under this provision. *Id.*; 42 U.S.C. § 11302 (2018). So, even though it appears that doubled-up families with children would automatically qualify, this is often not the case because of the additional eligibility requirements that exclude those who have simply fallen on hard times. *See, e.g.*, Ali, *supra* note 1.

114. *What is a Continuum of Care?*, *supra* note 109.

115. *Id.*

needs.[116] The coordinated intake process also allows programs, which currently have clients whose needs could be better served elsewhere, to easily and efficiently refer those clients to the better-suited program.[117]

Participants in a local CoC provide both housing resources and service resources.[118] In order to address a problem as complicated as homelessness, a wide variety of services beyond housing need to be part of the coordinated system because many homeless individuals and families require or already receive support from these other entities.[119] Possible partners in a CoC include: homeless services organizations, community and economic development organizations, healthcare providers, local businesses, churches, community-based organizations, law enforcement, schools, and local governments.[120] However, since CoCs are governed by HUD, they currently exclude most of the doubled-up population even though there are other partners in the CoC that are not necessarily governed by HUD for their broader operations.[121] The doubled-up served by organizations not bound by HUD's definition are then excluded from the CoC even though their status with the non-housing organization is homeless.[122] So, many of the doubled-up fall through this crack created in the CoC Program because of the differing definitions of homelessness.

116. Federal Agency Final Regulations Implementing Executive Order 13559: Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, 81 Fed. Reg. 19,355, 19,387 (Apr. 4, 2016) (amending 2 C.F.R. pt. 3474; 34 C.F.R. pt. 75 and 76; 6 C.F.R. pt. 19; 7 C.F.R. pt. 16; 22 C.F.R. pt. 205; 24 C.F.R. pt. 5, 92, 570, 574, 576, 578, and 1003; 28 C.F.R. pt. 38; 29 C.F.R. pt. 2; 38 C.F.R. pt. 50, 61, and 62; 45 C.F.R. pt. 87 and 1050).

117. *Coordinated Entry: Core Elements*, U.S. DEP'T OF HOUS. AND URBAN DEV. 46 (2017), https://files.hudexchange.info/resources/documents/Coordinated-Entry-Core-Elements.pdf.

118. *Continuum of Care 101*, U.S. DEP'T OF HOUSING AND URB. DEV. 79 (June 2009), https://files.hudexchange.info/resources/documents/CoC101.pdf; *Collaboration Brief Series*, *supra* note 69, at 2.

119. *Continuum of Care 101, supra* note 118, at 15.

120. *Id.* at 14; *Collaboration Brief Series*, *supra* note 69, at 2.

121. *Continuum of Care 101*, *supra* note 118, at 4.

122. For example, the Department of Health and Human Services funds Healthcare for the Homeless (HCH) programs through community health centers and other primary healthcare services targeting the homeless population. HCH was created in 1985 by the Robert Wood Johnson Foundation and the Pew Memorial Trust. In 1987, HCH funding was included in the McKinney-Vento Act and in 1996, HCH was merged with community health centers and other primary care providers. All of which are administered by Health Resources and Services Administration's (HRSA) Bureau of Primary Health Care. Since HRSA operates under Health and Human Services (HHS), HCH operates under HHS's broader definition of homelessness from the Public Health Service Act. HHS defines homelessness as generally those "who lack housing." *When and How Was the Health Care for the Homeless Program created? What Does it Do?*, NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL, https://nhchc.org/understanding-homelessness/faq/ (last visited Jan. 8, 2021).

III. THE DOUBLED-UP POPULATION IN THE UNITED STATES

Generally, as has already been stated, individuals and families who are living with someone else or couch-surfing are considered doubled-up. Technically, someone is considered to be living doubled-up if their relationship to the head of household in which they are staying is one of the following:

1. an adult child (18 years old or older) who is not in school, is married, and/or has children;
2. a sibling;
3. a parent or parent-in-law;
4. an adult grandchild who is not in school;
5. a grandchild who is a member of a subfamily;
6. a son- or daughter-in-law;
7. another relative;
8. or any non-relative.[123]

Because HUD excludes the majority of the doubled-up population from its definition of homeless, they are not included in the Point-in-Time count.[124] This Point-in-Time count is conducted by CoCs and is the only annual count of the number of homeless in the country.[125] However, the U.S. Census Bureau's American Community Survey includes the doubled-up in its surveys of American demographics.[126] In 2018, around four million people in low-income households were considered doubled-up.[127] Some states, like Rhode Island, Florida, and Nevada have seen the number of doubled-up households increase by over sixty-eight

123. *State of Homelessness: 2020 Edition*, supra note 8.

