STUDENT WORKS

SOMETIMES IT TAKES A SENIOR VILLAGE TO RAISE A CHILD

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I. INTRODUCTION

Meredith[1] is not aware that her father, Jarvis Ballard, surrounded by police, allowed his pitbull terrier to exit his Cadillac and attack a police officer.[2] She was less than three months old on October 27, 2009, when his sale of illegal drugs led to a high-speed chase that ended in his arrest.[3] She does not remember that after that day he would no longer be able to exercise his parental responsibilities over her or her half-sibling for more than ten years.[4] A few years later, all she knows is that her daddy is in jail because he did a very bad thing.[5]

Meredith looked destined for child protective services until her adult half-sister intervened. In the year after her father's arrest, Meredith would also temporarily lose her mother's pres-

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1. The name of the minor has been changed.

2. *Police Arrest Man for Dealing Meth*, THE FLYER GROUP (Oct. 29, 2009, 11:20 AM), http://www.flyergroup.com/news/local_news/article_6be8bdc5-4fbf-5768-b429-65e28f23d46f.html; Interview with Doug Boring, Grandfather of Meredith, Tampa, Fla. (Sept. 23, 2013) (on file with Author) (Doug Boring is the stepfather of this Article's author.).

3. *Police Arrest Man for Dealing Meth*, *supra* note 2. Mr. Ballard attempted to sell 3.6 grams of methamphetamine to an undercover police officer, which was the second such sale by Mr. Ballard that had been observed by law enforcement officers. *Id.*

4. Interview with Doug Boring, *supra* note 2.

5. *Id.*

ence.[6] Meredith's mother battled with drug addiction, poverty, and criminal charges, which made it a struggle to care for Meredith. Eventually, she could no longer care for Meredith because of an impending stay of several months in jail and rehab.[7] Meredith bounced from household to household as her mother's life unraveled and the days before her mother's jail sentence dwindled.[8] When Meredith's adult sister learned of the situation, she called her maternal grandfather, Doug Boring.[9]

Within twenty-four hours of learning of Meredith's plight, Mr. Boring flew from Tampa, Florida, to Indianapolis, Indiana, to find his youngest granddaughter and bring her to his home.[10] Mr. Boring took custodial control of Meredith in the hopes that her mother would overcome her battle with addiction and prove capable of resuming her parental role. Nine months later, upon completion of a prison sentence and rehab, Meredith was reunited with her mother in Mr. Boring's home.[11]

Meredith's story is not unique; it represents a growing trend of grandparents leading households where minors reside for a variety of reasons.[12] Seven percent of all minors live in grandparent-led households—a forty-percent rise from the number of grandparent-led households in 2000.[13] Sometimes, intergenerational housing is a matter of pure preference. As the baby boomers age, causing the percentage of seniors in the population to dras-

6. *Id.*

7. *Id.*

8. *Id.* At one point, Meredith was housed with her paternal grandparents, who decided they were not up to the challenge and sent Meredith to live with "friends." *Id.*

9. *Id.*

10. *Id.* Through the aid of an Indiana attorney, Mr. Boring secured his daughter's consent to serve as Meredith's temporary guardian. *Id.*

11. *Id.* Additionally, Mr. Boring and his wife paid for all financial expenses for Meredith and her mother while her mother found work. *Id.*

12. Amy Goyer, *More Grandparents Raising Grandkids*, AARP (Dec. 20, 2010), http://www.aarp.org/relationships/grandparenting/info-12-2010/more_grandparents_raising_grandchildren.html; *see* Carole B. Cox, *Policy and Custodial Grandparents*, 11 MARQ. ELDER'S ADVISOR 281, 282–84 (2010) (examining the reasons for the increase in homes headed by grandparents, the grandparents' emotional benefits and strain, and the financial implications of such housing).

13. Ada-Helen Bayer & Leon Harper, *Fixing to Stay: A National Survey on Housing and Home Modification Issues*, AARP 21 (May 2000), http://www.aarp.org/home-garden/housing/info-2000/aresearch-import-783.html (reporting results from a survey of two thousand people over the age of forty-five that found that four percent of grandparents lived with a grandchild in 2000); Goyer, *supra* note 12 (citing 2010 census data that demonstrates that the number of grandchildren living in grandparent-led households increased from 4.5 in 2000 to 4.9 million in 2010).

tically increase, that preference may grow.[14] Additionally, the economic downturn of the last decade caused multiple generations to live together to save money.[15] In other cases, like Meredith's, grandparents raise a grandchild due to unfortunate circumstances.[16] These situations span from a child who is fleeing an abusive parent[17] to parents who face problems involving their health,[18] the law,[19] substance abuse,[20] or divorce.[21]

Living with a grandparent or extended family member may present the best possible solution for the child in any number of these unfortunate circumstances.[22] Family member involvement could provide the minor with irreplaceable benefits:[23] preserving the child's connection to family to the greatest extent possible; preventing the child from entering foster care; and providing a

14. Neil Howe, *What Makes the Boomers the Boomers?*, GOVERNING.COM (Sept. 2012), http://www.governing.com/generations/government-management/gov-what-makes-boomers.html. The "baby-boomer" generation as defined by the United States Census Bureau consists of individuals in the United States born between the years of 1946 and 1964. *Id.*

15. Mark D. Bauer, *"Peter Pan" as Public Policy: Should Fifty-Five-Plus Age-Restricted Communities Continue to be Exempt from Civil Rights Laws and Substantive Federal Regulation?*, 21 ELDER L.J. 33, 56 (2013).

16. Stefanos Chen, *The Minor Threat: Age-Restricted Communities Evicting Children*, AOL REAL ESTATE, http://realestate.aol.com/blog/2012/01/06/the-minor-threat-age-restricted-communities-evicting-children/ (updated Jan 6, 2012, 8:58 PM) (reporting on cases of grandparents fighting eviction from age-restricted communities for housing grandchildren whose parents cannot care for them). I use the phrase "minors in unfortunate circumstances" throughout this article to refer to minors in emergency situations, which includes minors in need of housing due to the sickness, death, incarceration, abuse, or substance abuse of a parent.

17. *Id.* (discussing the story of Chaz Cope, who took refuge with his grandparents to escape an abusive stepfather).

18. Moore v. E. Cleveland, 431 U.S. 494, 496–97, 505 n.16 (1977) (plurality) (discussing a situation in which a minor moved into his grandmother's home after his mother died).

19. Interview with Doug Boring, *supra* note 2; *Police Arrest Man for Dealing Meth*, *supra* note 2.

20. Meredith Minkler et al., *The Physical and Emotional Health of Grandmothers Raising Grandchildren in the Crack Cocaine Epidemic*, 32 GERONTOLOGIST 752, 752 (1992).

21. Chen, *supra* note 16. There are also cases where financial difficulties cause adult children and their children to move into the grandparent's home. *Id. See also* James Brooke, *Young Unwelcome in Retirees' Haven*, N.Y. TIMES (Feb. 16, 1997), http://www.nytimes.com/1997/02/16/us/young-unwelcome-in-retirees-haven.html (highlighting the story of a high school student who moved in with his grandparents in an age-restricted community to escape his abusive stepfather).

22. Chen, *supra* note 16; Phoebe S. Liebig et al., *Zoning, Accessory Dwelling Units, and Family Caregiving: Issues, Trends, and Recommendations*, 18 J. AGING AND SOC. POL'Y 155, 160 (2006).

23. Chen, *supra* note 16; Liebig et al., *supra* note 22, at 160.

host of benefits inherent to intergenerational housing that foster care cannot provide.[24]

Meredith's story shows that a grandparent's intervention to temporarily raise a child can preserve the possibility for a child in unfortunate circumstances to be reunited with his or her parents. Meredith's mother reformed her life without the fear of losing permanent custody of her child.[25] She held a steady job, remained drug-free for more than two years, and embraced the responsibilities of parenthood.[26] Today, Meredith's mother and grandparents occupy a central role in Meredith's life, surrounding her with love and support.[27]

Meredith's story may have turned out differently, however, had Doug Boring lived in a residential community in which a homeowner's association imposed deed restrictions on the use of his land.[28] Covenants serve as binding promises as to how land will be used—including restrictions on the ages of the individuals who reside on the land.[29] While offering a home to a grandchild in unfortunate circumstances may be instinctual for a grandparent,[30] the grandparent would meet resistance should he or she live in an age-restricted community as defined by the Fair Hous-

24. Liebig et al., *supra* note 22, at 160–61. While not every grandparent wishes to raise a grandchild, those who seek to house a grandchild escaping unfortunate circumstances should not be hindered by the law from doing so.

25. Interview with Doug Boring, *supra* note 2.

26. *Id.* Meredith and her mother established their own residence in October 2012, but they still see Mr. Boring on average at least once a week. *Id.*

27. *Id.*

28. Chen, *supra* note 16; Interview with Doug Boring, *supra* note 2. Tegus, exotic lizards that have recently invaded Florida, are more of a threat to a child on Mr. Boring's land than land-use restrictions. Keith Morelli, *Nearly 100 Sightings of Exotic Lizard in Eastern Hillsborough County*, TAMPA TRIB., http://tbo.com/brandon/nearly-100-sightings-of-exotic-lizard-in-eastern-hillsborough-county-20140223/ (updated Feb. 24, 2014, 10:33 AM).

29. Hill v. Palm Beach Polo, Inc., 717 So. 2d 1080, 1081 (Fla. 4th Dist. Ct. 1998); 7 FLA. JUR. 2d *Building, Zoning, and Land Controls* § 63 (2013); BLACK'S LAW DICTIONARY 421 (Bryan A. Garner ed., 9th ed. 2009) (defining a restrictive covenant as a "private agreement, usu[ally] in a deed or lease, that restricts the use or occupancy of real property, esp[ecially] by specifying lot sizes, building lines, architectural styles, and the uses to which the property may be put").

30. Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 129 (Cal. 1982) ("A society that sanctions wholesale discrimination against its children in obtaining housing engages in suspect activity. Even the most primitive society fosters the protection of its young; such a society would hardly discriminate against children in their need for shelter.").

ing Amendments Act (FHAA)[31] and amended by the Housing for Older Persons Act (HOPA).[32]

The FHAA's endorsement of age-restricted communities may threaten a fundamental right of families to cohabitate by violating the due process right to maintain the intimate relationships of a family.[33] While not necessarily prevailing on constitutional challenges to the covenants of such communities, grandparent–residents of such communities have fought and won the right to raise their grandchildren in their homes.[34] These cases reflect the societal attitude that there is something inherently wrong with refusing to allow a child in unfortunate circumstances to reside with his or her closest family members who are capable of raising the child.[35] Additionally, such conflicts serve as a preview of issues to come, which ultimately could lead to a direct constitutional challenge on an age-restricted community's decision to forbid children from residing within its borders.[36]

The interest of preserving families would be served by amending the FHAA to prevent age-restricted communities from barring children from living with extended family in emergency circumstances. This Article utilizes the right for family cohabitation as reflected in *Moore v. East Cleveland*[37] as its primary

31. 42 U.S.C. §§ 3601–3619, 3607 (2012) (banning housing discrimination on the basis of familial status or disability).

32. Housing for Older Persons Act, Pub. L. No. 104-76, 109 Stat. 787 (1995) (amending the Fair Housing Act, 42 U.S.C. §§ 3601–3631 (1968)). The FHAA explicitly allows elders to live in a community without children in three categories of housing. 42 U.S.C. § 3607(b)(2); *see infra* Part II(C) (explaining the FHAA categories of age-restricted housing and their requirements under the Code of Federal Regulations).

33. Moore v. E. Cleveland, 431 U.S. 494, 503–04 (1977) (holding that a town ordinance was invalid for intruding on the right of families to cohabitate); John R. Dorocak, *De Facto Disparate Impact Familial Discrimination (Housing for Older Persons Age Fifty-Five and Over) Under the Fair Housing Act: Is it Legal? Is it Constitutional?*, 21 GEO. MASON U. C. R. L.J. 1, 26–27 (2010) (arguing that the FHAA violates the due process clause and discriminates against families and minorities); *see generally* Shelley D. Cutts, Comment, *The Fair Housing Amendments Act of 1988: An Incomplete Solution to the Problem of Housing Discrimination Against Families*, 30 ARIZ. ST. L.J. 205 (1998) (arguing that the FHAA exemptions for senior housing constitute violations of constitutional rights: the right to privacy; the right of association as a fundamental right to enter into and maintain certain intimate relationships; and the Due Process Clause of the Fifth Amendment because the FHAA allows discrimination that does not serve an important state interest).

34. Chen, *supra* note 16. The grandparents prevail in these cases often due to technicalities where the community did not comply with federal regulations for such communities. *Id.*

35. Bauer, *supra* note 15, at 56; Chen, *supra* note 16; Howe, *supra* note 14.

36. *Moore*, 431 U.S. at 500.

37. 431 U.S. 494.

constitutional justification for an emergency-circumstances amendment.[38] Further, this amendment would hardly thwart congressional intent underlying the FHAA age-restricted community exemption[39]—in fact, it would help to eradicate the discriminatory housing practices that the FHAA intended to banish.[40] An emergency-circumstances amendment would also comport with Supreme Court rulings that further establish the freedom of families to associate as a fundamental liberty.[41] Such a change would allow minors in emergency circumstances to more readily cohabitate with members of their extended family.

Constitutional arguments abound against barring minors in unfortunate circumstances from residing in an age-restricted community.[42] This Article will not thoroughly explore every constitutional argument, deferring to other articles that discuss the constitutionality of age-restricted housing.[43] Additionally, this

38. *Id.* at 500; Cutts, *supra* note 33, at 213–18; Dorocak, *supra* note 33, at 26–29.

