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## Family Values: Prevention of Discrimination and the Housing for Older Persons Act of 1995

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# Family Values: Prevention of Discrimination and the Housing for Older Persons Act of 1995

JONATHAN I. EDELSTEIN\*

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## I. INTRODUCTION

In September 1988, nine-year-old Jamie Swartz lost her mother to cancer.<sup>1</sup> Unfortunately, this tragedy was only the beginning of her problems.

In April of that year, when her mother underwent chemotherapy, Jamie went to live with her father and stepmother in the Viewpointe condominium complex in Margate, Florida.<sup>2</sup> Viewpointe, however, was an “adults-only” housing complex, with a charter forbidding families with children from residing in the complex.<sup>3</sup> Although the by-laws allowed exceptions from that adults-only policy, the condominium association’s board members showed little sympathy for Jamie’s plight.

In July 1988, the board voted to allow Jamie to reside in Viewpointe until her mother completed chemotherapy.<sup>4</sup> However, when her mother died in September and it became clear that Jamie would be a permanent resident of the complex, the board’s attitude changed. Only

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\* Attorney in private practice. J.D., Fordham University School of Law, 1997; B.A., John Jay College of the City University of New York, 1992. This Article continues my long-standing tradition of sentimental author’s notes. My first thanks go, as always, to Professor Abraham Abramovsky of Fordham University School of Law, whose encouragement and support for my career and scholarship is selfless and continuing. I also wish to thank Professor Harold Lubell, also of Fordham, who originally inspired me to write this Article. Honorable mention goes in addition to the gang at the Corporation Counsel’s office, who have offered nothing but support for my spare-time scholarship. Finally, I would like to thank my first family—Martin, Sharon, Deborah and Judith Edelstein—as well as my second family—Deborah, Bucky, Ari, Dov and Aviva Abramovsky—for their skill at pretending interest whenever I waxed philosophical about this topic and for their consideration in always having coffee waiting.

1. See *Adults at Odds over 9-Year-Old in a Florida Condominium*, N.Y. TIMES, Dec. 28, 1988, at A17.

2. See *id.*

3. See *id.*

4. See *id.*

days after her mother's death, the board voted to begin eviction proceedings against her father if she was not out of Viewpointe by January 10, 1989.<sup>5</sup> In addition, the widespread social ostracism that Jamie had suffered since moving into the complex worsened.<sup>6</sup>

Fortunately, Jamie Swartz's story has a happy ending. On March 12, 1989, the Fair Housing Amendments Act of 1988 (the "FHAA"),<sup>7</sup> which sharply restricted housing discrimination against families with children, went into effect.<sup>8</sup> Jamie, whose father had declared his willingness to fight the Viewpointe board's decision,<sup>9</sup> was able to stay.<sup>10</sup>

Congress enacted the FHAA to prevent discriminatory treatment similar to that faced by the Swartzes. The growth of "adults-only" apartments and condominiums in the 1970s and 1980s led to widespread discrimination against families with children, to the point where many families found it difficult to obtain housing. The FHAA was enacted in response to this problem, and in an attempt to restore order to the confused state of the law that had resulted from inconsistent judicial decisions.

Many senior<sup>11</sup> activists opposed the FHAA, however, because they feared it could endanger the integrity of the retirement communities, which consisted disproportionately of mobile home parks and condominiums, in which many seniors had chosen to live in the company of fellow retirees. To allay these fears, the FHAA created three categories of exemption that allowed certain seniors communities to discriminate on the basis of age and family status. The broadest of these allows age-based discrimination by housing communities that provide "significant facilities and services" for the elderly, if at least eighty percent of the occupied units contained at least one person fifty-five years of age or older.<sup>12</sup>

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5. *See id.*

6. *See id.*

7. Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601-3602, 3604-3608, 3610-3619, 3631 (1944 & Supp. I 1996)).

8. *See* Jennifer Jolly Ryan, *A Real Estate Professional's and Attorney's Guide to the Fair Housing Law's Recent Inclusion of Familial Status as a Protected Class*, 28 CREIGHTON L. REV. 1143, 1164 (1994-1995).

9. *See Adults at Odds over a 9-Year-Old in a Florida Condominium*, N.Y. TIMES, Dec. 28, 1988, at A17.

10. *See* Ron Stodgill III et al., *Adults-Only Housing Hears the Pitter-Patter of Little Feet*, BUS.WK., Mar. 13, 1989, at 39.

11. The term "senior(s)" is used herein as a general term to describe adults fifty-five years of age and over. Other age classifications, such as "adults 62 and over," are specifically used as necessary.

12. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6(d)(2), 102 Stat. 1619, 1623 (codified as amended at 42 U.S.C. § 3607(b)(2)(C) (1994)). The term "55-and-over housing" is used here as a general term for housing communities to which this exemption applies.

According to its critics, however, the FHAA created at least as many problems as it solved. The regulations crafted by the Department of Housing and Urban Development ("HUD") to implement the Act are vaguely drawn and subject to frequent litigation. Furthermore, many critics argue that the FHAA has inhibited the creation of new senior communities due to the expense of meeting the exemption requirements and the possibility of expensive litigation thereunder. Consequently, in the fall of 1994, HUD held hearings to revise its regulations and to more clearly define the "significant facilities and services" requirement.<sup>13</sup> Pursuant to these hearings, HUD issued a new set of regulations in 1995.<sup>14</sup>

HUD's attempted clarification, however, was pre-empted by legislative action. In 1995, following the election of a Republican majority in Congress, senior activists were able to secure passage of legislation repealing many of the FHAA provisions they considered onerous.<sup>15</sup> The Housing for Older Persons Act of 1995,<sup>16</sup> among other things, eliminated the controversial requirement that senior communities provide "significant facilities and services" for the elderly.<sup>17</sup>

The relaxation of the "significant facilities and services" requirement forced courts to strike a difficult balance. In enforcing the FHAA, not only must courts give effect to the congressional intent of making it easier to qualify for exemption under the statute, but they must also avoid granting recognition to "communities of seniors united [only] by their preference to not live around children."<sup>18</sup> In the first reported case decided under the amended statute, a federal district court achieved this delicate balance.

In *Simovits v. Chanticleer Condominium Ass'n.*,<sup>19</sup> the Northern District of Illinois construed the FHAA, as amended, by strictly applying the provisions of the Act as it existed prior to the amendments cre-

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13. See *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 832-33 (9th Cir.), *amended in part* by 125 F.3d 1281 (9th Cir. 1997) (discussing the regulatory history of the FHAA).