124. The Point-in-Time Count, conducted by HUD, is the only official tracker of how many people are experiencing homelessness in the United States at any given time. *What is a Point-in-Time Count?*, *supra* note 8. The Point-in-Time Count is required by HUD for communities that receive homeless services funding, so the only people being counted are those that fit HUD's definition of homeless. *Id.* The count is conducted by CoCs every year in cities and communities across the nation. *Id.* The count involves volunteers going into camps in the woods, under bridges, and on undeveloped land to count those living in uninhabitable places and also includes counts from homeless service providers who run shelters. *Id.* The individuals and families who are doubling-up are not captured in the count. *Id.*; S*tate of Homelessness: 2020 Edition*, *supra* note 8. While these individuals and families have roofs over their heads (as do those living in shelters who are counted), the instability of their lives has the same impact. It is also important to note that the doubled-up will not be counted in 2021, so data acquired about the effects of coronavirus on homelessness will also be skewed. Those who are evicted but move into another's home will be counted as evicted, but not homeless, even though they lost their home as a result of the national crisis.

125. *What is a Point-in-Time Count?*, *supra* note 8.

126. *State of Homelessness: 2020 Edition*, *supra* note 8.

127. *Id.*

percent since 2007, while other states have experienced a downward trend.[128]

A. Doubled-Up Population After the 2008 Housing Crisis

From 2003 to 2009, the time leading up to and during the housing crisis,[129] the number of doubled-up households increased more than any other type of household—those with adult children between the ages of eighteen to twenty-nine years old living at home being the most common.[130] During the same time period, households with adult children living at home increased by 12.9% among single adult children ages eighteen to twenty-nine and by 24.6% among renters.[131] Furthermore, and more startlingly, the number of households with unrelated families living doubled-up increased by 216%, to more than 600,000 households.[132] Of the households doubled-up with unrelated families, the largest increases were in younger parents between the ages of twenty-six and thirty-five and more highly educated families.[133] The trend toward younger, more highly educated doubled-up households indicates that economic hardship is a driver of the higher numbers of the doubled-up population before and during the housing crisis.[134] So, even though HUD does not consider most of the doubled-up population to be homeless, the composition of the doubled-up demographic is similar to the conception of homelessness that drove the HEARTH Act's amendment of the homeless definition.

B. Living Doubled-Up

There are similarities between the life of someone considered homeless by HUD and the life of someone living in a doubled-up situation. In 2018, researchers at Vanderbilt University conducted a study about the experiences of families who moved from homeless

128. *Id.*
129. *See supra* pt. II.C (discussing the 2008 financial and housing crisis).
130. Eggers, Frederick, Moumen, & Fouad, *Analysis of Trends in Household Composition Using American Housing Survey Data*, ECONOMETRICA vi–8 (Dec. 2013), https://ssrn.com/abstract=2445476 (About half of the doubled-up households surveyed had adult children over twenty-one years old, with fifty percent of those households having children who were between eighteen and twenty-nine years old.).
131. *Id.* at 8.
132. *Id.* at 26.
133. *Id.* at 32.
134. *Id.*

shelters to doubling-up.[135] Researchers interviewed twenty-nine families who were formerly homeless in order to document the positive and negative experiences each family had while doubled-up.[136] The study concluded that experiences while doubled-up tended to be negative because of the lack of autonomy, the feeling of impermanence, and the interpersonal conflict that often arose.[137] In a broad sense, it is not so unlike experiences in a homeless shelter. In a shelter, one cannot come and go freely, beds are not always guaranteed, and interpersonal conflict commonly prevents people from staying in a shelter in the first place.[138] So, even in this small comparison of experiences, life doubled-up is not so different than life in a shelter, even though only living in a shelter is considered homeless by HUD.