39. *See* H.R. REP. NO. 100-711, at 19 (1988) (explaining that "Congress and the courts have a long tradition of defining and protecting families as 'perhaps the most fundamental social institution of our society'") (quoting Trimble v. Gordon, 430 U.S. 762, 769 (1977)). The House Report linked the passage of the FHAA to "numerous social welfare programs intended to support children and their parents." *Id.*; *see, e.g.*, Aid and Services to Needy Families with Children, 42 U.S.C. § 601 (2012); Adoption Assistance and Child Welfare Act, 42 U.S.C. § 670. "In 1949, the federal government made a commitment to provide 'a decent home and suitable living environment for every American family.'" H.R. REP. NO. 100-711, at 19 (quoting 42 U.S.C. § 1441). "Nearly 40 years after this commitment, however, discrimination against families with children prevents millions of American families from realizing this goal." *Id.*

40. H.R. REP. NO. 100-711, at 19 (1988); Edward Allen, *Six Years After Passage of the Fair Housing Amendments Act: Discrimination Against Families with Children*, 9 ADMIN. L.J. AM. U. 297, 298 (1995); Dorocak, *supra* note 33, at 26–27.

41. *Moore*, 431 U.S. at 500; *see also* Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (plurality) (holding that the liberty interest infringed upon by the government must be both fundamental and "an interest traditionally protected by our society"); Roberts v. U.S. Jaycees, 468 U.S. 609, 617–20 (1984) (holding that the right to freedom of association only "receives protection as a fundamental element of personal liberty" when a person's "[choice] to enter into and maintain certain intimate human relationships" is intruded upon by the government). The Court grants families the protection to associate because familial relationships "involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Id.* at 619–20.

42. Cutts, *supra* note 33, at 213–18; Dorocak, *supra* note 33, at 26–27; John Nelson, Comment, *The Perpetuation of Segregation: The Senior Housing Exemption in the 1988 Amendments to the Fair Housing Act*, 26 T. JEFFERSON L. REV. 103 (2003) (arguing that age-restricted housing has a racially discriminatory effect because minority households are larger and more likely to include grandparents).

43. Cutts, *supra* note 33, at 213–18; Dorocak, *supra* note 33, at 26–27.

Article will not rehash arguments that were silenced in *Senior Civil Liberties Ass'n v. Kemp*.[44]

Instead, this Article will focus on one constitutional issue presented by the FHAA senior-housing exemption[45]—the fundamental right of families to cohabitate. An exception to the FHAA exemption for minors in unfortunate circumstances is justified by the right of a family to cohabitate based on a history and tradition of extended family caring for minor relatives.[46] Additionally, this Article will demonstrate how such an amendment would protect age-restricted communities from the pitfalls of litigation.[47]

Crafting an exception to the FHAA senior housing exemption[48] to allow minors in unfortunate circumstances to live with extended family is justified on several fronts: Supreme Court cases establish the right of family to associate as a fundamental liberty meriting protection;[49] practical concerns of communities

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44. 761 F. Supp. 1528 (M.D. Fla. 1991), *aff'd*, 965 F.2d 1030 (11th Cir. 1992). In *Kemp*, the Eleventh Circuit rejected seven constitutional arguments against the FHAA: (1) the FHAA violated the Commerce Clause; (2) the FHAA violated the Tenth Amendment; (3) the FHAA violated the "penumbra" right of privacy and free association for communities to be free of children; (4) the FHAA was unconstitutionally vague and deprived seniors of due process; (5) the FHAA violated the Fifth Amendment's Equal Protection Clause; (6) the FHAA was invalid as a violation of due process under the Fifth Amendment for applying retroactively; and (7) the FHAA was invalid for constituting an unconstitutional taking without just compensation in violation of the Fifth Amendment. *Id.* at 1543–60; *see* Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965) (holding that the right of privacy was "created by several fundamental constitutional guarantees" which emanate like a "penumbra" from the First, Third, Fourth, Fifth, and Ninth Amendments).

45. 42 U.S.C. § 3607(b)(2) (2012).

46. *Moore*, 431 U.S. at 500.

47. *See* Balvage v. Ryderwood Improvement & Serv. Ass'n, 642 F.3d 765, 772, 777–78 (9th Cir. 2011) (explaining that a community may not discriminate its way towards FHAA compliance and that lost data could risk its age-restricted status); Massaro v. Mainlands Section 1 & 2 Civic Ass'n, 3 F.3d 1472, 1478–79 (11th Cir. 1993) (holding that excluding all individuals less than sixteen years of age does not establish an intent to operate as an age-restricted community); United States v. Fountainbleau Apartments, L.P., 566 F. Supp. 2d 726, 738 (E.D. Tenn. 2008) (stating that a lack of compliance with age-verification requirements will not be excused by hectic circumstances); Gibson v. Cnty. of Riverside, 181 F. Supp. 2d 1057, 1081–83 (C.D. Cal. 2002) (holding that a community that uses the wrong age and has no policy for enforcement of age restrictions has failed to establish an intent to operate as an age-restricted community); Simovits v. Chanticleer Condo. Ass'n, 933 F. Supp. 1394, 1408 (N.D. Ill. 1996) (ordering injunctive relief against a community to cease discriminating against families after attempting to establish an age-restricted community through a subjective assessment of residents' ages); *see infra* Part II(E) (providing more detailed discussion of these cases).

48. 42 U.S.C. § 3607(b)(2).

49. Michael H. v. Gerald D., 491 U.S. 110, 122 (1989); Roberts v. U.S. Jaycees, 468 U.S. 609, 618–20 (1984); *Moore*, 431 U.S. at 500.

should compel them to avoid litigation against relatives seeking to house a minor in unfortunate circumstances;[50] and societal trends predict an increase in the conflicts between age-restricted communities and seniors seeking to raise grandchildren in those communities,[51] which could clog the courts with litigation in the absence of the proposed exception to the FHAA senior-housing exemption.[52]

To help resolve disputes between grandparents raising grandchildren and age-restricted communities, this Article will suggest several triggers that would serve to activate an emergency exception to FHAA-based age restrictions: medical documentation, court-approved custody (even temporary), or proof of a parent's incarceration. These conditions should trigger an automatic exemption from an age-restricted community's age requirements.[53] The last Part will also explore how mere economic justifications would not qualify for an exemption to the FHAA senior-housing exemption.[54]

While this solution has been proposed by another author,[55] this Article expands upon how this amendment would reflect common sense and help proponents of age-restricted communities. The proposed exception would benefit age-restricted communities for several reasons. First, a limited exception would not destroy the character of an age-restricted community by flooding the sidewalks of the communities with children.[56] Second, the proposed exception could prevent challenges to communities over

50. *Balvage*, 642 F.3d at 777–78; *Massaro*, 3 F.3d at 1478–79; *Fountainbleau*, 566 F. Supp. 2d at 738; *Gibson*, 181 F. Supp. 2d at 1081–83; *Simovits*, 933 F. Supp. at 1408; *see infra* Part II(E) (discussing these cases in further detail).

51. Bayer & Harper, *supra* note 13, at 21–22; Goyer, *supra* note 12.

52. 42 U.S.C. § 3607(b)(2).

53. Cox, *supra* note 12, at 282–83; Elizabeth Burgess Dowdell, *Caregiver Burden: Grandmothers Raising Their High Risk Grandchildren*, 33 J. PSYCHOSOCIAL NURSING 27, 28 (Mar. 1995) (demonstrating the role of parental illness and death in the increase in the number of grandparents raising grandchildren); Paula L. Dressel & Sandra K. Barnhill, *Reframing Gerontological Thought and Practice: The Case of Grandmothers with Daughters in Prison*, 34 GERONTOLOGIST 685, 686 (1994) (discussing the role of parental incarceration in the increase in the number of grandparents raising grandchildren).

54. 42 U.S.C. §§ 3607(b)(1)–(2).

55. Cutts, *supra* note 33, at 213–18 (arguing that the FHAA should be amended to provide for an allowance for minors to reside in fifty-five-plus housing communities with impunity if there is proof that: "(1) a child's parent or guardian has died; (2) the child's parent or guardian is suffering from a severe, debilitating injury or illness," which prevents that person from caring for the minor; "or (3) a child's continued presence in the current home presents a risk to his or her life or health due to abuse or neglect").

56. *Id.* at 218.

how the communities verify the residents' ages or publicize their age-restricted intent, thus preventing the potential loss of a community's age-restricted status.[57] Lastly, opposing a minor's potential housing can damage the reputation of the community, causing depreciation of home values.

II. HISTORY

Protections against widespread housing discrimination against families[58] continued to evolve and increase through Supreme Court cases in the decades following *Moore*[59] and the passage of the FHAA.[60] However, the HOPA[61] amendments to the FHAA[62] allowed age-restricted communities to exclude individuals who are younger than fifty-five without providing any specific services or benefits to elders other than alienation from younger members of society.[63] Given the trends in intergenerational housing, increased litigation between grandparents seeking to raise grandchildren in their age-restricted communities could put communities' age-restricted statuses at risk.[64]

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57. Balvage v. Ryderwood Improvement & Serv. Ass'n, 642 F.3d 765, 772, 777–78 (9th Cir. 2011); Massaro v. Mainlands Section 1 & 2 Civic Ass'n, 3 F.3d 1472, 1478–79 (11th Cir. 1993); United States v. Fountainbleau Apartments, L.P., 566 F. Supp. 2d 726, 737–38 (E.D. Tenn. 2008); Gibson v. Cnty. of Riverside, 181 F. Supp. 2d 1057, 1081–83 (C.D. Cal. 2002); Simovits v. Chanticleer Condo. Ass'n, 933 F. Supp. 1394, 1402–03 (N.D. Ill. 1996).

58. Jonathan I. Edelstein, *Family Values: Prevention of Discrimination and the Housing for Older Persons Act of 1995*, 52 U. MIAMI. L. REV. 947, 950–51 (1998) (discussing the history of housing discrimination against families with children and criticizing the 1995 changes to the FHAA that eliminated the requirement to provide elder services for fifty-five-plus housing communities); Gretchen Walsh, Note, *The Necessity for Shelter: States Must Prohibit Discrimination Against Children in Housing*, 15 FORDHAM URB. L.J. 481, 482–84 (1986) (examining housing discrimination practices and living conditions of families with children prior to the FHAA).

59. Michael H. v. Gerald D., 491 U.S. 110, 122–23 (1989); Roberts v. U.S. Jaycees, 468 U.S. 609, 618–20 (1984); Moore v. E. Cleveland, 431 U.S. 494, 500–01 (1977).

60. 42 U.S.C. §§ 3601–3619 (2012).

61. Pub. L. No. 104-76, §§ 1–3, 109 Stat. 787, 787–88 (1995) (amending the Fair Housing Act, 42 U.S.C. §§ 3601–3631).

62. 42 U.S.C. §§ 3601–3619.

63. Pub. L. No. 104-76, 109 Stat. 787 (amending the Fair Housing Act, 42 U.S.C. §§ 3601–3631); Bauer, *supra* note 15, at 70–71 (showing the problem of eliminating the services requirement through the plight of seniors in an age-restricted community following Hurricane Wilma).

64. More grandparents continue to lead households where their grandchildren reside. Bayer & Harper, *supra* note 13, at 3, 19–21; Goyer, *supra* note 12. Challenging a resident's decision to raise a minor in an age-restricted community has cost more than one such community its age-restricted status. Massaro v. Mainlands Section 1 & 2 Civic Ass'n, 3 F.3d 1472, 1478–80 (11th Cir. 1993); United States v. Fountainbleau Apartments, L.P.,

This Part describes the history of housing discrimination against families to illustrate the problem that the FHAA aimed to rectify.[65] Supreme Court cases that assert the fundamental right of families to cohabitate[66] are examined to show the framework of legal protections that Congress did not overturn in passing the FHAA.[67] Then, this Part examines the FHAA's development and evolution.[68] Next, this Part explores intergenerational housing trends, which suggest that more grandparents will head households in which grandchildren reside.[69]

This Part concludes with an examination of technical requirements for age-restricted communities—the independent age verification[70] and intent to operate as age-restricted housing[71] requirements—and demonstrate how these requirements present litigation pitfalls for age-restricted housing communities.[72]

A. Pre-FHAA Discrimination Against Family Housing

Legal protections for family housing aimed to eradicate entrenched, nationwide discrimination. Prior to the Fair Housing Amendments Act[73] in 1988, housing discrimination against families with children was rampant.[74] A Housing and Urban Develop-

566 F. Supp. 2d 726, 737–38 (E.D. Tenn. 2008); Gibson v. Cnty. of Riverside, 181 F. Supp. 2d 1057, 1081–83 (C.D. Cal. 2002); Simovits v. Chanticleer Condo. Ass'n, 933 F. Supp. 1394, 1408 (N.D. Ill. 1996).

65. 42 U.S.C. §§ 3601–3619; H.R. REP. NO. 100-711, at 19 (1988); *see supra* notes 38–40 (providing a detailed description of the house report describing Congress's intent to end family discrimination by passing the FHAA).

66. Moore v. E. Cleveland, 431 U.S. 494, 500–01 (1977); *see also* Michael H. v. Gerald D., 491 U.S. 110, 122–23 (1989) (discussing interpretations of the holding in *Moore*); Roberts v. United States Jaycees, 468 U.S. 609, 618–20 (1984) (noting that the Bill of Rights provides protection of "certain kinds of highly personal relationships"); *see infra* Part II(B) (describing *Moore* in detail).

67. 42 U.S.C. §§ 3601–3619.

68. *Id.*; Pub. L. No. 104-76, 109 Stat. 787.