14. See 60 Fed. Reg. 43,322, 43,327-30 (1995) (to be codified at 24 C.F.R. pt. 100) (proposed July 31, 1995).

15. Carl A.S. Coan, Jr., and Sheila C. Salmon, *The Fair Housing Act and Seniors' Housing*, 27 URB. LAW. 826, 834-35 (1996) (stating that a proposed "Senior Citizens Equity Act," including the Housing for Older Persons Act, was part of the Republican Party's 1994 contract with America). It is, of course, beyond the scope of this Article to suggest why Republican legislators, with their often-expressed commitment to "family values," have historically been willing to sanction housing discrimination against families with children.

16. Pub. L. No. 104-76, 109 Stat. 787 (amending the Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1994 & Supp. I 1996)).

17. See S. REP. NO. 104-172, at 3 (1995), *reprinted in* 1995 U.S.C.C.A.N. 778, 780.

18. S. REP. NO. 104-172, at 13 (1995), *reprinted in* 1995 U.S.C.C.A.N. 778, 779.

19. 933 F. Supp. 1394, 1401-03 (N.D. Ill. 1996). See Part IV *infra* for a discussion of the reasoning of the *Simovits* court.

ated by the Housing for Older Persons Act.<sup>20</sup> Due to an expedited discovery process and expedited trial before a magistrate judge, *Simovits* is likely two to three years ahead of any subsequent decision construing the Housing for Older Persons Act.<sup>21</sup> Furthermore, as the *Simovits* decision was not appealed,<sup>22</sup> it is that much further ahead of any other final decision regarding this statute. Consequently, the *Simovits* decision charts a course for courts to follow when faced with federal fair housing litigation.

This Article examines the potential effect of the Housing for Older Persons Act on the legal status of senior communities and families with children. Part II examines the crisis in family housing that led to passage of the FHAA, as well as the legal environment that existed in state and federal jurisdictions prior to 1988. Part III outlines the age and family-status provisions of the FHAA, and examines significant cases in which courts have attempted to define "significant facilities and services." Part IV outlines the legislative history and provisions of the Housing for Older Persons Act, and attempts to determine whether it Act will ease the availability of senior housing or, as some critics have argued, make it easier for adult communities to discriminate against families with children. Part V discusses the *Simovits* decision, its grounding in congressional intent and prior judicial decisions, and its implications for future fair housing litigation. In Part VI, recommendations are made regarding state legislation and means by which those states that still require senior communities to provide "significant facilities and services" might protect those communities from potentially crippling liability, without eliminating the requirement entirely.

## II. HISTORICAL DEVELOPMENT BEFORE THE FAIR HOUSING AMENDMENTS ACT

During the 1970s and 1980s, the shortage of housing for families with children reached crisis proportions.<sup>23</sup> A significant portion of this crisis was caused by the proliferation of adult mobile home parks and condominium housing complexes,<sup>24</sup> many of which—unlike private

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20. *Id.* at 1401-03.

21. See Telephone Interview with Jeffrey Lynn Taren, Attorney for Plaintiffs in *Simovits v. Chanticleer Condominium Ass'n* (May 29, 1997). Due to the congested calendars of federal courts and administrative tribunals adjudicating fair housing disputes, decisions often are not rendered until three to five years after the complaint is filed. See *id.*

22. See *id.*

23. For an excellent discussion of the causes and symptoms of housing discrimination against families with children prior to the FHAA, see 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, 1277-83 (1989).

24. The number of occupied condominium units in the United States nearly doubled during

homes—contained restrictive covenants or by-laws discriminating against families with children or residents under a certain age.

The magnitude of this problem is evidenced by a nationwide study of housing discrimination prepared by HUD in 1980, in which 80,000 units were surveyed.<sup>25</sup> This study reported that twenty-five percent of housing providers excluded children completely, while an additional fifty percent imposed age restrictions.<sup>26</sup> Other studies conducted during the 1980s in various parts of the United States confirmed the conclusion that discrimination against families with children was widespread.<sup>27</sup> For the most part, state and federal courts were deferential to adults-only housing complexes. 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.<sup>28</sup> Prior to enactment of the FHAA, only fifteen states and the District of Columbia had laws prohibiting discrimination against families with children.<sup>29</sup> More-

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the 1980s, from 1,707,807 to 3,204,000. See Lewis A. Schiller, *Limitations on the Enforceability of Condominium Rules*, 22 STETSON L. REV. 1133, 1133 (1993). Condominium housing is attractive to senior citizens, presumably because of the affordability of condominium units as well as the greater ease of providing senior services and amenities in a condominium setting. In addition, states that have historically been attractive to retirees, including Florida, Arizona, and California, also contain greater concentrations of condominium housing. At the time of passage of the FHAA, Florida was second only to Hawaii in the number of condominium dwellers. See *Adults at Odds over 9-Year-Old in a Florida Condominium*, N.Y. TIMES, Dec. 28, 1988, at A17. Age-restricted condominiums also flourished during the 1980s in Arizona and California, as well as Connecticut and New Jersey. See Andree Brooks, *Condos Face Loss of Control*, N.Y. TIMES, Dec. 2, 1990, at 7.

25. See ROBERT W. MARANS ET AL., INSTITUTE FOR SOCIAL RESEARCH, MEASURING RESTRICTIVE RENTAL PRACTICES AFFECTING FAMILIES WITH CHILDREN: A NATIONAL SURVEY (1980).

26. See *id.* at 24. During the debate concerning the Fair Housing Amendments Act, Senator Domenici cited these figures in support of his claim that two million Americans were denied their choice of housing due to discrimination. See 134 CONG. REC. S10,544, S10,553 (daily ed. Aug. 2, 1988) (statement of Sen. Domenici).

27. See, e.g., MARIN HOUSING CENTER, CHILD DISCRIMINATION AUDIT REPORT: A REPORT BY THE FAIR HOUSING PROGRAM OF MARIN COUNTY (1986) (indicating that 63% of housing complexes in Marin County preferred families without children); R. BURKE, A REPORT ON DISCRIMINATION AGAINST CHILDREN IN DES MOINES RENTAL HOUSING (1985) (indicating that 48% of rental housing in Des Moines excluded families with children); Kristin Downey, *Housing Bill Slams Door on Adult-Only Apartments*, WASH. POST, Aug. 14, 1988, at A1 (reporting that 93% of rental housing in Alexandria had some restrictions on occupancy by children, with 20% banning children outright).

28. See *Pomerantz v. Woodlands Section 8 Ass'n*, 479 So. 2d 794 (Fla. 4th DCA 1986). The *Pomerantz* court relied on the Florida Supreme Court's decision in *White Egret Condominium v. Franklin*, 379 So. 2d 346 (Fla. 1979), holding that an age restriction did not trigger strict scrutiny but instead gave rise to a two-part test requiring a court to determine whether the restriction was reasonable under the circumstances of the case and whether it was unduly oppressive. See 479 So. 2d at 794. The *Pomerantz* case is also interesting because expert testimony was admitted to support the homeowners' association's contention that seniors benefit from living exclusively in the company of other seniors. See *id.* at 795.