However, there were also consistent reports of positive experiences in living doubled-up, especially relating to children's behavior and socialization.[139] This makes sense because having a live-in support network to help with personal needs or childcare is helpful to any family. However, critically absent from the perk of living and raising one's children in the home of another is choice: the parent's choice in whether they utilize their village and who in the village helps. This choice is missing from those living doubled-up because they have no other option but to use their village.

Finally, the study found that living doubled-up was another stop in a cycle whereby homeless families enter a shelter, leave the shelter to live with family or possibly enter their own housing, but ultimately end up back at a shelter and/or living with family again.[140] While there are arguable benefits to doubling-up, it does not increase housing stability for families who have experienced definitional homelessness.[141] Instead, it becomes another step in the cycle as opposed to an intervention or solution to homelessness.[142] So, simply because those doubled-up have a roof over their heads, they remain unstably housed.

135. Hannah Bush & Marybeth Shinn, *Families' Experiences of Doubling Up After Homelessness*, 19 CITYSCAPE 331, 331 (2017).
136. *Id.* at 335.
137. *Id.* at 341.
138. *Talk of the Nation: Why Some Homeless Choose the Streets Over Shelters*, *supra* note 91.
139. Bush & Shinn, *supra* note 135, at 340–41.
140. *Id.* at 351.
141. *Id.*
142. *Id.*

IV. CONGRESS INTENDED FOR THE DOUBLED-UP POPULATION TO BE SERVED UNDER THE HEARTH ACT

The McKinney-Vento Act and the HEARTH Act were passed during homelessness and housing crises in the United States.[143] As a result of political pressure caused by these crises, legislation was created and funds appropriated to address homelessness.[144] During these times, the understandings and causes of homelessness also changed, impacting the way the federal government approached solutions to the issue.[145]

The McKinney-Vento Act's policy approached homelessness primarily as a healthcare issue affecting mentally ill individuals who were living on the street by choice.[146] At the time: (1) Congress did not know enough about homelessness and much of what it did know only pertained to mental health; (2) the Reagan administration was not interested in learning more; (3) Congress had just adopted a healthcare program for the homeless; and (4) the most visible homeless were panhandlers suffering from some form of mental illness.[147] As such, it is unsurprising that the McKinney-Vento Act prioritized individuals who were mentally ill and living on the streets because that was what a homeless person was understood to be.

Similarly, the HEARTH Act's passage was triggered by the worst economic crisis since the Great Depression, during which time millions lost their homes to foreclosure.[148] President Obama ran on a platform of keeping families housed as part of his 2008 presidential campaign,[149] creating political pressure for a swift response once he was elected. Similar to the passage of the McKinney-Vento Act, the HEARTH Act's solution to homelessness is, in large part, based upon new understandings of what a homeless person was at the time. This time, the perceived population were families who lost their homes to foreclosure, rather than mentally ill individuals living on the street.[150]

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143. *See supra* pts. II.B–C.
144. *Id.*
145. *See id.*
146. Jones, *supra* note 36, at 139–40.
147. *See supra* pts. II.B–C.
148. *See supra* pt. II.C.
149. Kimberly Amadeo, *Obama 2008 Economic Promises and Platform*, THE BALANCE, https://www.thebalance.com/obama-2008-economic-promises-and-platform-3305774 (last updated June 25, 2019).
150. *See* Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, 123 Stat. 1632 (2009) (Congress' name of the statute evidences its desire to make sure constituents knew they were addressing family homelessness.).

The individuality and healthcare focus of the original McKinney-Vento Act could not address the types of needs homeless families presented during the Great Recession. While the cost of healthcare is widely accepted to be an issue for low-income individuals and families, access to healthcare is not the only significant barrier to permanent housing for those who lose housing because they can no longer afford their mortgage.[151] Thus, because the federal conception of homelessness evolved to include more families who were homeless for economic reasons, policy solutions also reflected this changing understanding.[152] For example, the HEARTH Act embraced the Housing First model, particularly Rapid Re-Housing, as a primary intervention tool for service providers because it is the tool best suited for families experiencing homelessness due to economic and other social reasons.[153] Also, the homeless definition was expanded to include additional circumstances, like having children or being at-risk of losing housing, not just basing homelessness solely on the physical location of the individual or family (like the streets, shelters, and motels). Therefore, Congressional intent and purpose for enacting the HEARTH Act aligns with including the doubled-up population in the homeless definition because the federal government wanted to get those experiencing economic hardship back into their own homes.