69. Bayer & Harper, *supra* note 13, at 3, 19–21; Goyer, *supra* note 12.

70. 42 U.S.C. § 3607(b)(2)(C)(iii); 24 C.F.R. § 100.307 (2013) (providing multiple ways for a community to satisfy the bi-annual age verification requirement).

71. 24 C.F.R. § 100.306.

72. Balvage v. Ryderwood Improvement & Serv. Ass'n, 642 F.3d 765, 777–78 (9th Cir. 2011); Massaro v. Mainlands Section 1 & 2 Civic Ass'n, 3 F.3d 1472, 1478–79 (11th Cir. 1993); United States v. Fountainbleau Apartments, L.P., 566 F. Supp. 2d 726, 738 (E.D. Tenn. 2008); Gibson v. Cnty. of Riverside, 181 F. Supp. 2d 1057, 1081–83 (C.D. Cal. 2002); Simovits v. Chanticleer Condo. Ass'n, 933 F. Supp. 1394, 1408 (N.D. Ill. 1996); *see infra* Part II(E) (discussing these cases at length).

73. 42 U.S.C. §§ 3601–3619.

74. Edelstein, *supra* note 58, at 949–51; Walsh, *supra* note 58, at 482–84.

ment (HUD) survey found that twenty-five percent of the eighty thousand housing providers surveyed totally excluded children and "fifty percent imposed age restrictions."[75] Courts regularly upheld these discriminatory practices.[76] Far from providing families protection from housing discrimination, only fifteen states and the District of Columbia had restrictions against such discrimination.[77] Often though, these laws proved ineffective—they were riddled with exceptions that rendered them meaningless.[78] Additionally, punishments for violating the laws of the minority of states with age-discrimination laws were "trivial."[79]

The effects of such discrimination amounted to much more than a mere inconvenience for the affected families—families were exposed to squalid living conditions and homelessness.[80] However, proponents of such discrimination argued that the restrictions against families were justified by market forces and property rights,[81] even if such practices exposed children and families to unsanitary and unsafe living conditions.[82] These conditions included families living in automobiles and tents.[83] In one instance, a family with six children lived in a station wagon parked near a pier for more than two months.[84] Those families who could find housing too often shared their living quarters with rats and cockroaches or lived in dwellings in need of repair, but

75. Edelstein, *supra* note 58, at 951.

76. *Id.* "For instance, one Florida appellate court permitted enforcement of a deed restriction prohibiting residents under the age of sixteen, against a couple who had recently had a baby." *Id.*

77. *Id.* at 951, n.29 (citing state laws in Arizona, California, Connecticut, Delaware, Illinois, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New York, Rhode Island, Vermont, and Virginia).

78. *Id.* at 952. These exceptions included blanket exceptions if a housing community simply called itself "adult housing" and allowed for retirement housing with entrance ages less than sixty years old. Robert A. Bilott, Note, *The Fair Housing Amendments Act of 1988: A Promising First Step Toward the Elimination of Familial Homelessness?*, 50 OHIO ST. L.J. 1275, 1281–83 (1989) (citing a Michigan statute).

79. Fines were often less than $100. Edelstein, *supra* note 58, at 952.

80. Walsh, *supra* note 58, at 483, n.14, 484.

81. *Id.* at 482–83 (explaining that landlords cited a right to live in child-free environments, which were in high demand).

82. *Id.* at 483–84.

83. *Id.* at 483 n.14. Families also lived in "'abandoned buildings'" and "'rundown motels and hotels.'" *Id.* Thirty-three percent of those surveyed by HUD reported living "'in cars, vans, abandoned buildings, or tents.'" *Id.*

84. *Id.* The HUD survey went on to say that forty-four percent of all respondents reported living with family or friends, and nineteen percent reported separating their families into separate households. *Id.*

the dwellings "'were not repaired because the owners knew that the families had no place else to go.'"[85]

B. The Fundamental Right of Families to Maintain Intimate Relationships

Against the backdrop of rampant discrimination against family housing, the Supreme Court established limits to restrictions on a family's right to cohabitate, linking this right to the "penumbra" right to privacy[86] as a precursor to the FHAA.[87] The preservation of the family, especially in emergency circumstances, is reflected in *Moore* as a fundamental right.[88] The plurality argued that a family has a substantive due process right to live together based on the fact that "the institution of the family is deeply rooted in this Nation's history and tradition."[89] Additionally, in the decades that followed, two other Supreme Court cases refined and strengthened the fundamental right of families to cohabitate.[90]

The facts of *Moore* prove especially relevant to this Article's purpose. In that case, a grandmother served as the head of a household that included her son and two grandsons (who were first cousins).[91] East Cleveland passed an ordinance that excluded such a household from the definition of family.[92] John Moore Jr.,

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85. *Id.* at 483 n.15. According to the HUD survey, "'[f]orty-seven percent of the sample said they lived in substandard housing in the past year.'" *Id.*

86. Moore v. E. Cleveland, 431 U.S. 494, 500–02 (1977); Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965) (holding that the right to privacy emanates like a "penumbra" from the First, Third, Fourth, Fifth, and Ninth Amendments).

87. 42 U.S.C. §§ 3601–3619 (2012).

88. *Moore*, 431 U.S. at 500–06.

89. *Id.* at 503.

90. Michael H. v. Gerald D., 491 U.S. 110, 122–24 (1989); Roberts v. U.S. Jaycees, 468 U.S. 609, 618–20 (1984); *see infra* notes 100–109 and accompanying text (providing an overview of these cases).

91. *Moore*, 431 U.S. at 496.

92. *Id.* at 495–96. East Cleveland defined a family as:

> 'Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:
>
> (a) Husband or wife of the nominal head of the household.
>
> (b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.
>
> (c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

the son of Ms. Moore's daughter, came to live with his grandmother after his mother died.[93] For opening her home to her grandson after his loss, Ms. Moore was sentenced to five days in jail and fined twenty-five dollars.[94]

In its plurality decision, the Supreme Court held that the City of East Cleveland's ordinance violated a fundamental right.[95] The Court, relying on past decisions, noted a long history and tradition in the United States of a family's right to associate.[96] The right to cohabitate with family extends beyond the nuclear family, as reflected in our nation's history and tradition, particularly in times when unfortunate circumstances compel the extended family to help raise its youngest members.[97] "Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it."[98] While times may have changed, resulting in fewer extended families

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(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

(e) A family may consist of one individual.

Id. at 496 n.2 (quoting EAST CLEVELAND, OHIO, CITY OF EAST CLEVELAND HOUS. CODE § 1341.08 (1966)). The city justified the law as a means to limit traffic, prevent overcrowding, and ease the financial burden on the school system. *Id.* at 499–500.

93. *Id.* at 496–97, 505 n.16.

94. *Id.* at 497.

95. *Id.* at 500, 504.

96. *Id.* at 504–05. The Court relied on a long history of cases upholding constitutional protections for the rights of families. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 165, 169–71 (1944) (stating that the state may not interfere with the parent's indoctrination and the child's participation in religious activities generally, when safety concerns do not apply); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding that parents have the right to send children to private schools); Meyer v. Nebraska, 262 U.S. 390, 400–01 (1923) (holding that parents have the right to have children instructed in a foreign language).

97. *Moore*, 431 U.S. at 504–06. "Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life." *Id.* at 505. "The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." *Id.* at 504.

98. *Id.* at 504–05. "Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home." *Id.* at 505.

sharing households than in the past, there still remains "the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family."[99]

Following *Moore*, the Supreme Court made additional rulings that further strengthened the rights of extended family members to cohabitate with related children.[100] In *Michael H. v. Gerald D.*,[101] Justice Scalia, writing for the majority, explained that a constitutionally protected liberty interest under the Due Process Clause[102] must be deemed both fundamental and "an interest traditionally protected by our society."[103] The "sanctity of the family" merits the Court's protection "because the institution of the family is deeply rooted in this Nation's history and tradition."[104] Additionally, in *Roberts v. United States Jaycees*,[105] Justice Brennan's majority opinion distinguished the types of relationships that were protected by the freedom to associate.[106] Generally, relationships that would merit constitutional protection under the freedom to associate will be noted by "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."[107] The Court granted families the protection to associate because familial relationships "involve deep attachments and commitments" with other persons "with whom one shares not only a special community of thoughts,

99. *Id.* "Decisions concerning child rearing . . . long have been shared with grandparents or other relatives who occupy the same household—indeed who may take on major responsibility for the rearing of the children." *Id.*

100. Michael H. v. Gerald D., 491 U.S. 110, 122–23 (1989); Roberts v. U.S. Jaycees, 468 U.S. 609, 618–20 (1984).

101. 491 U.S. 110.

102. U.S. CONST. amend XIV, § 1.

103. *Michael H.*, 491 U.S. at 122. The Court explains that these qualifications are both necessary in the interest of judicial restraint in recognizing new rights under the Due Process Clause. *Id.* "'[T]he Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare.'" *Id.* (quoting *Moore*, 431 U.S. at 544 (White, J., dissenting)).

104. *Id.* at 124 (quoting *Moore*, 431 U.S. at 503 (plurality)) (explaining that "[t]he presumption of legitimacy was a fundamental principle of the common law" to protect the marital family against challenges of paternity from a male outside the marriage).

105. 468 U.S. 609 (1984).

106. *Id.* at 618–20.

107. *Id.* at 620. "Accordingly, the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees." *Id.*

experiences, and beliefs but also distinctively personal aspects of one's life."[108] Together, these cases further refine and strengthen the Court's justifications for recognizing grandparents' rights to raise their grandchildren in their homes.[109]

C. FHAA History and Requirements of Age-Restricted Housing

This Subpart will trace the evolution of FHAA protections against housing discrimination against families. First, it will describe the general protections afforded to families by the FHAA.[110] Then, it will trace the changes in requirements for age-restricted communities to be exempt from restrictions on discrimination against families.[111] Lastly, it will detail technical requirements to which the age-restricted communities must adhere to preserve their ability to legally discriminate against families.[112]

Less than ten years after *Moore*,[113] the FHAA explicitly forbade discrimination based on familial status in the rental or sale of housing.[114] This law made it illegal to refuse to sell or rent after a good faith offer, "to refuse to negotiate for [a] sale or rental," to discriminate in the terms of a sale or rental for reasons including familial status, or to publish any preference against housing based on familial status.[115]

The FHAA, however, provided exceptions for age-restricted communities through successful lobbying by special-interest groups.[116] Senior-housing advocates wished to maintain communities for individuals who had exceeded their child-rearing

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108. *Id.* at 619–20.

109. Michael H. v. Gerald D., 491 U.S. 110, 122 (1989); *Roberts*, 468 U.S. at 618–20; Moore v. E. Cleveland, 431 U.S. 494, 500, 504 (1977).

110. *See infra* notes 113–124 and accompanying text (discussing 42 U.S.C. §§ 3601–3619 (2012)).

111. *See infra* notes 125–134 and accompanying text (reviewing the history of 42 U.S.C. § 3607(b)(2)).

112. *See infra* notes 135–163 and accompanying text (focusing on 42 U.S.C. § 3607(b)(2)(C)(iii); 24 C.F.R. § 100.307 (2013)).

113. 431 U.S. at 494.

114. 42 U.S.C. § 3604(a)–(e).

115. *Id.* § 3604(a)–(c). Additionally, a landlord or seller cannot, on the basis of familial status, represent that a dwelling is not available for sale, rent, or inspection when it in fact is. *Id.* § 3604(d). Nor can an individual "[f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin." *Id.* § 3604(e).

116. 42 U.S.C. § 3607(b)(2); Bauer, *supra* note 15, at 34.

years.[117] These advocates "argued that it was elders' right to be free from the noise of children" and that elders amounted to a burden on families by "complaining about the ordinary sounds of children at play."[118]

The FHAA provided for three "housing for older persons" (HOP) exemptions from its requirements against discriminating against families.[119] The first HOP exemption pertained to housing that HUD determined to be "designed and operated to assist elderly persons" and provided by a state or federal government.[120] As of the date of this Article, HUD has never made any such designation.[121] The second exemption covers housing that is "intended for, and solely occupied by," persons at least sixty-two years old;[122] however, because this exemption provides no flexibility for housing residents younger than sixty-two, it has not been frequently utilized.[123] The final exemption—the focus of this Article—provides that HOP "intended and operated for occupancy by persons [fifty-five] years . . . [and] older" (fifty-five-plus housing) may lawfully conduct familial discrimination.[124]

When Congress passed the FHAA, including provisions for exemptions for HOP, it included three main requirements for fifty-five-plus housing.[125] First, such housing must provide "significant facilities and services specifically designed to meet the physical or social needs of older persons."[126] Second, at least eighty percent of all units in fifty-five-plus housing must be occupied by

117. Bauer, *supra* note 15, at 38 (citing reports to Congress where groups lobbied for an age-restricted housing exemption to the FHAA).

118. *Id.* "Elders argued to preserve their ability to live with people of common affinity, those at the same stage of life, with similar interests and activities." *Id.*

119. 42 U.S.C. § 3607(b).

120. *Id.* § 3607(b)(2)(A).

121. Bauer, *supra* note 15, at 39 n.28; Dorocak, *supra* note 33, at 8. "This part of the [HOP] exemption has been rendered a virtual nullity as a result of current HUD policy, which has determined not to designate any of HUD's elderly housing programs as exempt under this provision." Robert G. Schwemm & Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 IOWA L. REV. 121, 157 n.186 (2004).

122. 42 U.S.C. § 3607(b)(2)(B).

123. Bauer, *supra* note 15, at 39. Because not even a spouse would be exempt under this exemption, housing complexes that wish to qualify for this exception will aim to qualify for the fifty-five-plus exemption due to its increased flexibility. *Id.* (citing Dorocak, *supra* note 33, at 8).

124. 42 U.S.C. § 3607(b)(2)(C).