29. See ARIZ. REV. STAT. ANN. § 33-1317 (West 1990 & Supp. 1997); CAL. CIV. CODE § 51.2

over, a number of these statutes contained exceptions which essentially vitiated the anti-discrimination provisions, such as blanket exceptions for any housing community that declared itself to be "adult housing"<sup>30</sup> and exceptions for "'retirement' [housing] with abnormally low entrance ages."<sup>31</sup> In nine of these sixteen jurisdictions, the anti-discrimination statutes applied only to rental housing.<sup>32</sup> Additionally, violation of these statutes was often punishable by a fine of less than \$100,<sup>33</sup> a trivial expense for many housing providers. The weakness of these laws was cited by Congress as a key reason for passage of the FHAA.<sup>34</sup>

Even in the absence of protective legislation, some courts attempted to fashion rationales for preventing discrimination against families with children. Challenges to age discrimination in housing proved most successful when the victim could show that race as well as age discrimination had occurred.<sup>35</sup> In 1982, however, the Ninth Circuit ruled that, where state action is involved, adults-only policies infringe upon a fundamental right and trigger strict scrutiny analysis even in the absence of racial discrimination.<sup>36</sup> The obvious deficiency in this decision is that, since most housing is privately owned, no state action is implicated by sale or rental restrictions. Thus, despite its hopeful language, this decision provided little relief to families facing discrimination by private developers or landlords.

Some courts, however, have been willing to go further. The California Supreme Court led the way among states without family-protect-

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(Deering 1990 & Supp. 1998); CONN. GEN. STAT. ANN. § 46a-64a (West 1986) (repealed 1990); DEL. CODE ANN. tit. 25, § 6503 (1989) (repealed 1996); 775 ILL. COMP. STAT. ANN. 5/3-104 (West 1989) (repealed 1989); ME. REV. STAT. ANN. tit. 14, § 6027 (West 1988) (repealed 1989); MASS. GEN. LAWS ANN. ch. 151B, § 4(11) (West 1996); MICH. COMP. LAWS ANN. § 37.2502 (West Supp. 1998); MINN. STAT. ANN. § 363.03(2)(1) (West 1991 & Supp. 1998); N.J. STAT. ANN. § 2A:42-101 (West 1987); N.Y. REAL PROP. LAW §§ 236-37 (McKinney 1989); R.I. GEN. LAWS § 34-37-4 (1995 & Supp. 1997); VT. STAT. ANN. tit. 9, § 4503(a) (1993); VA. CODE ANN. § 36-88 (Michie 1984) (repealed 1991).

30. See ARIZ. REV. STAT. ANN. § 33-1317(B) (West 1990) (amended 1991); R.I. GEN. LAWS § 34-37-4(E)(5)(e) (1995 & Supp. 1997); VA. CODE ANN. § 36-88 (Michie 1984) (repealed 1991).

31. Bilott, *supra* note 23, at 1282 (citing MICH. COMP. LAWS ANN. § 37.2503(1)(c) (West 1985 & Supp. 1997)). The Michigan statute provides an exemption for retirement communities designed for persons fifty years of age or older. See *id.* at 1282 n.62.

32. See *Seniors Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030, 1034 (11th Cir. 1992) (citing H.REP. NO. 100-711, at 19 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2180).

33. See Bilott, *supra* note 23, at 1282, n.65.

34. *Hearings on H.R. 1158*, 100th Cong. 394, 402 (1988) (statement of James Morales).

35. See, e.g., *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983 (4th Cir. 1984). In *Betsey*, the Fourth Circuit held that Turtle Creek's conversion to adults-only housing, resulting in a higher eviction rate for minority families, was sufficient to establish a prima facie case of discriminatory impact, and that Turtle Creek would have to meet the business necessity standard to overcome the showing of discrimination. See *id.* at 988.

36. See *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982).

tion laws in *O'Connor v. Village Green Owners Ass'n*.<sup>37</sup> *O'Connor*, a case of first impression in California, provoked vigorous and heated discussion within the judiciary. In fact, the three decisions of the two appellate Courts in that case provide an excellent example of the reasoning of both sides on the family-protection issue.

Plaintiffs John and Denise O'Connor resided in Village Green, a Los Angeles condominium that limited residency to persons over eighteen years of age.<sup>38</sup> The O'Connors, who had a minor son, filed suit in Los Angeles County Superior Court to invalidate and enjoin enforcement of this restriction; the condominium association countersued to enjoin the O'Connors from residing in their unit with their son.<sup>39</sup> The trial court dismissed the O'Connors' suit and granted a preliminary injunction to the condominium board.<sup>40</sup>

The O'Connors appealed both decisions to the California Court of Appeals for the Second District. After deciding that state civil rights law did not prohibit age discrimination in housing,<sup>41</sup> the appellate court stated the following:

[E]ach owner [of a condominium] must necessarily surrender a certain amount of freedom of action to the regulatory authority of the other owners as a group. . . .

. . . [P]ersons who purchase condominiums and thus surrender their own freedom of action have the right to rely on the fact that the other owners will be similarly restricted.<sup>42</sup>

The Second District Court of Appeals further held that condominium associations could reasonably "impose regulations to prevent activities that might be annoying or disturbing to the entire group of occupants."<sup>43</sup> Children, said the court, can be "greatly disturbing to those not . . . favorably disposed. Those . . . individuals have the right, by lawful means, to insulate themselves from such disturbance . . . ."<sup>44</sup> The court accordingly affirmed the trial court's decision.

The California Supreme Court, however, reversed.<sup>45</sup> California's

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37. 662 P.2d 427 (Cal. 1983) (en banc).

38. *O'Connor v. Village Green Owners Ass'n*, 177 Cal. Rptr. 159, 160 (Cal. Ct. App. 1981), vacated, 183 Cal. Rptr. 111 (Cal. Ct. App. 1982), vacated, 662 P.2d 427 (Cal. 1983) (en banc).

39. *See id.*

40. *See id.*

41. *See id.* at 161-62. The court compared the laws governing employment and housing discrimination to support its conclusion that "the Legislature [intended] to exclude age as a protected class in housing . . ." *Id.* at 161.

42. *Id.* at 163 (citations omitted).

43. *Id.* citing *Ritchey v. Villa Nueva Condominium Ass'n*, 146 Cal. Rptr. 695 (Cal. Ct. App. 1978)).