Furthermore, the CoC Program's purpose of creating a system of comprehensive services for the homeless is frustrated by HUD's exclusion of the doubled-up. Because HUD's definition is controlling for a CoC and the Coordinated Intake System, most of the doubled-up cannot enter the coordinated system of services. For example, if a CoC partner organization, like a community-based organization or other privately funded charity, is working with a doubled-up family that does not otherwise qualify under HUD's definition, that entity is not able to refer the family to the CoC's comprehensive system of services. The very program meant to create an efficient and collaborative solution to homelessness on a community-by-community basis fails of its essential purpose because each partner does not necessarily operate under HUD's more narrow definition in its usual operations. So, the system is no

151. *See* Martha R. Burt et. al, *Strategies for Improving Homeless People's Access to Mainstream Benefits and Services*, HUD USER xv–xvi (March 2010), https://www.huduser.gov/portal/publications/strategiesaccessbenefitsservices.pdf; *supra* pts. II.B–C. (describing the evolution of our understandings of homelessness and its causes).

152. *See* 42 U.S.C. § 11301 (Congress stated in HEARTH's findings that lack of affordable housing was a leading cause of homelessness and that homelessness was a complicated issue.).

153. *See supra* pt. II.C. (explaining Housing First and Rapid Re-Housing).

longer efficient or entirely productive for partners because it cannot accommodate all of the clients served by those partners.

However, there is an argument that if HUD includes the doubled-up population it will create a strain on the system because there could be as many as four million people doubled-up in the United States.[154] However, not all of those doubled-up have negative experiences or are doubled-up because they have no other choice, so it is unlikely that all four million will seek services.[155] Furthermore, there are already suggested best practices to help sort those doubled-up for convenience versus those doubled-up because they are homeless.[156] However, it is interesting to note that Healthcare for the Homeless (HCH), administered by HHS, does not make a distinction between those who are doubled-up for convenience and those who are not.[157] HHS instead draws a distinction between those doubled-up and someone who was invited to stay with another person for the night.[158] HHS's different approach further reinforces the idea that HUD is behind the times in its approach to homelessness. Not only does HHS allow HCH to serve most of the doubled-up, it also does not take into consideration why someone is doubled-up and instead considers the stability of the housing as the determining factor in whether someone is homeless.[159]

V. HUD SHOULD AMEND ITS REGULATORY DEFINITION TO INCLUDE THE DOUBLED-UP

The federal agency responsible for distributing grant funding and regulating homeless service organizations usually depends on the specific cause of homelessness the organization addresses, like housing or healthcare, or the population the organization works with, like children or veterans.[160] While this is oversimplifying complex

154. *State of Homelessness: 2020 Edition*, *supra* note 8.

155. *See supra* pt. III.B (describing living doubled-up).

156. *See NCHE Coffee Break Materials Understanding Doubled-U*p, NAT'L CENTER FOR HOMELESS EDUCATION, https://nche.ed.gov/understanding-doubled-up/ (last visited Jan. 8, 2021) (All materials provide a guide for schools and other education entities to determine if children are doubled-up as homeless. This provides a solid foundation for a CoC's guide to distinguish between individuals doubled-up for convenience and those doubled-up as homeless.).

157. *Uniform Data System Reporting Instructions for 2019 Health Center Data*, BUREAU OF PRIMARY HEALTH CARE 42 (May 28, 2019), http://bphcdata.net/docs/uds_rep_instr.pdf [hereinafter *2019 UDS Manual*]; *Frequently Asked Questions*, NAT'L HEALTHCARE FOR THE HOMELESS COUNCIL, https://nhchc.org/understanding-homelessness/faq/ (last visited Dec. 19, 2020) [hereinafter *HCH FAQ*].

158. *2019 UDS Manual*, *supra* note 157, at 42.

159. *HCH FAQ*, *supra* note 157.