125. *Id.* (amended 1995).

126. *Id.* § 3607(b)(2)(C)(i).

at least one person fifty-five years of age or older.[127] Third, the original FHAA required fifty-five-plus housing communities to publish and adhere to "policies and procedures which demonstrated an intent . . . to provide housing for persons [aged fifty-five and] older."[128]

After several unsuccessful attempts by HUD to enact clear regulations for what qualified as "significant facilities and services,"[129] Congress eliminated that requirement through the passage of HOPA in 1995.[130] HOPA revised the requirements for age-restricted housing and put to rest controversy over the "significant facilities and services" provision.[131] Post-HOPA requirements for fifty-five-plus housing encompass three main requirements. Just as before, HOPA regulations first require that at least eighty percent of the housing units must be occupied by at least one resident who is at least fifty-five years of age.[132] Second, the community must publish and adhere "to policies and procedures that demonstrate the intent" to operate as a fifty-five-plus community.[133] Lastly, HOPA separated and refined the requirement for a bi-annual age verification of all residents of fifty-five-plus communities from the intent requirement.[134]

On its face, the post-HOPA FHAA does not explicitly restrict minors from living in a fifty-five-plus community.[135] The eighty percent requirement, however, operates as a minimum standard—fifty-five-plus communities can be more restrictive.[136] While this eighty percent requirement appears to open the door for children to live in such communities, that is not the case in

127. *Id.* § 3607(b)(2)(C)(ii).

128. *Id.* § 3607(b)(2)(C)(iii).

129. Bauer, *supra* note 15, at 40–41 (citing 59 Fed. Reg. 34,902 (July 7, 1994)).

130. Housing for Older Persons Act of 1995, Pub. L. No. 104-76, 109 STAT. 787 (1995) (codified in 42 U.S.C. § 3607(b)(2)(C)).

131. 42 U.S.C. § 3607(b)(2)(C)(i). "HUD's inability (or refusal) to better define 'significant facilities' led to considerable litigation." Bauer, *supra* note 15, at 40 (citing seven cases concerning what constituted "significant facilities").

132. 42 U.S.C. § 3607(b)(2)(C)(i).

133. *Id.* § 3607(b)(2)(C)(ii); 24 C.F.R. § 100.306 (2013) (providing for a variety of ways that a fifty-five-plus community can comply with the intent requirement); *see infra* notes 208–217 and accompanying text (providing additional information about how communities satisfy the intent requirement).

134. 42 U.S.C. § 3607(b)(2)(C)(iii).

135. *Id.* § 3607(b)(2)(C).

136. *See* Bauer, *supra* note 15, at 41 (noting that "*at least* eighty percent of the units" are filled by residents over fifty-five) (emphasis added).

practice.[137] In fact, a scholar on age-restricted communities has written that he could not find one example of an age-restricted community using the twenty percent cushion to allow a minor in unfortunate circumstances to reside within its borders.[138]

Federal regulations provide cushioning to the eighty percent minimum standard: certain categories of people do not count against a fifty-five-plus community's allowance of residences occupied by persons under fifty-five.[139] A community's employees and their families do not count towards this allowance.[140] Units occupied by caregivers of disabled residents do not count either.[141] This second exemption could have far reaching consequences since many elders qualify as disabled under the FHAA[142] and wish to age in place.[143] Being disabled under the FHAA *requires* reasonable accommodation.[144] More than thirty percent of persons sixty-five and older have trouble climbing one flight of stairs or walking a quarter of a mile,[145] which would qualify for FHAA protection as a mobility limitation.[146] Additionally, qualifying conditions that tend to exist in high percentages among the elderly include, among other conditions, heart problems and diabetes.[147]

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137. Chen, *supra* note 16.

138. Bauer, *supra* note 15, at 56 n.162 (citing Chen, *supra* note 16).

139. 24 C.F.R. § 100.305(e) (2013). Nevertheless, minors in unfortunate circumstances are excluded. Bauer, *supra* note 15, at 56 n.162; Chen, *supra* note 16.

140. 24 C.F.R. § 100.305(e) (clarifying that families will not count, "provided the employees perform substantial duties related to the management or maintenance of the facility or community").

141. *Id.* § 100.305(e)(4) (citing 24 C.F.R. § 100.204 (requiring "reasonable accommodations in rules, policies, practices, or services," when necessary, to provide equal opportunity for handicapped individuals "to use and enjoy a dwelling unit, including public and common use areas").

142. *Id.* § 100.201 (listing conditions that qualify for FHAA protection); *id.* §§ 100.204, 100.305(e). Qualifying under the FHAA as a disabled person requires one of the following: "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of such an impairment, or (3) being regarded as having such an impairment." 42 U.S.C. § 3602(h).

143. Bayer & Harper, *supra* note 13, at 4 (examining results of a survey of two thousand people over forty-five that revealed that seventy-one percent of those surveyed wish to remain in their homes as long as possible).

144. 24 C.F.R. §§ 100.204, 100.305(e).

145. Jon Pynoos et al., *Aging in Place, Housing, and the Law*, 16 ELDER L.J. 77, 80 (2008).

146. U.S. DEP'T OF HEALTH & HUMAN SERVS., PHYSICAL ACTIVITY GUIDELINES ADVISORY COMMITTEE REPORT, at G6-1, G6-3 (2008), *available at* http://www.health.gov/paguidelines/report/pdf/CommitteeReport.pdf.

147. 24 C.F.R. § 100.201(a)(2). Other qualifying conditions include the following:

Federal regulations refine the requirement that communities publish and adhere "to policies and procedures that demonstrate the intent"[148] to operate as a fifty-five-plus community.[149] Many dwellings qualify as a "housing facility or community," which federal regulations define as constituting more than a portion of a building and being "governed by a common set of rules, regulations or restrictions."[150] Such a community must also demonstrate its "intent to serve" as an age-restricted community,[151] which causes more compliance headaches than the facility requirement when litigation illuminates a community's practices.[152]

HUD established factors to help determine whether a fifty-five-plus community satisfies this intent-to-serve requirement.[153] Practices that suggest an intent to serve as fifty-five-plus housing include the following: the community's description to prospective residents; advertising to prospective residents; lease provisions; covenants or other written restrictions; "[t]he maintenance and consistent application of relevant procedures;" the community's actual practices; and "[p]ublic posting . . . of statements describ-

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> cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: [n]eurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or . . . [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, . . . heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

Id. § 100.201(a). A major life activity includes "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." *Id.* § 100.201(b).

148. 42 U.S.C. § 3607(b)(2)(C)(ii) (2012).

149. 24 C.F.R. § 100.304(a). *See id.* § 100.306 (outlining actions that communities can take to meet the "publish and adhere" requirement).

150. *Id.* § 100.304. The Code of Federal Regulations provides the following non-exhaustive list of what constitutes a housing community: "(1) A condominium association; (2) A cooperative; (3) A property governed by a homeowners' or resident association; (4) A municipally zoned area; (5) A leased property under common private ownership; (6) A mobile home park; and (7) A manufactured housing community." *Id.*

151. *Id.* § 100.306.

152. *E.g.*, Massaro v. Mainlands Section 1 & 2 Civic Ass'n, 3 F.3d 1472, 1478–79 (11th Cir. 1993); Gibson v. Cnty. of Riverside, 181 F. Supp. 2d 1057, 1081–83 (C.D. Cal. 2002); *see infra* Part II(E) (examining these cases in more detail).

153. 24 C.F.R. § 100.306(a).

ing the . . . community as housing for persons [fifty-five] years of age or older."[154] However, HUD singled out practices like using the words "adult living" or "adult community" in advertisements or marketing materials as failing to meet the intent requirement for not being specific enough.[155]

HOPA separated the independent-age-verification requirement from the intent-to-serve requirement,[156] crafting regulations to refine the expectations for independent-age verification.[157] HUD requires that a fifty-five-plus community produce "reliable surveys and affidavits" verifying its residents' ages in response to a lawsuit that the HOP violates the eighty-percent residency requirement.[158] Additionally, "[a] summary of occupancy surveys shall be available for inspection upon reasonable notice and request by any person."[159] Communities may incorporate age verification of residents during the lease or sale process.[160] The survey of all residents' ages must occur at least every two years; however, HUD provides no guidance for managing the biennial updates.[161] Acceptable methods to prove age include most standard forms of identification, including a driver's license, passport, military identification, and immigration card.[162] As with other FHAA requirements for age-restricted housing, failure to

154. *Id.* § 100.306(a)–(b).

155. *Id.* § 100.306(b) Should a community use language contrary to its intent to operate as HOP housing, HUD will consider communities' good faith efforts to remove such language. *Id.*

156. 42 U.S.C. § 3607(b)(2)(C)(ii)–(iii) (2012).

157. 24 C.F.R. § 100.307.

158. *Id.* § 100.307(a).

159. *Id.* § 100.307(i).

160. *Id.* § 100.307(b).

161. *Id.* § 100.307(c).

162. *Id.* § 100.307(d). Methods of proving a resident's age include but are not limited to:

> (1) Driver's license; (2) Birth certificate; (3) Passport; (4) Immigration card; (5) Military identification; (6) Any other state, local, national, or international official documents containing a birth date of comparable reliability; or (7) A certification in a lease, application, affidavit, or other document signed by any member of the household age 18 or older asserting that at least one person in the unit is 55 years of age or older.

Id. Additionally, should a household refuse to cooperate with a community's attempts to collect its residents' ages, a community may establish a resident's age through sufficient evidence, including government records or documents, such as a household census, prior applications, or "a statement from an individual who has personal knowledge of the age of the occupants" signed under the penalty of perjury. *Id.* § 100.307(g).

comply with the independent-age-verification requirement can result in the community losing its age-restricted status.[163]

D. Upward Trend of Grandparents' Involvement

This Part will explore significant causes of the rise in grandparents who reside in intergenerational households. This rise suggests that the demand for age-segregated housing will fall, especially for age-segregated housing that is rigid in its exclusion of children in unfortunate circumstances.[164] First, this Part will explore the rise in the number of children in unfortunate circumstances that compel such children to seek refuge with a grandparent, focusing on the long-term economic effects of the Great Recession[165] and how the Great Recession spurred a return to housing preferences where generations resided under one roof.[166] Then, this Part will give a sharper look into baby boomers' preferences and diversity, which suggest a decrease in the demand for age-restricted communities due to grandparents' desire to have a role in grandchildren's lives.[167]

From 2000 to 2010, the number of minors living in grandparents' households rose from 4.5 million to 4.9 million.[168] This rise came in spite of the fact that the rate of divorce decreased over the period.[169] Nevertheless, conflicts between age-restricted com-

163. Balvage v. Ryderwood Improvement & Serv. Ass'n, 642 F.3d 765, 776–77 (9th Cir. 2011); United States v. Fountainbleau Apartments, L.P., 566 F. Supp. 2d 726, 738 (E.D. Tenn. 2008); Simovits v. Chanticleer Condo. Ass'n, 933 F. Supp. 1394, 1408 (N.D. Ill. 1996); *see also infra* notes 183–229 and accompanying text (discussing these cases further).

164. Bayer & Harper, *supra* note 13, at 3 (surveying two thousand people over forty-five and finding that four percent of grandparents lived with a grandchild in 2000); Chen, *supra* note 16 (examining the cases of communities that have attempted to exclude children in unfortunate circumstances and failed); Goyer, *supra* note 12 (citing 2010 census data that shows that the number of children living in grandparent-led households grew from 4.5 to 4.9 million from 2000 to 2010).

165. *Chart Book: The Legacy of the Great Recession*, CTR. ON BUDGET & POL'Y PRIORITIES, http://www.cbpp.org/cms/index.cfm?fa=view&id=3252 (updated July 8, 2014). "The United States went through its longest, and by most measures worst economic recession since the Great Depression between December 2007 and June 2009." *Id.*

166. Bauer, *supra* note 15, at 48; Chen, *supra* note 16. Housing advertisements from the late 1890s to the early 1900s reflected intergenerational housing, often picturing a husband and wife, their children, and an elderly female. Liebig et al., *supra* note 22, at 157.

167. Goyer, *supra* note 12; Howe, *supra* note 14.

168. Goyer, *supra* note 12.

169. *National Marriage and Divorce Rate Trends*, CENTERS FOR DISEASE CONT. & PREVENTION, http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm (last updated

munities and grandparents seeking to house a grandchild suggest that more grandchildren are in unfortunate circumstances that compel a grandparent to provide housing.[170]

One possible explanation for this increase is a shift in housing practices following the Great Recession, which caused multiple generations to live together to save money.[171] While the economy may be improving, real estate markets may make it impractical for divorcing parents or parents who have lost their homes to relocate to an independent residence.[172] Parents in such cases may move in with their parents because they have no other viable economic option.[173] Additionally, parental illness, death, substance abuse, and incarceration could lead to an increase in the number of grandparents raising grandchildren, but it does not appear that the increase in grandparent-led households is due to an increase of these unfortunate circumstances.[174]

A stronger explanation may exist in the fact that the baby boomers have an increased preference for intergenerational housing.[175] As the baby boomers age, that preference may grow, and the rate of growth of the senior population will increasingly reflect the views of the baby boomers.[176] The senior population will grow at a rate of three percent for the next twenty years, exceeding the growth rate of the general population; and senior citizens will constitute nineteen percent of the general population in 2029 compared to only ten percent in 2010.[177]

Feb. 19, 2013). Four out of every one thousand people got a divorce in 2000, whereas 3.6 out of every 1,000 people got a divorce in 2011, although the data does not include six states' statistics. *Id.* No state reported an increase in the rate of divorce from 1990 to 2011, although California, Georgia, Hawaii, Louisiana, Indiana, and Minnesota did not provide complete data. Ctrs. for Disease Control & Prevention, *Divorce Rates by State: 1990, 1995, and 1999–2011*, CDC.GOV, http://www.cdc.gov/nchs/data/dvs/divorce_rates_90_95_99-11.pdf (last visited Feb. 17, 2015).