44. *Id.*

45. *See O'Connor v. Village Green Owners Ass'n*, 662 P.2d 427, 431 (Cal. 1983) (en banc).



highest court found that age restrictions in condominium housing violate California's Unruh Civil Rights Act.<sup>46</sup> In granting the O'Connors' petition to invalidate Village Green's regulation, the court held that condominiums are business establishments and thus subject to the provisions of the Unruh Civil Rights Act governing discrimination by businesses.<sup>47</sup>

The ruling that condominium associations are businesses brought the *O'Connor* case squarely in line with a prior California civil rights decision. In *Marina Point, Ltd. v. Wolfson*,<sup>48</sup> the California Supreme Court ruled the previous year that the business provisions of the Unruh Civil Rights Act prohibit age discrimination by owners of rental housing.<sup>49</sup> In *O'Connor*, the court extended the application of *Marina Point* to condominium associations.<sup>50</sup>

In 1984, California's Unruh Civil Rights Act was amended to incorporate the reasoning underlying the *O'Connor* and *Marina Point* decisions.<sup>51</sup> However, California courts later retreated from the sweeping prohibition against age discrimination provided by *O'Connor*. In 1987, after Chief Justice Bird and two other liberal justices were not re-elected, the newly-right-leaning California Supreme Court refused to grant certiorari in a case in which an appellate court had ruled that a condominium association could lawfully exclude children from an adults-only section of the complex.<sup>52</sup> In contravention of at least the spirit of *O'Connor*, California Court of Appeals *Sunrise Country Club Ass'n. v. Proud*,<sup>53</sup> had ruled that families with children could be rele-

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46. CAL. CIV. CODE § 51 (Deering 1990 & Supp. 1998).

47. See *O'Connor*, 662 P.2d at 431. The court reasoned:

Contrary to the association's attempt to characterize itself as but an organization that "mows lawns" for owners, the association in reality has a far broader and more businesslike purpose. The association . . . is charged with employing a professional property management firm, with obtaining insurance for the benefit of all owners and with maintaining and repairing all common areas and facilities of the 629-unit project. It is also charged with establishing and collecting assessments from all owners to pay for its undertakings and with adopting and enforcing rules and regulations for the common good. In brief, the association performs all the customary business functions which in the traditional landlord-tenant relationship rest on the landlord's shoulders.

*Id.*

48. 640 P.2d 115, 116 (Cal. 1982) (en banc).

49. *Id.* at 116.

50. See *O'Connor*, 662 P.2d at 431.

51. See Act of Aug. 28, 1984, ch. 787, 1984 Cal. Laws 2780 (creating CAL. CIV. CODE § 51.2); Act of Sept. 25, 1984, ch. 1333, § 1, 1984 Cal. Laws 4681, 4681-82 (creating CAL. CIV. CODE § 51.3). Chapter 787 specifically stated that section 51.2 was being added to clarify the California Supreme Court's decisions in *O'Connor* and *Marina Park*. See § 1, 1984 Cal. Laws at 2781.

52. See *Sunrise Country Club Ass'n v. Proud*, 190 Cal. App. 3d 377 (Cal. Ct. App. 1987), review denied (June 3, 1987).

53. *Id.* at 377.

gated to specific areas of a condominium complex in which a reasonable number of units and recreational facilities were provided for them.<sup>54</sup> The *Sunrise Court* distinguished *O'Connor* and *Marina Point* on the basis that those cases involved situations in which families with children were completely and absolutely banned, whereas in the case at bar over one-half of the living units and swimming pools were set aside for family use.<sup>55</sup>

In another case decided the same year, the California Supreme Court also declined to extend the protection of the Unruh Civil Rights Act to mobile home parks.<sup>56</sup> In ruling that mobile home parks were permitted to restrict occupancy to adults, California's highest court stated that "the solution [to the problem of finding affordable housing for children] lies with the legislature, not the courts."<sup>57</sup>

### III. THE FAIR HOUSING AMENDMENTS ACT OF 1988: A PROBLEMATIC SOLUTION

This judicial inconsistency, combined with the rising affordable-housing crisis of the 1980s, fueled support for just such a legislative solution. The solution came in the form of the Fair Housing Amendments Act, introduced in companion bills by Representatives Fish and Edwards in the House and Senators Kennedy and Specter in the Senate.<sup>58</sup> Among its provisions, the FHAA banned discrimination based on familial status in the rental or sale of housing.<sup>59</sup> It also prohibited assignment of families with children to "family ghettos" similar to those allowed by the California courts in *Sunrise*.<sup>60</sup>

The FHAA also provided "teeth," both in terms of enforcement methods and penalties, that the Fair Housing Act had not previously possessed.<sup>61</sup> In addition to allowing aggrieved persons to file complaints with the Secretary of HUD<sup>62</sup> and outlining procedures for the adjudication of these complaints, the FHAA allows enforcement by the Attorney General in federal court<sup>63</sup> and by aggrieved persons in federal

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54. *Id.* at 382.

55. *See id.* at 382.

56. *See Schmidt v. Superior Court*, 742 P.2d 209, 212-13 (Cal. 1987), *vacated*, 769 P.2d 932 (Cal. 1989).

57. *Id.* at 217.

58. *See* H.R. REP. NO. 100-711, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2175.

59. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6(b)(1)-(2), 102 Stat. 1619, 1622 (codified as amended at 42 U.S.C. §§ 3604(a)-(e), 3606 (1994)).

60. *See* 24 C.F.R. § 100.70(c)(4) (1997).

61. *See* Edward Allen, *Six Years After Passage of the Fair Housing Amendments Act: Discrimination Against Families with Children*, 9 ADMIN. L.J. AM. U. 297, 299 (Summer 1995).

62. *See* 42 U.S.C. § 3610 (1994).

63. *See id.* § 3614. This provision allows the Attorney General to commence a civil

or state courts.<sup>64</sup> Additionally, administrative law judges hearing cases under the FHAA are authorized to impose punitive damages "to vindicate the public interest" of up to \$10,000 if the offending housing provider has not been adjudged to have committed previous discriminatory housing practices, and as much as \$50,000 if the housing provider has been adjudged to have committed two or more discriminatory housing practices during the seven years prior to the filing of the charge.<sup>65</sup> Moreover, the FHAA lengthened the statute of limitations for private enforcement of the act from 180 days to two years.<sup>66</sup>

Despite bipartisan sponsorship of the FHAA, opposition was fierce, especially among advocates for seniors. They argued that "seniors deserved the freedom of choice and even the serenity that they thought only a child-free environment could provide."<sup>67</sup> Seniors who had chosen to live in adult communities, they argued, should not be forced to live with the possibly disturbing and disruptive presence of young children.<sup>68</sup>

To allay these concerns, provisions were included in the FHAA to allow three categories of senior housing to discriminate on the basis of age or familial status. This "housing for older persons" under the FHAA includes housing built under state or federal programs to assist the elderly,<sup>69</sup> housing intended for and solely occupied by persons sixty-two years of age or older,<sup>70</sup> and a general category of senior housing intended for occupancy by adults fifty-five years of age or older.<sup>71</sup> This last category grants the widest exemption, and has also caused the greatest number of problems.