160. *Collaboration Brief Series*, *supra* note 69, at 2–3; *see generally Home Together: The Federal Strategic Plan to Prevent and End Homelessness*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (Oct.

administrative structures, HUD typically funds housing support organizations through grant programs, like the CoC Program.[161] Furthermore, federal funding usually makes up a large portion of an organization's operating budget,[162] which in turn means that federal agencies and their governing statutes have significant control over the organization's service model and who they can or cannot serve.[163] Therefore, housing service providers' hands are often tied by HUD's homeless definition, which renders them unable to serve those seeking assistance and limiting the organization's ability to evolve their service models to address changing needs.[164] Currently, most of those doubled-up do not qualify for HUD services unless they are, for example, being kicked out of their housing and, even then, those few must also satisfy other narrow program eligibility requirements.[165]

HUD used notice-and-comment rulemaking related to the homeless definition three times, in 1994, 2011, and 2015.[166] During each notice-and-comment session, comments were filed expressing concern that HUD's definition did not explicitly or implicitly include those who were

2018), https://www.usich.gov/resources/uploads/asset_library/Home-Together-fact-sheet-Oct-2018.pdf.

161. *See, e.g.*, *Notice of Funding Availability (NOFA) for the Fiscal Year (FY) 2019 Continuum of Care Program Application*, U.S. DEP'T OF HOUSING AND URB. DEV. 1–2, https://www.hud.gov/sites/dfiles/SPM/documents/CoC6300_25_82719.pdf (last visited Jan. 8, 2021) [hereinafter *2019 CoC Program Application*].

162. Mark Hrywna, *80% of Nonprofits' Revenue is From Government, Fee for Service*, NONPROFIT TIMES (Sept. 19, 2019), https://www.thenonprofittimes.com/news/80-of-nonprofits-revenue-is-from-government-fee-for-service/#:~:text=Overall%2C%2080%20cents%20of%20every,from%20private%20fees%20for%20services ("Overall, 80 cents of every dollar of nonprofit revenue in the United States comes from government grants or contracts and fees for services.").

163. *2019 CoC Program Application*, *supra* note 161, at 2–3, 5–13.

164. *Collaboration Brief Series*, *supra* note 69, at 7; Sarah Katherine Hess, *Keeping Homeless Kids Homeless: How the Homeless Children and Youth Act Addresses Children Who Are Excluded from Receiving Housing*, 47 J. MARSHALL L. REV. 769, 781–82 (2013).

165. *See* 24 C.F.R. § 582.5 (2020). The only way a doubled-up individual or family can qualify for services is if they are being kicked out of their housing fourteen days without another residence identified and without a support network, if they are children or have children that qualify under one of five enumerated statutes and meet strict additional eligibility requirements, or they are fleeing domestic violence and satisfy additional eligibility requirements. *Id.*

166. Homelessness Emergency Assistance and Rapid Transition to Housing: Defining "Chronically Homeless," 80 Fed. Reg. 75,791, 75,791–806 (Dec. 4, 2015) (amending 24 C.F.R. pt. 91 and 578) (establishing the definition of "chronically homeless" for the Continuum of Care program, providing greater clarity than McKinney-Vento's definition); Homeless Emergency Assistance and Rapid Transition to Housing: Defining "Homeless," 76 Fed. Reg. 75,994, 75,994–76,019 (Dec. 5, 2011) (amending 24 C.F.R. pt. 91, 582, and 583) (integrating the definition of "homeless" and associated recordkeeping requirements from HEARTH into the Shelter Plus Care program); Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. 1878, 1878–81 (Jan. 5, 1994) (amending 24 C.F.R. pt. 91, 92, 570, 574, 576, and 968) (adopting the McKinney-Vento definition for Comprehensive Housing Affordability Strategies (CHAS), a consolidation funding application for certain housing and shelter programs).

doubled-up.[167] The 2011 notice-and-comment process resulted in the final rule for the homeless definition used today, which kept the HEARTH Act's same four general categories, revising a minority of the wording throughout.[168] Upon release of the proposed rule, commenters requested the addition of the doubled-up population or a rule clarification that would include the doubled-up population in two categories of the final rule: 1) an individual or family who will imminently lose their housing and 2) unaccompanied youth and families with children defined as homeless under other federal statutes.[169]