170. Chen, *supra* note 16 (reporting on cases of minors in unfortunate circumstances who seek refuge in the home of a grandparent); Brooke, *supra* note 21.

171. Bauer, *supra* note 15, at 56–57.

172. *Id.* at 25.

173. *Id.* at 25–26.

174. Dowdell, *supra* note 53, at 28; Dressel & Barnhill, *supra* note 53, at 686; *see generally* Minkler et al., *supra* note 20, at 752 (examining the role of grandparents in raising grandchildren since crack cocaine became widely used).

175. Howe, *supra* note 14.

176. *Id.*

177. *Id.*

The baby boomers have redefined each stage of life through which they have passed.[178] It is a safe bet that baby boomers will have different perspectives and preferences in their golden years.[179] First, baby boomers are a more culturally diverse group—and it is more common for African-American and Hispanic households to be led by grandparents.[180] Second, baby boomers are closer to their children than prior generations in terms of financial support and raising their grandchildren.[181] Third, baby boomers are less likely to want to live in a retirement community that restricts access to their children and grandchildren.[182]

E. Cautionary Tales of Fifty-Five-Plus Communities That Lost Their Status

Age-restricted communities have lost their age-restricted status when litigation exposed their lack of compliance with either the age-verification[183] or the intent-to-serve requirements.[184] This Part will examine five cases where defendants broke either or both requirements and revealed ways for communities to lose their age-restricted status.[185] In doing so, this Part will reveal

178. *Id.* In the mid-1960s, the oldest boomers entered college campuses and ignited "countercultural passions and push[ed] the nation into an era of political idealism, cultural awakening and social upheaval." *Id.* Then, baby boomers underwent transformations "from hippie to yuppie." *Id.* They "shook the windows and rattled the walls (to paraphrase Bob Dylan) of everything their parents had built." *Id.* Throughout their existence, this generation showed much "of the collective attitudes and behaviors for which they have since become famous: their individualism, their attraction to personal risk, their distrust of big institutions, their carelessness about material wealth, their cultivation of self, their die-hard moralism." *Id.*

179. *Id.*

180. *Id.*; *see* Nelson, *supra* note 42, at 106–07.

181. Howe, *supra* note 14. "[A] growing closeness between boomers and their young adult children reflects a major shift in family dynamics." *Id.* While the weaker job market of recent years plays a role, the close relationship between baby boomers and their children reflects "the complete closure of the values gap." *Id.* "Boomers and their children maintain much closer financial relationships than boomers did with their own parents." *Id.*

182. *Id.* New age-restricted communities will "likely . . . have fewer rules and more opt-out provisions." *Id.* Restrictions against minors living in such communities will change. *Id.*

183. Balvage v. Ryderwood Improvement & Serv. Ass'n, 642 F.3d 765, 778–79 (9th Cir. 2011); United States v. Fountainbleau Apartments, L.P., 566 F. Supp. 2d 726, 738 (E.D. Tenn. 2008); Simovits v. Chanticleer Condo. Ass'n, 933 F. Supp. 1394, 1408 (N.D. Ill. 1996).

184. Massaro v. Mainlands Section 1 & 2 Civic Ass'n, 3 F.3d 1472, 1478–79 (11th Cir. 1993); Gibson v. Cnty. of Riverside, 181 F. Supp. 2d 1057, 1081–83 (C.D. Cal. 2002).

185. *See Balvage*, 642 F.3d at 772, 777–78 (explaining that a community cannot discriminate on the basis of age prior to meeting compliance with the FHAA); *Massaro*,

that the failure of these communities to comply did not result from malice or even intent to break the FHAA regulations; instead, these communities failed to comply out of mere negligence, ignorance of the requirements, or a lack of an understanding of the risks of failure to exactly comply.[186] As a result, these communities forsook the right to have the cases decided on their merits, losing instead on technicalities.[187]

In *United States v. Fountainbleau Apartments L.P.*,[188] an apartment complex lost its age-restricted status due to age-discrimination practices, and the apartment complex's ignorance of the technical requirements for independent-age verification did not excuse those practices.[189] From 2000 to 2006, the apartment complex's age-verification attempts consisted of two resident profiles completed in 2004 and 2005; however, the manager admitted that she listed the ages of some of the residents based on what she "knew" and that her situation was hectic during the period in question.[190] Errors in the tenant reports compiled by the apartment complex included cases with no age or birthdate, listing a thirty-one-year-old man's age as fifty-five, a thirty-one-year-old woman's age as sixty-one, and a nineteen-year-old woman's age as sixty-one.[191] The District Court found that neither the assertion of personal knowledge of the residents' ages nor the defense that the reports were shoddy due to things being hectic

F.3d at 1478–79 (holding that a community's exclusion of all individuals less than sixteen years of age failed to meet the FHAA intent requirement); *Fountainbleau*, 566 F. Supp. 2d at 738 (explaining that a failure to comply with age-verification requirements will not be excused by negligence); *Gibson*, 181 F. Supp. 2d at 1081–83 (holding that using the incorrect age for a fifty-five-plus requirement and lacking policies for enforcement of age restrictions will fail to show that a community intends to operate as an age-restricted community); *Simovits*, 933 F. Supp. at 1408 (ordering injunctive relief to end a community's discrimination against families after it attempted to obtain age-restricted status through a subjective assessment of residents' ages).

186. *Balvage*, 642 F.3d at 777–78; *Massaro*, 3 F.3d at 1478–79; *Fountainbleau*, 566 F. Supp. 2d at 729, 738; *Gibson*, 181 F. Supp. 2d 1081–83; *Simovits*, 933 F. Supp. at 1403, 1408.

187. *Balvage*, 642 F.3d at 777–78; *Massaro*, 3 F.3d at 1478–79; *Fountainbleau*, 566 F. Supp. 2d at 729, 738; *Gibson*, 181 F. Supp. 2d 1081–83; *Simovits*, 933 F. Supp. at 1408.

188. 566 F. Supp. 2d 726.

189. *Id.* at 738.

190. *Id.* at 729. There were no follow-up procedures, such as photocopying driver's licenses or other IDs. *Id.* The manager "admitted that there was a 'good possibility' that she was not 'careful' because she 'had a lot on [her] at the time, family-wise. And [she] may not have verified everything like [she] should have.'" *Id.* (brackets in original).

191. *Id.* at 730.

excused the lack of compliance.[192] The flagrant lack of compliance in how the apartment complex banned children "[did] not present this court with a difficult case."[193] From this case, it can be expected that courts will withhold relief from defendants if their efforts do not strictly comport with the technical requirements of the FHAA independent-age-verification regulations.[194]

A community's survey of ages will only be deemed reliable if it is verified by independent evidence.[195] Failure to so comply has cost a community its age-restricted status and potentially exposed it to non-pecuniary damages, such as pain and suffering.[196] In *Simovits v. Chanticleer Condominium Association*,[197] a condominium association had a rule that barred residents who were under age eighteen.[198] Many of the residents were older than fifty-five, but there was no stated requirement about it being a fifty-five-plus community.[199] The plaintiff tried to sell his condo to a family with minor children, which the Association prevented.[200] The plaintiff warned the Association as to the illegality of the covenant, which prompted the Association to take an informal survey of its residents' ages, supplying some of them based on "personal knowledge."[201] No steps to verify the list were taken, leading to inaccuracies.[202] The plaintiff alleged that he had lost thirty thousand dollars on the sale of his home by turning away

192. *Id.* at 738. In her deposition, the apartment manager admitted she had no training in FHAA requirements. *Id.* at 728–29. She summarized her knowledge as follows: "'The only thing I can tell you is that we were supposed to have [eighty percent fifty-five] and-older.'" *Id.* at 729.

193. *Id.* at 737.

194. 42 U.S.C. § 3607(b)(2)(C)(iii) (2012); *Fountainbleau*, 566 F. Supp. 2d at 738; 24 C.F.R. § 100.307 (2014).

195. Simovits v. Chanticleer Condo. Ass'n, 933 F. Supp. 1394, 1403 (N.D. Ill. 1996); *see also* 24 C.F.R. § 100.307 (listing documents considered reliable to verify an occupant's age). In another case, two surveys did not qualify as independent age verification because they relied solely on the answers of the residents. Massaro v. Mainlands Section 1 & 2 Civic Ass'n, 3 F.3d 1472, 1478–79 (11th Cir. 1993). Its welcoming committee met with new residents, but did nothing to prevent those who would violate the age requirement from becoming residents. *Id.*; *see infra* notes 215–219 (explaining specifically how Mainlands Civic Association failed to satisfy the intent-to-serve- requirement of the FHAA).

196. *Simovits*, 933 F. Supp. at 1399, 1403.

197. 933 F. Supp. 1394 (N.D. Ill. 1996).

198. *Id.* at 1397.

199. *Id.*

200. *Id.* at 1398.

201. *Id.*

202. *Id.*

buyers and that he suffered from emotional distress and health problems as a result.[203]

An age-restricted community, however, can wash its hands of past failings to comply with FHAA regulations[204] as long as the past noncompliance occurred before the injury alleged in a suit.[205] *Balvage v. Ryderwood Improvement and Service Association, Inc.*[206] demonstrates this possibility, as the HOP did not comply with the age-verification requirements for a period of time before the alleged injuries occurred.[207] Because the complaint covered a time during which the association complied with the FHAA regulations, the association could assert its defense that it could discriminate against families as HOPs.[208]

However, *Balvage* provides additional guidance as to how communities could run afoul of FHAA regulations.[209] Specifically, the opinion explains procedures on complying with the independent age-verification requirement and how to properly become a HOP.[210] Data-collection procedures must preserve past records, as overwriting data could cause a community to run afoul of the FHAA.[211] Communities must show that they collected and used the data at least every other year, and updating the ages could cause the past data to be lost.[212] Additionally, a community may not reserve units for individuals older than fifty-five, denying

203. *Id.* at 1399.

204. 42 U.S.C. § 3607(b)(2)(C)(iii) (2012); 24 C.F.R. § 100.307 (2014).

205. Balvage v. Ryderwood Improvement & Serv. Ass'n, 642 F.3d 765, 768–69, 773 (9th Cir. 2011). An age-restricted community that "continuously operated as a retirement community for persons age 55 or older" qualifies for the HOPA exemption from the FHAA's ban on discrimination on the basis of familial status if "it *currently* satisfies the exemption's . . . criteria at the time of the alleged violation, even if [it] enforced age restrictions when it first achieved compliance with the exemption's age verification requirement." *Id.* at 768–69.

206. 642 F.3d 765 (9th Cir. 2011).

207. *Id.* at 768–69. Fifty-four residents of Ryderwood filed their complaint against the Ryderwood Improvement and Service Association (RISA) in 2009. *Id.* at 773.

208. *Id.* at 779–80.

209. *Balvage*, 642 F.3d at 772.

210. *Id.* at 772, 777. A 2006 memorandum from HUD explained that after the FHAA transition period, which ended May 3, 2000, communities could not discriminate their way into becoming HOPs. *Id.* at 772.

211. *Id.* at 777–78. The court stated that the rolodex cards did not satisfy the requirements because they did not provide "a record of verifications that should have been conducted biennially between 2000 and 2006." *Id.* at 778. Further, the community could not "rely on current rolodex information to establish that it verified the ages of Ryderwood's residents in 2000, 2002, 2004[,] or 2006—especially when no claim has been made that any such verifications actually occurred." *Id.* at 778.

212. *Id.* at 777–78.

such units to younger individuals, in order to achieve its aim of reaching the eighty-percent threshold for fifty-five-plus residents.[213] Nor can a community advertise or otherwise demonstrate an intent to operate as fifty-five-plus housing before reaching the eighty-percent threshold.[214]

Cautionary tales also show how a fifty-five-plus community can lose its HOP status or be subject to injunctive relief and damages for failing to comply with the demonstrated-intent requirement.[215] Technicalities must be adhered to in demonstrating such intent, as in *Massaro v. Mainlands Sections 1 & 2 Civic Association*,[216] in which the community passed a rule against having individuals under age sixteen live there.[217] Feeling justified by that rule, Mainlands Civic Association tried to evict two families with infants.[218] The Ninth Circuit held that the congressional intent underlying the FHAA did not condone blanket prohibitions against children.[219] The would-be fifty-five-plus community must specifically state that it intends to house individuals aged fifty-five and older;[220] however, vaguely worded bans on children will invite trouble.

A HOP could also lose its status by neglecting to list the correct age in its advertisements or signage: *Gibson v. County of*

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213. 42 U.S.C. § 3607(b)(2)(C)(i) (2012); *Balvage*, 642 F.3d at 772.

214. 42 U.S.C. § 3607(b)(2)(C)(i); *Balvage*, 642 F.3d at 772 (A would-be HOP shall not cause resident families to "feel unwelcome or otherwise encourage [them] to move.").

215. *See, e.g.*, Massaro v. Mainlands Section 1 & 2 Civic Ass'n, 3 F.3d 1472, 1479 (11th Cir. 1993) (concluding that "the Association had not instituted age-verification procedures adequately evidencing an intent to provide housing for persons [fifty-five] years of age or older"); Gibson v. Cnty. of Riverside, 181 F. Supp. 2d 1057, 1078 (C.D. Cal. 2002) (explaining that a community must publish and consistently adhere to procedures that demonstrate the community's intent to be a fifty-five or older HOP).

216. 3 F.3d 1472.

217. *Id.* at 1474.