In order to qualify for the fifty-five-and-over exemption under the FHAA, housing complexes formerly were required to provide "signifi-

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proceeding against any person or housing provider in cases where there is "reasonable cause to believe that [such person or persons] is engaged in a pattern or practice" of housing discrimination in violation of the Fair Housing Act. *Id.* § 3614(a). The trial court in such actions can impose civil penalties of up to \$50,000 for a first offense, and up to \$100,000 for subsequent offenses. *See id.* § 3614(d)(1)(C).

64. *See id.* § 3613.

65. *See id.* § 3612(g)(3).

66. *See* H.R. REP. NO. 100-711, at 39 (1988), *reprinted in* 1988 U.S.C.A.N. 2173, 2200.

67. Allen, *supra* note 61, at 301-02.

68. *See* Ryan, *supra* note 8, at 1164 ("The exemption for 'housing for older persons' was included in the FHAA in recognition of the impact the amendments would have on elderly residents who had bought or rented homes with the expectation that they would be able to live without the noise and hazards of children.") (citing 134 CONG. REC. H6499-6500 (daily ed. Aug. 8, 1988) (statement of Rep. Fish)).

69. *See* 42 U.S.C. § 3607(b)(2)(A) (1994).

70. *See id.* § 3607(b)(2)(B).

71. *See id.* § 3607(b)(2)(C).

cant facilities and services" to the elderly.<sup>72</sup> Additionally, at least eighty percent of occupied units had to be inhabited by at least one person fifty-five years of age or older.<sup>73</sup> Qualifying housing complexes were also required to demonstrate an intent to serve the senior community by publishing and adhering to policies and procedures consistent with the Fair Housing Act,<sup>74</sup> and to comply with HUD rules regarding verification of occupancy.<sup>75</sup>

Despite these exemptions, senior organizations were quick to mount legal challenges to the FHAA. Within four years of its the enactment, in a challenge to the familial status provisions reached the Eleventh Circuit in *Seniors Civil Liberties Ass'n v. Kemp*.<sup>76</sup> In that case, a Florida seniors organization and two residents of a condominium which faced a potential loss of its adults-only status<sup>77</sup> claimed that the FHAA violated their constitutional right to freedom of association, right to privacy, a deprivation of their property interests and violated their due process rights, and also violated the Tenth Amendment guarantee against encroachments upon state sovereignty.<sup>78</sup> The Eleventh Circuit concluded, however, that these were "five meritless arguments."<sup>79</sup>

In *Seniors*, the court first considered the contention that the FHAA violated the Tenth Amendment by infringing on Florida's sovereignty. The Eleventh Circuit found the necessary authority under the Commerce Clause of the Constitution,<sup>80</sup> recognizing that courts must defer to Congress if a rational basis exists for Congress' determination that an activity affects interstate commerce.<sup>81</sup> The court stated that the national housing market affects interstate commerce, and that Congress had a rational basis for amending the Fair Housing Act due to a desire to remedy the nationwide crisis caused by housing discrimination against families with children.<sup>82</sup>

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72. See Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6(d)(2), 102 Stat. 1619, 1623 (codified as amended at 42 U.S.C. § 3607(b)(2)(C)(i) (Sep. 13, 1994).

73. See 42 U.S.C. § 3607(b)(2)(C)(i) (Supp. I 1996).

74. See *id.* § 3607(b)(2)(C)(i); see also 134 CONG. REC. 510,456 (daily ed. Aug. 1, 1988) (statements of Sens. Kennedy and Specter) ("[T]he housing in question must, in its marketing to the public and in its internal operations, hold itself out as housing for persons age 55 or older.").

75. See 42 U.S.C. § 3607(b)(2)(C)(iii) (Supp. I 1996).

76. 965 F.2d 1030 (11th Cir. 1992).

77. The Clearwater Point Condominium complex, an adults-only complex in Florida, failed to meet the standards for qualified senior housing under 42 U.S.C. § 3607 as amended by the Fair Housing Amendments Act. See *id.* at 1033.

78. See *id.*

79. See *id.* at 1036.

80. U.S. CONST. art. I, § 8, cl. 3 (granting Congress authority to regulate interstate commerce).

81. See *Seniors*, 965 F.2d at 1034 (citing *Preseault v. ICC*, 494 U.S. 1, 18 (1990)).

82. See *id.* at 1034.

The plaintiffs' Fifth Amendment claim of violation of due process was likewise quickly disposed of by the Eleventh Circuit, which noted that "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."<sup>83</sup> The court noted that the FHAA contains specific provisions allowing qualified seniors housing to discriminate on the basis of age or familial status, and concluded that Congress' action was neither irrational nor arbitrary.<sup>84</sup>

The fact that the FHAA provides exemptions for qualified seniors housing was also cited by the court in considering the plaintiffs' claim that the FHAA "discriminated" against elderly people who wished to live away from children.<sup>85</sup> The Eleventh Circuit then considered what it termed the "most meritless" argument advanced by the plaintiffs, that the FHAA infringed upon their freedom of association and right to privacy.<sup>86</sup> In a stinging rebuke to the Seniors Civil Liberties Association and the individual plaintiffs, the court stated that "[w]hatever the penumbral right to privacy found in the Constitution might include, it excludes without question the right to dictate or to challenge whether families with children may move in next door to you."<sup>87</sup> Finally, the Eleventh Circuit found that the FHAA was not unconstitutionally vague, holding that it was not "so vague and indefinite as really to be no rule or standard at all."<sup>88</sup>

Whatever the constitutional status of the FHAA may be, the practical difficulties raised thereby have been considerable. At the time the FHAA was proposed, many housing complex owners and managers worried that it would be expensive or impractical to meet the standards set for qualified senior housing. In Florida, for example, less than twenty-five percent of adults-only condominiums qualified under any of

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83. *Id.* at 1035 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)).

84. *See id.* ("If Congress had not also acted to protect the rights of persons situated similarly to the [plaintiffs]—that is, older, potentially more vulnerable home owners and renters—perhaps plaintiffs' argument that the 1988 amendments were arbitrary and irrational might have some strength.")