Commenters recommending the doubled-up population be included under the imminent-loss-of-housing category suggested that HUD restore the rule to the statutory language.[170] The preferred statutory language describes this category as "individual[s] or famil[ies] who will imminently lose their housing, including housing they own, rent, or live in without paying rent, are sharing with others, and rooms in hotels or motels not paid for by Federal, State, or local government programs."[171] However, the corresponding proposed rule from HUD described the category as "an individual or family who will imminently lose their primary nighttime residence."[172] Commenters advocating for the inclusion of the examples in the statute think Congress was explicitly and clearly including the doubled-up population in the definition and that the proposed rule was not faithful to the statute because this population would be excluded.[173] In HUD's response to these concerns, it disagreed that the doubled-up population would be excluded by the replacement of "housing" with "primary nighttime residence" and that any clarity lost as to which circumstances would qualify was addressed in the recordkeeping requirements.[174] HUD's recordkeeping requirements would allow an individual or family who is doubled-up to

167. Homelessness Emergency Assistance and Rapid Transition to Housing: Defining "Chronically Homeless," 80 Fed. Reg. at 75,801; Homeless Emergency Assistance and Rapid Transition to Housing: Defining "Homeless," 76 Fed. Reg. at 75,998; Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. at 1881.

168. 24 C.F.R. § 582.5.

169. Homeless Emergency Assistance and Rapid Transition to Housing: Defining "Homeless," 76 Fed. Reg. at 75,998.

170. *Id*. at 76,000–01.

171. 42 U.S.C. § 11302(a)(5)(A) (2018).

172. Homeless Emergency Assistance and Rapid Transition to Housing: Defining "Homeless," 76 Fed. Reg. at 76,013.

173. *Id.* at 76,000–01. While this part of the statute was changed, the imminent-loss-of-housing category is substantially similar to the HEARTH Act's definition of homelessness, so HUD's reluctance to make substantial changes to the specificity of the statute is reasonable. *See* 42 U.S.C. § 11302(a)(5).

174. Homeless Emergency Assistance and Rapid Transition to Housing: Defining "Homeless," 76 Fed. Reg. at 76,001.

receive services only if they are to lose housing within fourteen days, they have no other option for housing, and they have exhausted their support network.[175] While this was a creative critique of the proposed rule, the concern expressed by the commenters were not entirely well-founded because some of the doubled-up were still eligible if these narrow circumstances were satisfied. Also, this provision in the statute was clear, leaving HUD with limited flexibility to further interpret it.

Another category commenters identified as a place to include the doubled-up population was designed to extend housing services to unaccompanied youth and families with children who qualify as homeless under other federal statutes. Commenters were primarily concerned that the proposed rule was too narrow because there are additional requirements to qualifying, like the requirement that someone must have persistent housing instability that is not expected to improve because of a disability or unstable employment.[176] So, even though, on its face, it seems as though families with children qualify for HUD services, it is only if they are experiencing one of these other additional circumstances. As HUD addressed in its response, these additional requirements are statutory, and additions made by HUD were an interpretation of the statute's more vague "multiple barriers to employment" language.[177] This is another circumstance where commenters focused on a provision that left HUD with little room for interpretation to include all of the doubled-up because of the specificity of the statute.

However, there is one place where HUD missed an opportunity to include more of the doubled-up population: the category for those "lack[ing] a fixed, regular, and adequate nighttime residence."[178] This provision is not specific like the imminent-loss-of-housing or the qualifies-under-other-statutes provisions. This provision is instead

175. 24 C.F.R. § 582.301(b)(3) (2020). The record keeping requirements are: (i) the head of household has given them fourteen days to leave, (ii) the person or family seeking assistance has not identified another residence, and (iii) they do not have the financial, community, or familial resources to obtain permanent housing. *Id.* While these requirements do not identify the doubled-up as specifically as the statute, HUD's response that the possible loss in clarity is remedied by the requirements is not a stretch. *See* 42 U.S.C. § 11302(a)(5)(A).

176. Homeless Emergency Assistance and Rapid Transition to Housing: Defining "Homeless," 76 Fed. Reg. at 76,004.

177. *Id.*; 42 U.S.C. § 11302(a)(6). HUD's interpretation of "multiple barriers to employment" includes situations like undereducation, a criminal record, and a history of unstable employment. Homeless Emergency Assistance and Rapid Transition to Housing: Defining "Homeless," 76 Fed. Reg. at 76,003–04.