218. *Id.* at 1474–75.

219. *Id.* at 1479 (citing 134 CONG. REC. S10549 (daily ed. Aug. 2, 1988)).

> Senator DeConcini asked Senator Kennedy, as sponsor of the bill, whether a community with a preexisting restriction lower than the age in the Act could qualify for the exemption assuming that the community currently meets the criteria for an exemption and that the preexisting restrictions are not applied in a manner that conflicts with the Act. Senator Kennedy responded that the community could qualify for the exemption "contingent upon the community meeting the exemption requirements and not enforcing any pre-existing restriction in a manner inconsistent with the act."

Id. (quoting 134 CONG. REC. S10549).

220. *Id.*

Riverside[221] provides that a HOP must list the correct age or run afoul of failing to meet HOP requirements.[222] A HOP must specifically state that its intent is to be a fifty-five-plus community, not just HOPA.[223] Additionally, the community in *Gibson* failed to adhere to procedures to establish intent, as it had no proactive procedures to handle violations of the age requirement.[224]

From these cases, a HOP community may risk losing its status for the following reasons: (1) relying on personal knowledge of residents' ages or on residents' unverified statements of age;[225] (2) not preserving prior records of independent age-verification;[226] (3) achieving the eighty percent threshold through familial discrimination;[227] (4) not specifically stating the community's intent to be a fifty-five plus community—or asserting instead that the community is a childless community or listing a different age to satisfy the intent requirement;[228] and (5) not having a policy for dealing with violations.[229] Furthermore, ignorance of FHAA requirements does not excuse a community's failure to comply with them.[230]

III. ANALYSIS: THE JUSTIFICATION FOR AN EXCEPTION TO THE SENIOR HOUSING EXCEPTION

Congress should adopt a federal exception to the FHAA senior-housing exemption[231] to allow minors in unfortunate circumstances to live with extended family for several reasons.

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221. 181 F. Supp. 2d 1057 (C.D. Cal. 2002). The seven named plaintiffs included the Gibsons, a husband and wife and their two minor sons; James Russell Dittmar, who lived with his wife and minor son; and Lucille Mayo, who lived with her grandson, Craig Flynn. *Id.* at 1061–62.

222. *Id.* at 1081–82. This community used the age of fifty. *Id.* at 1082.

223. *Id.* "As a matter of law, a written policy which requires compliance with the housing for older persons provisions' does not satisfy the [demonstrated-intent] requirement." *Id.* (citing Simovits v. Chanticleer Condo. Ass'n, 933 F. Supp. 1394, 1403 (N.D. Ill. 1996)) (internal quotations omitted).

224. *Id.* at 1079. The community only reacted to violation complaints. *Id.*

225. United States v. Fountainbleau Apartments, L.P., 566 F. Supp. 2d 726, 737 (E.D. Tenn. 2008); *Simovits*, 933 F. Supp. at 1403.

226. Balvage v. Ryderwood Improvement & Serv. Ass'n, 642 F.3d 765, 777–78 (9th Cir. 2011).

227. *Id.* at 772.

228. Massaro v. Mainlands Section 1 & 2 Civic Ass'n, 3 F.3d 1472, 1478–79 (11th Cir. 1993); *Gibson*, 181 F. Supp. 2d at 1081–83.

229. *Gibson*, 181 F. Supp. 2d at 1079.

230. *Fountainbleau*, 566 F. Supp. 2d at 738.

231. 42 U.S.C. § 3607(b)(2) (2012).

First, this Part will show how an exception for minors in unfortunate circumstances comports with the Supreme Court cases that establish the right of family to associate as a fundamental liberty.[232] This Subpart will examine how a HOP's ability to demand the expulsion of a minor in unfortunate circumstances violates the underlying purpose of the FHAA—to protect families.[233] Next, the second Subpart examines societal trends based on the aging of the baby boomers, which predicts an increased demand for intergenerational housing.[234] This increased demand should be welcomed; however, it will increase conflict between HOPs and its residents.[235] Last, this Subpart will argue that it may be in HOPs' best interests—and in the interest of judicial efficiency—to avoid potential pitfalls of FHAA litigation and support a federal exemption for minors in unfortunate circumstances.[236]

A. Supreme Court and Congressional Support for an Exception to the Exemption.

The Supreme Court recognizes an entrenched tradition of families determining their living arrangements, including living with extended family, that merits governmental protections,[237] and Congress enacted the FHAA[238] with the intent of eradicating widespread discrimination against families.[239] The HOP exemption to the FHAA[240] violates fundamental rights jurisprudence: the preservation of the family, especially in emergency circumstances, as reflected in *Moore*, clashes with the practices of fifty-five-plus housing communities.[241] While Ms. Moore's actions vio-

232. Michael H. v. Gerald D., 491 U.S. 110, 122 (1989); Roberts v. U.S. Jaycees, 468 U.S. 609, 618–20 (1984); Moore v. City of E. Cleveland, 431 U.S. 494, 500 (1977).

233. Edelstein, *supra* note 58, at 950–51; Nicole Napolitano, Comment, *The Fair Housing Act Amendments and Age-Restrictive Covenants in Condominiums and Cooperatives*, 73 ST. JOHN'S L. REV. 273, 278 (1999) (exploring the congressional record to show congressional intent to protect families in passing the FHAA).

234. Bayer & Harper, *supra* note 13, at 21–22; Goyer, *supra* note 12; Howe, *supra* note 14.

235. Bayer & Harper, *supra* note 13, at 21–22; Goyer, *supra* note 12; Howe, *supra* note 14; Liebig et al., *supra* note 22, at 160–61.

236. *Infra* Part III(3).

237. *Michael H.*, 491 U.S. at 123–24; *Roberts*, 468 U.S. at 618–20; *Moore*, 431 U.S. at 499–501.

238. 42 U.S.C. §§ 3601–3619 (2012).

239. Edelstein, *supra* note 58, at 950–51; Napolitano, *supra* note 233, at 278.

240. 42 U.S.C. § 3607.

241. *Moore*, 431 U.S. at 500.

lated an ordinance, as opposed to a covenant,[242] her fight resembles that of a contemporary resident of an age-restricted community seeking to raise a grandchild in unfortunate circumstances; therefore, the reasoning of the Court to justify Ms. Moore's actions illuminates the just cause of a grandparent who today seeks to house a grandchild in unfortunate circumstances despite the covenants of an age-restricted community.[243] The plurality decision cites both deep-seated traditions and recent developments of extended families living together and chastises the East Cleveland law for "slicing deeply into the family itself."[244]

The FHAA[245] has strayed from its initial purpose of protecting the rights of families—like Ms. Moore's—and keeping families from being forced to room with rats and roaches or from living in cars.[246] Congress aimed to end these discriminatory practices, as is reflected extensively in the congressional record of the FHAA.[247] The original HOP exception required that age-restricted communities provide "significant facilities and services specifically designed to meet the physical or social needs of older persons."[248] It makes more sense for a community that provides services intended for senior citizens to retain the right to exclude children, as something more than mere "animus against children" is afoot:[249] a community that is designed to provide services to its elderly residents would have different needs than and be potentially ill-suited for children.[250] However, caving in to the lobbying

242. *Id.* at 497.

243. "Decisions concerning child rearing . . . long have been shared with grandparents or other relatives who occupy the same household—indeed who may take on major responsibility for the rearing of the children." *Id.* at 505.

244. *Id.* at 498; *see generally* Adam Lubow, Comment, "... Not Related by Blood, Marriage, or Adoption": *A History of the Definition of "Family" in Zoning Law*, 16 J. AFFORDABLE HOUS. & COMMUNITY DEV. L. 144 (2007) (examining the Court's definition of family in its land-use decisions).

245. 42 U.S.C. §§ 3601–3619.

246. Walsh, *supra* note 58, at 483 nn.14–15. Prior to the Fair Housing Amendments Act in 1988, housing discrimination against families with children was rampant. Edelstein, *supra* note 58, at 950–51.

247. *See* H.R. REP. NO. 100-711, at 19 (1988) (linking the passage of the FHAA to "numerous social welfare programs intended to support children and their parents"). "[H]owever, discrimination against families with children" remained despite past legislation, compelling Congress to pass the FHAA. *Id.*

248. 42 U.S.C. § 3607(b)(2)(C)(i).

249. SEN. REP. NO. 104-172, at 9, 15 (1995).

250. White Egret Condo., Inc. v. Franklin, 379 So. 2d 346, 351 (Fla. 1980).

of real estate developers and others,[251] Congress eliminated the services requirement, allowing HOP to exclude children without being required to offer any other benefit to its residents except age-based discrimination.[252] As a result, the FHAA HOP exception[253] eases the perpetuation of the discrimination against families with children that the FHAA aimed to banish.[254]

Were Ms. Moore to live in Sun City Center, the Villages, or any number of Florida's age-restricted communities today,[255] she would not be able to house either of her grandsons;[256] the FHAA HOP exception[257] allows these communities to "slic[e] deeply into the family itself."[258] Nevertheless, *Moore* and other Supreme Court cases provide compelling reasons for the FHAA to create an exception to the HOP exemption to allow minors in unfortunate circumstances to reside with extended family.[259] These cases provide grandparents like Judie and Jim Stottler, who litigated for at least five years to keep their grandchild Kimberly in their home, ammunition to house a grandchild in unfortunate circumstances.[260] In Sun City Center, a retirement community in Central Florida, at least ten cases of children living with relatives were discovered in a six-month stretch.[261] These families can

251. Bauer, *supra* note 15, at 41.

252. *Id.*; *see also* S. REP. NO. 104-172, at 15 (1995) (relaying that then Senator Joe Biden said the services and facilities requirement prevented housing providers from "keep-[ing] kids away because [they] don't like them, or because [they] don't want them around"). Senator Biden said that the Senate "recognized that something—something other than an animus against children—must set these communities apart in order to merit an exemption from the Fair Housing Act." *Id.*

253. 42 U.S.C. § 3607.

254. S. REP. NO. 104-172, at 9; H.R. REP. NO. 100-711, at 19; Napolitano, *supra* note 233, at 280.

255. Chen, *supra* note 16.

256. Moore v. E. Cleveland, 431 U.S. 494, 496–97, 505 n.16 (1977).

257. 42 U.S.C. § 3607.

258. *Moore*, 431 U.S. at 498; *see generally* Lubow, *supra* note 244, at 144 (examining the Court's definition of family in its land-use decisions).

259. Michael H. v. Gerald D., 491 U.S. 110, 122 (1989); Roberts v. U.S. Jaycees, 468 U.S. 609, 618–20 (1984); *Moore*, 431 U.S. at 500; *see supra* notes 97–109 and accompanying text (analyzing how these latter two cases strengthened the housing rights of families).

260. Chen, *supra* note 16. The Stottlers' litigation to keep Kimberly in their home began when she was three years old, although their Clearwater, Florida, homeowners association began objecting to her presence during her infancy. *Id.*

261. *Id.* It is impossible to quantify the prevalence of grandparents housing a grandchild in an age-restricted community, because they remain hidden to the greatest extent that they can. *Id.* The children may only be seen "peeking out from behind screen doors." *Id.*

argue that the FHAA HOP exemption[262] violates their constitutionally protected right of privacy.[263] Families must be free to decide their living arrangements without the government's or their neighbor's interference or meddling.[264] The tradition of extended family, "especially grandparents sharing a household along with parents and children[,] has roots . . . deserving of constitutional recognition."[265] Consequently, extended family members have the right to government protection to house a minor in unfortunate circumstances and "preserve the sanctity" of their families.[266] This right demonstrates that the preservation of the family trumps the right of elders to exclude children.[267]

Proponents of age-restricted communities will claim that the services requirement was hopeless and that the removal of the requirement was intended to allow seniors "to live in safe, quiet communities congenial to them . . . regardless of their income."[268] Further, proponents of HOP discrimination against families with children will note that "age limitations . . . are reasonable means to accomplish the lawful purpose of providing appropriate facilities for . . . varying age groups" and will reject the notion that *Moore* prohibits such discrimination.[269] Proponents say that "[t]here is nothing inherently wrong with the concept of [fifty-five]-plus housing."[270] If elders want to live without the "noise of children, or just want to live with other individuals at the same stage of life, that is their choice—and they have earned it."[271]

Additional arguments for childless housing are based upon an economic analysis: age-restricted communities can avoid providing for schools, which lowers taxes.[272] It is reasonable to predict that a community with children will experience more

262. 42 U.S.C. § 3607.

263. *Michael H.*, 491 U.S. at 119–20; *Roberts*, 468 U.S. at 618–20; *Moore*, 431 U.S. at 499; Cutts, *supra* note 33, at 214. The FHAA HOP exception "enters the private sphere of one's home to prohibit grandchildren from residing with their grandparents in times of tragedy and hardship." Cutts, *supra* note 33, at 214.

264. *Id.*

265. *Moore*, 431 U.S. at 504.

266. Cutts, *supra* note 33, at 214.

267. Chen, *supra* note 16.

268. S. REP. NO. 104-172, at 5 (1995); Bauer, *supra* note 15, at 41.

269. White Egret Condo., Inc. v. Franklin, 379 So. 2d 346, 351 (Fla. 1980).

270. Bauer, *supra* note 15, at 80.

271. *Id.*

272. Napolitano, *supra* note 233, at 308.

property damage than one without children.[273] An increase in property damage would cause a community that houses children to suffer from increased insurance premiums and exposure to increased tort liability.[274] Therefore, excluding children from a community saves the community money in terms of maintenance, insurance, and repair costs.[275]

These arguments, while not meritless, fail to trump the fundamental right of families to associate in their housing.[276] The desire for a childless environment and mere economic interests fall short of a compelling state interest that overrides the interest of preserving a family when its youngest members require a refuge with relatives in an age-restricted community.[277] Further, an exception to the HOP exemption is justified as the logical extension of the constitutionally protected right of family to associate as discussed in *Moore*[278] and strengthened by subsequent cases.[279] Shattered lives of children are not so easily repaired as are broken windows or graffiti-painted fences.