85. *See id.* at 1035-36 (stating that the senior housing exemptions "are reasonable and rational in the light of a legitimate governmental purpose—curing familial status discrimination—[and therefore] the Act violates no due process rights of the [plaintiffs].") (For similar reasons, the court determined that the plaintiffs' right to freedom of association was not violated by the FHAA, noting that "if plaintiffs followed the exemption guidelines, they would lawfully be able to restrict occupancy based on age to an even greater degree than is the case in the condominium complex now." *Id.* at 1036.

86. *See id.*

87. *Id.* "[T]he Act violates no privacy rights because it stops at the [plaintiffs'] front door."  
*Id.*

88. *Id.* (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)).

the exemptions set forth in the FHAA.<sup>89</sup> Many condominium associations seeking to retain their adults-only status worried that the wording of their by-laws concerning age restrictions might prove inadequate under the FHAA, and many feared it would be difficult to muster the approval of two-thirds of the unit owners that is frequently required for a by-law change.<sup>90</sup> Some condominium board members were also concerned about the possibility of being personally sued for damages under the FHAA.<sup>91</sup>

Some critics of the FHAA claimed that the built-in enforcement provisions would be difficult to administer and would result in HUD administrative law courts being overburdened with age and familial status discrimination cases.<sup>92</sup> In fact, by the time the FHAA went into effect on March 12, 1989, about 12,800 familial discrimination complaints had already been filed.<sup>93</sup> During the first two years after the FHAA was implemented, about half of all HUD complaints alleged familial status discrimination; in 1992 and 1993, about twenty-six percent of HUD cases involved familial status discrimination.<sup>94</sup>

The majority of familial status cases brought under the FHAA involve two clauses of the statute: the provision requiring owners or managers of fifty-five-and-over housing to publish and adhere to procedures demonstrating their intent to provide qualified senior housing,<sup>95</sup> and the clause requiring such housing to provide "significant facilities and services" for the elderly.<sup>96</sup> The regulations promulgated by HUD in 1989 providing guidelines for measuring intent to comply with the FHAA by publishing and adhering to procedures were straightforward and specific,<sup>97</sup> but HUD has been reluctant to find housing providers in

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89. See Brooks, *supra* note 24.

90. See *id.*

91. See *id.* Being sued personally could be particularly burdensome because some condominium associations do not insure or indemnify board members for liability arising out of actions taken in their capacities as members of the board. See *id.*

92. See Allen, *supra* note 61, at 302.

93. See *id.* at 303.

94. See *id.* By early 1994, as many as two-thirds of the cases in which HUD found reasonable cause to find discrimination were family status cases. See *id.*

95. See 42 U.S.C. § 3607(b)(2)(C)(ii) (Supp. I 1996).

96. See Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6(d)(2), 102 Stat. 1619, 1623 (codified as amended at 42 U.S.C. § 3607(b)(2)(C)(i) (1994)).

97. See 24 C.F.R. § 100.304(c)(2) (1989). This regulation enumerated six factors to be considered in determining whether a housing provider met the standards of 42 U.S.C. § 3607(b)(2)(C)(ii): (1) the manner in which the housing facility was described to prospective residents; (2) the nature of advertising designed to attract prospective tenants; (3) age verification procedures; (4) lease provisions; (5) written rules and regulations; and (6) the actual practices of the owner or manager in enforcing lease or sale provisions and rules. See *id.* Although the regulation refers to "the owner or manager," a homeowner's association may qualify for

compliance.<sup>98</sup>

In *Massaro v. Mainlands Section 1 & 2 Civic Ass'n*,<sup>99</sup> the Eleventh Circuit considered whether a 529-unit housing complex in Florida had complied with the requirement that it publish and adhere to procedures demonstrating its intent to provide senior housing.<sup>100</sup> At issue in *Massaro* was a declaration of restrictions providing that "use of all the lots . . . [be] limited to permanent residents sixteen (16) years of age and older."<sup>101</sup> Pursuant to this restriction, in the fall of 1989, the association threatened action against the Massaros if they refused to remove their infant son from their home.<sup>102</sup> The Massaros filed a complaint against the association in federal court and an administrative complaint with HUD. A few months later, the association voted to amend its by-laws to restrict occupancy to adults fifty-five years of age and over.<sup>103</sup> The association thereafter notified another couple that the presence of their infant daughter in their home was a violation of the age restriction.<sup>104</sup> This second couple also filed a complaint against the association with HUD, which was ultimately consolidated with the Massaros' pending federal court action.<sup>105</sup>

In a rare ruling in favor of an adults-only community, the trial court found that the homeowners' association had met all the statutory requirements for the fifty-five-and-over housing exemption.<sup>106</sup> The Eleventh Circuit considered only whether the policies and procedures published and adhered to by the association at the time of the two couples' complaints were sufficient to qualify the complex as fifty-five-and-over housing under the FHAA. In assessing the policy in existence at the time of the Massaros' complaint, the court found that the restric-

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exemption under the FHAA if it performs functions of an owner or manager. See *Massaro v. Mainlands Section 1 & 2 Civic Ass'n*, 3 F.3d 1472, 1477 (11th Cir. 1993).

98. See, e.g., *HUD v. Nelson Mobile Home Park*, No. 04-91-0040-1, 1993 WL 498882, at \*1, \*9-10 (H.U.D.A.L.J. Dec. 2, 1993) (finding that the written regulations, description to prospective residents, and age verification procedures evidenced an intent to exclude children under 18 rather than to provide housing for persons 55 and over); *HUD v. Murphy*, Nos. 02-89-0202-1, 02-89-0203-1, 02-89-0204-1, 02-89-0205-01, 02-89-0206-1, 02-89-0209-1, 02-89-0212-1, 02-89-0213-1, 02-89-0243-1, 1990 WL 456962, at \*1, \*40 (H.U.D.A.L.J. July 13, 1990) (finding that a single billboard advertising an adults-only community did not meet the requirement).

99. 3 F.3d 1472 (11th Cir. 1993).

100. *Id.* at 1474.

101. *Id.*

102. See *id.* at 1474-75.

103. See *id.* at 1475.

104. See *id.*

105. See *id.* HUD investigated the two complaints and issued a final determination of familial status discrimination. The case was then referred to the Justice Department, which filed an action in federal court against the association. The Justice Department suit was consolidated with the Massaros' pending action. See *id.*

106. See *id.* at 1474.

tion against residency by persons sixteen years of age or under was insufficient to establish an intent to provide senior housing.<sup>107</sup> The Eleventh Circuit also held that restriction on occupancy by residents under fifty-five years of age, as contained in the amended by-laws, was not sufficient by itself to satisfy the requirements of the statute. The court specifically noted that the association had only enforced the age restriction against couples with children, rather than indiscriminately across the board.<sup>108</sup>

While not expressly ruling on the validity of the association's amended by-laws and policies, the court held that the complex did not qualify for the fifty-five-and-over exemption at the time of its actions against the two couples.<sup>109</sup> The major impact of *Massaro*, however, came in the court's approach to construing the FHAA exemptions. In a holding which has had profound implications on subsequent fair housing litigation, the *Massaro* court held that the exemptions contained in the FHAA "are to be narrowly construed to enforce the goals of the Act."<sup>110</sup>

Thus, the test for satisfying the "policies and procedures" requirement of the FHAA has been well established since *Massaro*. The "significant facilities and services" requirement, however, has proven considerably more problematic. The FHAA granted HUD the power to promulgate regulations enforcing this requirement;<sup>111</sup> however, the regulation HUD promulgated in 1989<sup>112</sup> was widely criticized for vagueness and has been the subject of frequent litigation.