178. 42 U.S.C. § 11302(a)(1).

vague and open to HUD's interpretation.[179] Therefore, HUD should interpret this vague provision, just as it did for the "multiple barriers to employment" provision, and amend its definition to include the doubled-up.

This provision can be traced back to the very beginning of federal homelessness legislation: the McKinney-Vento Act. While, when first passed in the 1980s, it was meant to only cover those mentally ill individuals living on the street or in shelters, our understandings of homelessness have evolved. In the wake of the 2008 housing crisis and on the edge of another crisis caused by the pandemic, it is perfect timing for HUD to reinterpret this provision. A reinterpretation that includes the doubled-up reflects Congress' intent that a broader understanding of homelessness be used to guide the current federal response.

Congress has demonstrated its evolution by adopting housing-first programming in the HEARTH Act, which is uniquely designed to address the economic and social drivers of homelessness. Furthermore, Congress has already included those doubled-up in various pieces of legislation passed since the 1980s, including the HEARTH Act. Additionally, other major agencies have adopted this new understanding in their regulatory rules, like DOE and HHS. So, while the legislation and other agencies have evolved, HUD fails to keep up.

Furthermore, living doubled-up is defined by the same insecurity that characterizes the most basic understanding of homelessness: housing insecurity. Like those living in a shelter, the doubled-up do not have their own space to call home, a legal entitlement to their housing, or certainty about how long they will have some sort of roof over their heads. However, only those living in a shelter qualify as "homeless" under HUD's definition.

Ultimately, the current exclusion of most of the doubled-up creates its own irony. Families and support networks are expected to solve homelessness, potentially at the risk of their own housing and security. As many who are doubled-up fall through the holes of the safety net that is supposed to catch them, they remain at the mercy of their family or strangers to provide them housing. Those with support systems and families are penalized because they are precluded from accessing services just because they have someone who is willing to help. Take the

179. Agency interpretations of statutes are reviewed by the courts using *Chevron* deference if there is a question of whether the agency overstepped its statutory authority. Chevron U.S.A. v. Nat. Res. Def. Council, Inc., 468 U.S. 837 (1984). However, a full analysis of whether HUD's inclusion of the doubled-up in its definition satisfies *Chevron* deference is beyond the scope of this Article.

family described at the beginning of this Article as an example, the only reason they do not qualify for housing assistance is because they have someone who has opened their home to them. Under the current rule, the doubled-up are required to burn all of their bridges before they can access services, bridges they will likely still need once they return to their own housing. Forcing the doubled-up into this situation before they can access services is counterproductive to ending homelessness. The doubled-up and their hosts bear the brunt of the harm caused by HUD's failure, making it HUD's obligation to bring itself up to speed with current understandings of homelessness and allow HUD funded programs, like CoC Programs, to provide services to more of those who are facing housing instability.

VI. CONCLUSION

As HUD's definition of homelessness currently stands, doubled-up families and individuals can only qualify for services in very narrow and specific circumstances. Excluding so many from services ultimately does more harm than good and creates a gaping hole in the CoC Program, frustrating its purpose and creating inefficiency in a community's attempt to end homelessness. Policy arguments like scarcity of resources and triage lend themselves to continuing with a narrower definition; however, when other administrative agencies have broader definitions that include the doubled-up, these policy arguments become less persuasive.

Furthermore, a more inclusive definition of homelessness will be necessary to respond to the continual fallout of the coronavirus pandemic. Just as major crises have historically driven Congress to expand the homeless definition, this current national health crisis presents another opportunity to reevaluate who can receive HUD-funded services. However, unlike previous instances, further congressional action is not currently required because Congress already demonstrated its intent to include the doubled-up under the HEARTH Act. Therefore, HUD is poised to include the doubled-up at a time when increasing access to services is paramount to prevent surges in homelessness.

Ultimately, homelessness is more complicated than simply not having a roof over one's head. It is essentially the instability of not having a place to call one's own. Those who are doubled-up experience the same instability as those who are living in shelters. Congress and other federal agencies have already recognized this by allowing for a more expansive

understanding of homelessness and creating programming that reflects this complexity. Therefore, HUD's definition is out of touch with current understandings of homelessness because it excludes the doubled-up population. HUD should amend its definition to include all those who are doubled-up, not just those who fit its narrow exceptions.