Additionally, as explained in the next Part, the baby boomers' preferences for intergenerational housing, as well as other changes in their preferences for aging, will cause the baby boomers to reject the notion that the needs of a community for seniors is hopelessly at odds with the needs of a community housing children.[280] Amending the FHAA to allow for an exception for minors in unfortunate circumstances to reside with relatives will not destroy the character of an age-restricted community by flooding it with children.[281]

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273. *Id.*
274. *Id.*
275. *Id.*
276. Michael H. v. Gerald D., 491 U.S. 110, 122 (1989); Roberts v. U.S. Jaycees, 468 U.S. 609, 618–20 (1984); Moore v. E. Cleveland, 431 U.S. 494, 498–99 (1977); Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 129 (Cal. 1982).
277. *Roberts*, 468 U.S. at 618–20; *Moore*, 431 U.S. at 498–99; *Marina Point*, 640 P.2d at 129.
278. 431 U.S. at 499.
279. *Roberts*, 468 U.S. at 618–20.
280. Howe, *supra* note 14.
281. Cutts, *supra* note 33, at 218.

B. The Impact of an Increased Demand for Intergenerational Housing

This Part serves as a bridge between the preceding and following Part: it aims to link the legal basis for changing the FHAA to include an exception to the HOP exemption for minors in unfortunate circumstances to practical concerns that should compel age-restricted communities to welcome such an exception. This Part begins by reiterating various trends that strengthen the need for a clear standard for allowing a minor in extraordinary circumstances to live in an age-restricted community. First, the increase in preference for intergenerational housing will contribute to future conflicts.[282] The baby boomers are less interested in age-restricted communities and instead favor communities that allow flexibility toward children.[283] Second, the demographics of the baby boomers signal an increase in the percentage of elderly minorities, which corresponds to an increase in intergenerational housing.[284] Last, some scholars speculate that the housing industry may have fundamentally shifted following the Great Recession, increasing the extent of extended families living under one roof.[285]

Intergenerational housing rose sharply from 2000 to 2010, increasing from 6.4 percent to 7 percent of all households.[286] This rise comes in spite of that fact that the rate of divorce appeared to be declining.[287] A strong factor in this increase is that the baby boomers are becoming grandparents.[288] The rate of growth of the senior population as the baby boomers age will redefine products and services intended for senior citizens—including housing—just

282. Goyer, *supra* note 12.

283. Howe, *supra* note 14.

284. *Id.*; Nelson, *supra* note 42, at 106–07, 114 (citing Betsey v. Turtle Creek Assocs., 736 F.2d 983, 988 (4th Cir. 1984) to support its assertion that "[b]ecause minority households tend to be larger, the excluding of children often has a racially discriminatory effect").

285. Bauer, *supra* note 15, at 56.

286. Goyer, *supra* note 12.

287. *National Marriage and Divorce Rate Trends*, *supra* note 169. Four out of every one thousand people divorced during 2000, whereas 3.6 out of every 1,000 people divorced in 2011, although the data does not include four states' statistics for 2000 and is missing six states' statistics for 2010. *Id.* No state reported an increase in the rate of divorce from 1990 to 2011, although California, Georgia, Hawaii, Louisiana, Indiana, and Minnesota did not provide complete data. *Divorce Rates by State: 1990, 1995, and 1999–2011*, *supra* note 169.

288. Howe, *supra* note 14.

as the baby boomers have redefined each stage of life through which they passed.[289]

Age-restricted housing communities should prepare to change or wither if they wish to cater to the baby boomers, including relaxing their rigid bans against minors. First, the baby boomers have a far more favorable view of intergenerational housing than their immediate predecessors.[290] "A growing closeness between boomers and their young adult children reflects a major shift in family dynamics."[291] Due to their preferences and increase of cultural diversity, baby boomers will be less inclined to reside in a community that restricts access to their grandchildren.[292] Last, economic circumstances may motivate some grandparents to open their doors to their children and grandchildren who have no other viable economic option.[293]

Opponents say that the baby boomers are fooling themselves, ignoring their own pending age-related limitations in their zeal to be in intergenerational housing.[294] Their desire to be active and break tradition with past generations' retirement lifestyles is much like Peter Pan's desire to never grow up.[295] Critics say that baby boomers ignore the fact that a community designed for the elderly has very different needs than one designed for young families and is ill-suited for children;[296] therefore, as the baby boomers witness first-hand the realities of aging, their desires will shift toward the norm, just as their prior rebellions against society settled into yuppiedom's conformity.[297] These opponents ignore the fact that a return to intergenerational housing is simply that: a return to a normative tradition.[298] Further, they ignore that advances in medicine could keep baby boomers healthier and active far longer than prior generations.[299] Last,

289. *Id.*; *see supra* notes 168–175 and accompanying text (describing the shift in views of intergenerational housing).

290. Howe, *supra* note 14; *supra* notes 168–175 and accompanying text.

291. Howe, *supra* note 14.

292. *Id.*; Nelson, *supra* note 42, at 106–07, 114 (demonstrating the greater likelihood for minorities to reside in intergenerational housing).

293. Bauer, *supra* note 15, at 56.

294. *Id.* at 36; Pynoos et al., *supra* note 145, at 80–81.

295. Bauer, *supra* note 15, at 36; Pynoos et al., *supra* note 145, at 80–81.

296. White Egret Condo., Inc. v. Franklin, 379 So. 2d 346, 351 (Fla. 1980).

297. *But see* Howe, *supra* note 14 (expecting baby boomers to revolutionize retirement).

298. Liebig et al., *supra* note 22, at 157.

299. Howe, *supra* note 14. *But see id.* (explaining that baby boomers' less-risk-averse habits may make them unhealthy).

these opponents fail to account for the fact that Naturally Occurring Retirement Communities (NORC) offer more to senior residents in the way of services that allow them to age in place than do the golf courses and clubhouses of age-restricted communities.[300]

Perhaps more importantly, the benefits of intergenerational housing dwarf the cost to an age-restricted community: when parents cannot take care of their children, due to any number of unfortunate circumstances, grandparents often intervene and may provide a host of irreplaceable benefits.[301] Grandparents may preserve a child's connection to family to the greatest extent possible and provide other benefits of intergenerational housing, including: assisting adult-children with parenting responsibilities and reducing "tensions between parents and their children"; supporting grandchildren's academic performance; providing children and adolescents the "opportunity to share in caregiving activities"; and increasing "generational solidarity," which could help reduce ageism and resentment in generational-equity debates.[302]

C. Take Heed, Age-Restricted Community: Litigating Against a Would-Be Custodial Grandparent Could Jeopardize Your Status

Litigation can be costly in terms of time, stress, money, and HOP status: parties have prevailed against age-restricted communities because the age-restricted community failed to either follow required age-verification procedures or demonstrate sufficient intent to be an age-restricted community.[303] This Part will

300. Bauer, *supra* note 15, at 44–45. "An intergenerational community is fostered by NORCs because elders volunteer to assist with various neighborhood activities, such as childcare or gardening." *Id.* at 45. The NORC designation technically refers to "'a community that is bringing in necessary social services, and receives government funding to better address the needs of older residents,'" but NORC often refers to informal communities populated mostly by elders. *Id.* at 44 (quoting Rebekah Darcy Mulhare, *The NORCs are Coming! Naturally Occurring Retirement Communities Thriving in New York*, COOPERATOR (May 2002), http://cooperator.com/articles/729/1/The-NORCs-Are-Coming/Page1.html).

301. Chen, *supra* note 16.

302. Liebig et al., *supra* note 22, at 160–61.

303. 42 U.S.C. § 3607(b)(2)(C)(iii) (2012); Balvage v. Ryderwood Improvement & Serv. Ass'n, 642 F.3d 765, 777–78 (9th Cir. 2011); United States v. Fountainbleau Apartments, L.P., 566 F. Supp. 2d 726, 738 (E.D. Tenn. 2008); Simovits v. Chanticleer Condo. Ass'n,

demonstrate that it is not in the preservation interests of age-restricted communities to oppose an exception for minors in unfortunate circumstances. Past cases of age-restricted communities fighting for their age-restricted status show that it might not be prudent to run the risk of losing HOP status for failing to strictly adhere to seemingly mundane and technical requirements.[304] Whether because of a lack of understanding of the requirements or who is responsible for fulfilling them, litigation against age-restricted housing exposes the age-restricted housing to the risk of loss of the age-restricted status.[305] Further, other potential pitfalls of litigation further increase the risk for age-restricted communities litigating against highly motivated plaintiffs in FHAA actions.[306] As it is reasonable to infer that such motivation would exist for a grandparent seeking to rescue a grandchild from an abusive, neglectful, or otherwise tragic situation, embracing an exception to the HOP exemption for such situations would mitigate the risk of loss of status for the age-restricted community. The reform proposed in the next Part will serve to avoid the unnecessary loss of age-restricted status and should be implemented by age-restricted communities.

The danger of opposing a grandparent attempting to essentially rescue a minor from unfortunate circumstances played out in 1996 in Youngstown, Arizona.[307] Then-sixteen-year-old Chaz Cope took refuge from his abusive stepfather by moving into his grandparents' home in an age-restricted community.[308] The association board "bristled" at his grandparents' petition to allow

933 F. Supp. 1394, 1408 (N.D. Ill. 1996); 24 C.F.R. § 100.307 (2014). Additionally, cases exist where age-restricted communities failed to satisfy the intent requirement. Massaro v. Mainlands Section 1 & 2 Civic Ass'n, 3 F.3d 1472, 1478–79 (11th Cir. 1993); Gibson v. Cnty. of Riverside, 181 F. Supp. 2d 1057, 1081–82 (C.D. Cal. 2002).

304. *Balvage*, 642 F.3d at 777–78; *Massaro*, 3 F.3d at 1478–79; *Fountainbleau*, 566 F. Supp. 2d at 738; *Simovits*, 933 F. Supp. at 1408.

305. 42 U.S.C. § 3607(b)(2)(C)(iii); *Balvage*, 642 F.3d at 777–78; *Massaro*, 3 F.3d at 1478–79; *Fountainbleau*, 566 F. Supp. 2d at 738; *Gibson*, 181 F. Supp. 2d at 1081–83; *Simovits*, 933 F. Supp. at 1408; 24 C.F.R. §§ 100.307(d) & (g) (providing the types of documentation that will satisfy the biennial age verification requirement).

306. *See* David Nuffer & Bruce C. Jenkins, *Qualifying Senior Communities Under the Fair Housing Act's New Rules (with Form)*, 12 PRAC. REAL ESTATE LAW 41, 44, 50–51 (1996) (showing potential compliance problems for age-restricted communities when responsibilities are delegated to a property management company to enforce covenants against renters).

307. Chen, *supra* note 16; Cutts, *supra* note 33, at 206 (citing multiple news articles covering the story of Chaz Cope).

308. Chen, *supra* note 16; Cutts, *supra* note 33, at 206.

Chaz to stay there until he graduated high school, which would have been just a few years' stay.[309] However, the Arizona attorney general's office ordered a stay on the eviction and launched an investigation of the community.[310] The investigation discovered that the town improperly sought its age-restricted status, and that status was stripped from the town, "allowing Cope—and anyone else inclined to live among a majority of seniors—to move into the community."[311]

While Chaz Cope's situation is a dramatic example, other cases have shown that an investigation from an attorney general is not required to save the day for a grandparent seeking to house a minor in unfortunate circumstances in an age-restricted community. Failure to meet the requirements for a biennial independent age-verification of residents,[312] or to operate, publish, and adhere "to policies and procedures that demonstrate the intent"[313] to operate as a fifty-five-plus community, will cause a community to lose such a status.[314] The path to the loss of the age-restricted status is paved with misunderstood requirements,[315] premature discrimination,[316] inchoate policies,[317] and imprecise policies,[318] and the light of litigation can illuminate such hazards.[319] Far from viewing ignorance as blissful, courts

309. Chen, *supra* note 16; Cutts, *supra* note 33, at 206.

310. Chen, *supra* note 16; Cutts, *supra* note 33, at 206.

311. Chen, *supra* note 16; Cutts, *supra* note 33, at 206.

312. 42 U.S.C. § 3607(b)(2)(C)(iii) (2012); Balvage v. Ryderwood Improvement & Serv. Ass'n, 642 F.3d 765, 777–78 (9th Cir. 2011); United States v. Fountainbleau Apartments, L.P., 566 F. Supp. 2d 726, 738 (E.D. Tenn. 2008); Simovits v. Chanticleer Condo. Ass'n, 933 F. Supp. 1394, 1408 (N.D. Ill. 1996); 24 C.F.R. § 100.307 (2014).

313. 42 U.S.C. § 3607(b)(2)(C)(ii).

314. Massaro v. Mainlands Section 1 & 2 Civic Ass'n, 3 F.3d 1472, 1478–79 (11th Cir. 1993); Gibson v. Cnty. of Riverside, 181 F. Supp. 2d 1057, 1081–83 (C.D. Cal. 2002).

315. *Balvage*, 642 F.3d at 777–78.

316. *Id.* at 772 (explaining that a community cannot discriminate on the basis of familial status on its way to achieving the eighty percent threshold for a fifty-five-plus community).

317. *Gibson*, 181 F. Supp. 2d at 1079 (explaining that failure to have a policy for dealing with violations of the age restriction can cause a community to lose its status).