In *HUD v. Nelson Mobile Home Park*,<sup>113</sup> an administrative law judge considered the case of an adults-only mobile home park in Florida. Although it claimed to meet the "significant facilities and services" requirement, the mobile home park provided few amenities for the elderly, including a clubhouse, petanque court, sporadic social events, and assistance in contacting the county "Meals on Wheels" program.<sup>114</sup> The

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107. *See id.* at 1479.

108. *See id.* at 1479-81. The court noted that there was no age screening of prospective purchasers prior to their settlement in the community, that the association had made no attempt to evict residents under fifty-five years of age other than those with children, and that the secretary of the association considered the age restriction unenforceable. *See id.* at 1481.

109. *See id.* at 1482.

110. *Id.* at 1480 (citing *Elliott v. City of Athens*, 960 F.2d 975, 979 (11th Cir. 1992)).

111. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 6(d)(2), 102 Stat. 1619, 1623 (codified as amended at 42 U.S.C. § (1994)).

112. *See* 24 C.F.R. § 100.304(b)(1) (1995). This regulation, which was repealed in 1995, provided several *categories* of services and programs that could be considered "significant facilities and services," but failed to specify any *particular* services or to provide guidance as to how many services a senior community must provide in order to qualify, stating merely that such housing facilities "need not have all of these features." *See id.*

113. No. 04-91-0040-1, 1993 WL 498882, at \*1 (H.U.D.A.L.J. Dec. 2, 1993).

114. *See id.* at \*6.



judge concluded that these services and facilities were insufficient to meet the "significant facilities and services" requirement. In reaching this conclusion, the judge specifically noted the lack of recreational facilities, educational programs, and informational services.<sup>115</sup>

The administrative judge next considered the mobile home park's contention that providing "significant facilities and services" for the elderly was impracticable and that it was therefore entitled to an exemption from that requirement under the HUD regulations.<sup>116</sup> The judge concluded that the park had failed to satisfy any of the factors specified in the regulation and that, moreover, the park had failed to provide reliable proof that eighty percent of the mobile homes in the park were occupied by persons fifty-five years of age or older.<sup>117</sup> In short, the judge concluded that the park "demonstrated a commitment to excluding children but not a commitment to promoting itself as housing for older persons."<sup>118</sup>

Other decisions have evidenced a similar reluctance to find that the amenities provided meet the "significant facilities and services" test.<sup>119</sup> For example, in *HUD v. Ocean Parks Condominium Ass'n*,<sup>120</sup> a HUD administrative law judge considered complaints brought against a luxury condominium in Florida by a man who had custody of his young daugh-

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115. *See id.*; *see also* *Rogers v. Windmill Pointe Village Club Ass'n*, 967 F.2d 525, 528 (11th Cir. 1992) (per curiam) (requirement not met where pool and tennis courts were not adapted to accommodate the needs of seniors and many housing units were not equipped to be physically accessible to older persons); *United States v. Keck*, Civ. A. No. C89-1664-C, 1990 WL 357064, at \*1, 3, 5 (W.D. Wash. Nov. 15, 1990) (requirement not satisfied by "routine park maintenance, a laundry room, cable TV, occasional distribution of a newsletter to tenants, weekly posting of items in or near the laundry room, and occasional advice and information provided on an ad hoc basis to tenants who inquire regarding transportation, local services, food programs and other matters").

116. The relevant regulation provided that housing complexes might qualify for the 55-and-over exemption if it was "not practicable" to provide significant facilities and services and if it proved that the provision of such services would "depriv[e] older persons in the relevant geographic area of needed and desired housing." 24 C.F.R. § 100.304(b)(2) (1995). The regulation provided seven factors to be considered in determining whether housing complexes qualified under this clause: (1) whether the owner or manager of the housing complex has made a bona fide effort to provide the necessary services; (2) the amount of rent charged or the sale price of the units; (3) the income range of the residents of the housing facility; (4) the demand for housing for older persons in the relevant geographic area; (5) the range of housing choices for older persons in the relevant geographic area; (6) the availability of similarly-priced housing for older persons in the relevant geographic area; and (7) the vacancy rate of the housing facility. *See id.* § 100.304(b)(2)(i)-(vii). Demonstrating that the provision of significant services and facilities is expensive is insufficient to show impracticability under the regulation. *See id.* § 100.304(b)(2)(i).

117. *See Nelson*, 1993 WL 498882, at \*7-9.

118. *Id.* at \*11.

119. *Id.* at \*2-3.

120. Nos. 04-90-0589-1, 04-90-0604-1, 1993 WL 316543, at \*1, 2, 3 (H.U.D.A.L.J. Aug. 20, 1993).

ter and an older couple with grandchildren.<sup>121</sup> In applying the “significant facilities and services” test, the judge noted that the complex did not employ an activities director, that resident-coordinated activities were sporadically attended, and that individual units were not accessible by wheelchair.<sup>122</sup> Proximity to outside services and stores was also found to be insufficient, as the condominium did not provide transportation for its residents and the outside services were accessible only by gravel paths that were not lit at night.<sup>123</sup> Furthermore, the condominium association did not provide services designed specifically for the elderly. The mere existence of a clubhouse and generic recreational facilities was insufficient to meet the test because the facilities were not fashioned primarily for older persons.<sup>124</sup>

Similarly, in *Lanier v. Fairfield Communities, Inc.*,<sup>125</sup> a federal district judge found that facilities not designed specifically for use by seniors did not meet the statutory test.<sup>126</sup> The Tenth Circuit in *United States v. Winters*<sup>127</sup> also applied this standard, affirming the trial court’s determination that a condominium’s luxurious amenities were not specifically designed for the elderly and that the complex therefore did not qualify as fifty-five-and-over housing under the statute.<sup>128</sup>

The confusion created by the “significant facilities and services” test and the difficult hurdle it posed for senior housing providers led to demands for clarification by HUD. Responding to these demands, Congress issued a mandate to HUD in 1992 to promulgate more definite rules outlining this requirement.<sup>129</sup> In response, HUD published a proposed rule in July 1994 clarifying the meaning of “significant facilities and services.”<sup>130</sup> However, overwhelming public disapproval forced

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121. See Andrea D. Panjwani, *Beyond the Beltway: The Housing for Older Persons Act of 1995*, J. Affordable Housing & Community Dev. L., Spring 1996, at 197, 198 (stating that senior communities rarely prevailed in litigation under the Fair Housing Amendments Act).