318. *Massaro*, 3 F.3d at 1479; *Gibson*, 181 F. Supp. 2d at 1081–82. Communities have lost their status for not specifically stating their intent to be a fifty-five-plus community—or asserting instead that they are childless or HOPA communities, or listing a different age to satisfy the intent requirement. *Massaro*, 3 F.3d at 1479; *Gibson*, 181 F. Supp. 2d at 1081–82.

319. *E.g.*, *Balvage*, 642 F.3d at 777–78; *Massaro*, 3 F.3d at 1478–79; United States v. Fountainbleau Apartments, L.P., 566 F. Supp. 2d 726, 738 (E.D. Tenn. 2008); *Gibson*, 181 F. Supp. 2d at 1081–83; Simovits v. Chanticleer Condo. Ass'n, 933 F. Supp. 1394, 1408 (N.D. Ill. 1996).

will view a community's defense that it was ignorant of FHAA requirements with suspicion and without mercy.[320]

Other pitfalls of litigation for an age-restricted community should further sway communities against fighting the housing intentions of a grandparent or extended family member of a minor in unfortunate circumstances.[321] Compliance with FHAA HOP regulations[322] could become an issue in cases where compliance responsibilities have been ineffectively delegated to a property management company.[323] While a homeowner's association consists of residents who, due to their proximity, can more ably monitor the activities of other residents, a property management company may be delegated the task of ensuring that the community complies with the FHAA.[324] While such an arrangement reduces the administrative demands of a homeowner association's board, the arrangement may inadvertently cause the association to fall into noncompliance with the FHAA.[325]

Whether or not an age-restricted community delegates its independent age-verification requirement to a property manager, the distinction between occupants and owners could present problems in complying with the eighty percent requirement, which could be exploited by a motivated litigant.[326] "Control over individual unit owners is difficult to maintain."[327] If a resident rents his or her dwelling to a family, the renters' ages would be considered in calculating the percentage of residences with at least one person who is fifty-five or older.[328] Further, the association cannot initiate eviction proceedings with such a renter because the association does not have privity of contract with the

320. *Fountainbleau*, 566 F. Supp. 2d at 738.

321. *See* Nuffer & Jenkins, *supra* note 306, at 44–45 (explaining that a housing provider "will not be able to discriminate against children" unless it can "affirmatively demonstrate through credible and objective evidence" that it meets certain requirements).

322. 42 U.S.C. § 3607(b)(2) (2012); 24 C.F.R. § 100.304–.307 (2014).

323. Nuffer & Jenkins, *supra* note 306, at 44. This article was written when HUD regulations did not explicitly state what constitutes a provider of HOPs. 24 C.F.R. § 100.304; Nuffer & Jenkins, *supra* note 306, at 44.

324. Nuffer & Jenkins, *supra* note 306, at 44. It is common for a homeowner association to delegate management of the community to a property management company, which can then assist the community in a variety of administrative tasks. *Id.*

325. 42 U.S.C. § 3607(b)(2); 24 C.F.R. §§ 100.304–.307; Nuffer & Jenkins, *supra* note 306, at 44.

326. 42 U.S.C. § 3607(b)(2)(C)(i); 24 C.F.R. §§ 100.304, 100.305, 100.307.

327. Nuffer & Jenkins, *supra* note 306, at 50.

328. 42 U.S.C. § 3607(b)(2)(C)(i); 24 C.F.R. §§ 100.304, 100.305, 100.307; Nuffer & Jenkins, *supra* note 306, at 45, 50–51.

renter.[329] The association's only recourse is to take action against the owner, but such action could still mean that the community runs the risk of not complying with the FHAA regulations.[330] This action, of course, assumes that the association is aware of such a rental. Therefore, the risk of exposure of noncompliance should persuade a defendant age-restricted community to tread cautiously in a proceeding against a family member who is highly motivated to litigate for the right to house a minor who is fleeing tragedy.

Age-restricted communities may contend that there are procedural compliance requirements that can just as easily lead to the dismissal of a case brought against them.[331] They can argue that HUD failed to "investigate their case within the required one hundred days, and second, that HUD denied them the conciliation process mandated by the Act."[332] Additionally, they will seek cover from the "good-faith" provision to reduce liabilities if they lose their case.[333]

These defenses, however, offer little help to an age-restricted community facing legal action. The one hundred-day rule requires that HUD determine whether discriminatory housing practices have occurred, or will soon occur, and notify the community within one hundred days after the filing of a complaint.[334] However, "substantial precedent" suggests that courts will ignore this requirement and not dismiss a case for merely violating the hundred-day rule.[335] While HUD must, "to the extent feasible, engage in conciliation with respect to [a] complaint,"[336] failure to do so will not automatically lead to the dismissal of the suit.[337]

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329. Nuffer & Jenkins, *supra* note 306, at 50–51.

330. 42 U.S.C. § 3607(b)(2)(C)(i); 24 C.F.R. §§ 100.304, 100.305, 100.307; Nuffer Jenkins, *supra* note 306, at 50–51.

331. Allen, *supra* note 40, at 335. "Housing providers have vigorously argued that their cases should be dismissed or damages reduced based on procedural noncompliance by HUD." *Id.*

332. *Id.*

333. 42 U.S.C. § 3607(b)(5); 24 C.F.R. § 100.308.

334. 42 U.S.C. § 3610(g).

335. Allen, *supra* note 40, at 336 (citing Kelly v. HUD, 3 F.3d 951 (6th Cir. 1993); Baumgardner v. HUD, 960 F.2d 572, 578 (6th Cir. 1992); United States v. Scott, 788 F. Supp. 1555, 1557–59 (D. Kan. 1992); United States v. Curlee, 792 F. Supp. 699 (C.D. Cal. 1992)). One court held the requirement is non-jurisdictional and caused no significant injury to the defendants. *Curlee*, 792 F. Supp. at 700.

336. 42 U.S.C. § 3610(b)(1).

337. Allen, *supra* note 40, at 338.

Failure to conciliate could lead to a reduction in damages[338] or could lead to dismissal in instances where there has been substantial prejudice.[339] Likewise, the "good-faith" defense applies if the association "has stated formally, in writing, that the facility or community complies with the requirements"[340] for the HOP exemption; however, this defense only guards against monetary damages, not injunctive relief.[341] In cases of grandparents seeking to house a grandchild, injunctive relief is the desired result. Therefore, a shield against monetary damages is no shield at all against such a plaintiff.

The potential for a grandparent to feel strongly enough about litigating to keep housing a grandchild fleeing a bad situation should come as no surprise. "Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life."[342] Thus, age-restricted communities should implement an exception for minors in unfortunate circumstances, as such an exception would prevent the most strongly contested cases from entering the courtroom where a community's compliance failures could be exposed.

D. Proposed Exception to the FHAA HOP

Grandparents and other close relatives have procedural requirements—in addition to public sympathy[343] and the fundamental right to cohabitate with family[344]—on their side in their effort to provide a refuge for a minor relative. Further, the preservation instincts of age-restricted communities should compel them to avoid the courtroom in cases where they can expect a fierce challenge from a resident seeking to rescue a child from a tragic situation. A more accommodating approach to housing children in age-restricted communities should be reached to preserve families and age-restricted communities. The HOP exception of

338. Morgan v. HUD, 985 F.2d 1451, 1456 (10th Cir. 1993).
339. *Baumgardner*, 960 F.2d at 578.
340. 42 U.S.C. § 3607(b)(5).
341. 24 C.F.R. § 100.308 (2014); Andrea D. Panjwani, *Beyond the Beltway: Housing for Older Persons Act of 1995*, 5 J. AFFORDABLE HOUS. & COMMUNITY. DEV. L. 197, 199–200 (1996).
342. Moore v. E. Cleveland, 431 U.S. 494, 505 (1977).
343. Chen, *supra* note 16.
344. *Moore*, 431 U.S. at 500–01.

the FHAA[345] should be amended to allow a grandparent, aunt, or uncle, to house a minor in unfortunate circumstances.[346]

Clear and objective triggers would need to be established for such an exception to adequately function.[347] Such triggers should be drafted with the understanding that the goal of this exception is to preserve families,[348] not merely to provide economic aid to them. Conditions that trigger the exception should be limited to the following: (1) when there is a death of the parent or guardian; (2) when there is a "severe, debilitating injury or illness which renders it impossible for" a parent or guardian to care for his or her child; (3) when "a child's continued presence in the current home presents a risk to his or her life or health due to abuse or neglect;"[349] (4) when the parent or guardian has been incarcerated; or (5) when temporary custody of the child has been granted to the relative. All of these conditions can be readily verified by court documents, medical reports, or police reports.

Economic justifications are excluded from the proposed changes because the purpose of the proposed rule is to preserve familial connections,[350] not merely lessen a family's financial difficulties. While it is arguable that a severe financial hardship situation could trigger a temporary exemption under the FHAA, the potential for abuse of such an exception runs the risk of discrediting the aforementioned most-dire cases that compel the need for legislative change. Further, in cases where a parent cannot afford to meet a child's basic needs and surrenders parental rights to a relative, this exemption's activation due to temporary custody would apply.

IV. CONCLUSION

A minor-in-unfortunate-circumstances exception is needed even though the FHAA already provides a scheme for allowing a limited number of minors to reside in fifty-five-plus age-restricted

345. 42 U.S.C. § 3607.
346. Cutts, *supra* note 33, at 217–18.
347. *Id.*
348. *Id.* at 217.
349. *Id.*
350. *Id.*

communities.[351] This need arises because age-restricted communities have universally opted to refuse to allow such habitation.[352] This rigidity could have the odd effect of allowing for a larger number of children to reside in a community in addition to other adverse consequences to the community.[353] The proposed exception is based on the reasonable anticipation that an extended family member attempting to take care of a minor relative whose parents are unable to do so will sue if his or her efforts are opposed.

Such a change would not require much of an alteration to the existing law and potentially could improve dramatically the lives of children who would otherwise be separated from their families. The FHAA already provides for an exception under which twenty percent of residences in fifty-five-plus-housing communities are excused from having at least one person who is at least fifty-five.[354] Therefore, an age-restricted community is not forbidden to allow a minor—or a family with no one over the age of fifty-five among its members—to live within its borders. The exception would simply provide that an age-restricted community does not have the discretion to deny a minor to cohabitate with his or her extended family in extraordinary cases.

This exception will not destroy the character of age-restricted communities; in fact, it could help to preserve them. The presence of one child in limited circumstances will not cause a flood of children into age-restricted communities.[355] This is because this exception would only apply in extraordinary cases, where the child truly is in a situation where living with the grandparent,

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351. *See* 42 U.S.C. § 3607(b)(2)(C) (2012) (providing that "at least [eighty] percent of the occupied units are occupied by at least one person who is [fifty-five] years of age or older").

352. Bauer, *supra* note 15, at 56 n.162 (citing Chen, *supra* note 16).

353. *See* Balvage v. Ryderwood Improvement & Serv. Ass'n, 642 F.3d 765, 777–78 (9th Cir. 2011) (stating that the measures taken by RISA to verify the community was fulfilling its obligation to ensure eighty percent of its occupied units were occupied by at least one person who was fifty-five-years or older were statutorily insufficient); United States v. Fountainbleau, 566 F. Supp. 2d 726, 738 (E.D. Tenn. 2008) (stating that the community's decision to discriminate against certain residents by implementing its "adults only" policy, without determining whether there was a legal basis to implement such a policy, was insufficient to raise the affirmative defense of housing for older persons); Simovits v. Chanticleer Condo. Ass'n, 933 F. Supp. 1394, 1408 (N.D. Ill. 1996) (stating that the association's alleged reputation for being a community for older people does not remedy the fact that families with children were wrongfully denied the opportunity to live within the community).

354. 42 U.S.C. § 3607.

355. Cutts, *supra* note 33, at 218.

aunt, or uncle will best preserve the child's connection to his or her family following tragic circumstances in the minor's life. Additionally, the proposed exception could prevent challenges to communities regarding how they verify the residents' ages or publicize their age-restricted intent, thus preventing the potential loss of a community's age-restricted status.[356]

Three years after Meredith's rescue, Meredith's mother has held the same job for two years and established her own household.[357] Meredith remains largely unaware of her father's crimes and shows no knowledge of her mother's previous inability to take care of her for nine months.[358] She does not know that her grandfather flew across the country on a moment's notice to rescue her, driving her from Indiana through the night to bring her to his home in Florida.[359] All she knows about that period in her life is that his home is the first place she remembers and that her grandfather has always been there for her.[360] All children in similar circumstances deserve that knowledge.

356. *See Balvage*, 642 F.3d at 777–78 (providing examples of statutorily insufficient age-verification procedures); Massaro v. Mainlands Section 1 & 2 Civic Ass'n, 3 F.3d 1472, 1478–79 (11th Cir. 1993) (stating that the Association's age-verification process and rules were insufficient to properly demonstrate the Association's intent to be a community for older persons); *Fountainbleau*, 566 F. Supp. 2d at 738 (explaining that ignorance of the law is not a defense against liability for a discriminatory and legally insufficient "adults only" policy); Gibson v. Cnty. of Riverside, 181 F. Supp. 2d 1057, 1081–83 (C.D. Cal. 2002) (requiring a community to properly demonstrate its intent to provide housing for persons at least fifty-five years old or risk liability for violating the FHA); *Simovits*, 933 F. Supp. at 1408 (stating that the wrongful denial of the opportunity to live within a given community will result in court action to remedy the wrongful conduct).

357. Interview with Doug Boring, *supra* note 2. During that time, Meredith's mother has been promoted at work and has begun taking courses at Hillsborough Community College to pursue an Associate's Degree. *Id.*

358. *Id.* To date, Meredith shows no recognition that she and her mother were ever separated. *Id.*

359. *Id.*

360. *Id.*