122. See *id.* at \*12, 32.

123. See *id.* at \*12.

124. See *id.* at \*31.

125. 776 F. Supp. 1533, 1535-37 (M.D. Fla. 1990).

126. *Id.* at 1535-37.

127. Nos. 93-2278, 94-2025, 1994 WL 582419, at \*1, 38 F.3d 1221 (10th Cir. Oct. 20, 1994) (unpublished table decision).

128. *Id.*

129. See Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 919, 121, 106 Stat. 3672, 3883. Congress enacted this legislation as a result of its dissatisfaction with the “continuing failure of [HUD] to issue timely regulations and [because of] HUD’s refusal to implement enacted provisions.” See H.R. REP. No. 102-760, at 73 (1992), reprinted in 1992 U.S.C.C.A.N. 3281, 3353. Among the provisions of this act was a directive to HUD to “make rules defining what are ‘significant facilities and services especially designed to meet the . . . needs of older persons’ . . .” § 919, 106 Stat. at 3883.

130. See 59 Fed. Reg. 34,902 (1994) (to be codified at 24 C.F.R. pt. 100) (proposed July 7, 1994).

HUD to withdraw this rule later that year.<sup>131</sup>

Following the debacle of the July 1994 proposal, HUD held nationwide hearings in the fall of 1994, culminating in the promulgation of a revised set of regulations on August 18, 1995.<sup>132</sup> These regulations defined "significant facilities and services" in greater detail, stating that a housing facility qualified if it provided at least two services or programs in at least five of twelve specific categories.<sup>133</sup> The regulations also provided a detailed guideline for determining whether facilities and services were sufficiently available to community residents to qualify under the statute,<sup>134</sup> and provided a self-certification provision by which senior communities could certify compliance with the regulation by completing a short checklist.<sup>135</sup>

#### IV. THE HOUSING FOR OLDER PERSONS ACT OF 1995: TOO MUCH SIMPLIFICATION?

The 1995 HUD regulations, however, never took effect.<sup>136</sup> A movement to eliminate the "significant facilities and services" requirement had been building for some time, spurred on by the perception that the requirement set an impossibly high hurdle. Even as HUD revised its regulations to achieve greater clarity, this movement achieved its goal.

At the heart of this movement was the view that statutory compliance was prohibitively expensive and that courts had set an impossibly high standard for qualifying for the fifty-five-and-over exemption. Critics of the FHAA pointed out that HUD and the courts had allowed very

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131. See 59 Fed. Reg. 64,104 (1994).

132. See 60 Fed. Reg. 43,322, 43,327-30 (1995) (to be codified at 24 C.F.R. pt. 100 (proposed July 31, 1995)).

133. See *id.* at 43,328-29. The 12 categories delineated included social and recreational services, continuing education activities, information and counseling services, homemaker services, outside maintenance health and safety services, emergency and preventive health care programs, community dining, transportation to outside social services, services designed to encourage residents to use available facilities, social and recreational facilities, accessible physical environment, and other facilities specifically designed to meet the needs of the elderly. Each category except the last included a list of a number of specific activities, programs, or facilities qualifying as services for the elderly. See *id.*

134. See *id.* at 43,329.

135. See *id.* at 43,329-30, 43-332-33.

136. These regulations might nevertheless ultimately have more than historical interest. At least one federal court has found that the Housing for Older Persons Act of 1995 does not apply retroactively. See *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 839 (9th Cir. 1997), *amended in part by* 125 F.3d 1281 (9th Cir. 1997). Thus, a pattern of discrimination that occurred in the three-month period between promulgation of the 1995 HUD regulations and passage of the Housing for Older Persons Act would conceivably fall within the scope of the regulations. The 1995 regulations are also of continuing usefulness as indicators of intent to provide housing for adults fifty-five years of age and over. See *infra* text accompanying notes 191-92.

few senior housing communities exempt status,<sup>137</sup> and that the statutory requirements were so nebulous and vaguely worded that courts and HUD could interpret them in any way they chose.<sup>138</sup>

Opponents further contended that the "significant facilities and services" requirement discriminated against low-income senior citizens by imposing prohibitively expensive compliance standards, thus raising the price of senior housing beyond what many low-income seniors could afford.<sup>139</sup> This complaint was particularly common among owners and managers of mobile home parks, which generally provided the fewest amenities for the least affluent tenants.<sup>140</sup> Other opponents of the FHAA opined that the "significant facilities and services" requirement was patronizing in that it attempted to impose services on seniors that they might not need or want, in other words, that the federal government was telling seniors how to live.<sup>141</sup>

These arguments had dubious merit, however, especially in light of the 1995 regulations, which defined the statutory requirements much more explicitly and set clear compliance standards. Furthermore, compliance need not be prohibitively expensive. Despite opponents' charac-

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137. See Allen, *supra* note 61, at 317 (reporting that only two trial court decisions have ever granted a fifty-five-and-over exemption to housing providers, and that one of those was reversed on appeal); see also S. Rep. No. 104-172, at 9 (1995), reprinted in 1995 U.S.C.C.A.N. 778, 785-86 (quoting an *Orlando Sentinel* article in which it was reported that "lawyers could not find a single instance in which a senior community was able to defend successfully against a challenge to its exempt status").

138. See S. REP. NO. 104-172, at 5 (1995), reprinted in 1995 U.S.C.C.A.N. 778, 781 (Nov. 9, 1995) ("The . . . requirement has been a disaster since the housing for older persons exemption was passed as an exception to the general rule prohibiting discrimination against families with children in 1988. Nobody, including the Government, can figure out what the phrase 'significant facilities and services' means."); see *id.* at 11, reprinted in 1995 U.S.C.C.A.N. at 787 (referring to "significant anecdotal evidence of rather arbitrary decisions by fair housing investigators"); 141 CONG. REC. S18,063, S18,064 (daily ed. Dec. 6, 1995) (statement of Sen. Brown) (contending that "the way bureaucrats have administered [the significant facilities and services requirement] would make the people who came up with the Mississippi literacy test proud").

139. See S. REP. NO. 104-172, at 5 (1995), reprinted in 1995 U.S.C.C.A.N. 778, 781-82; see also 141 CONG. REC. S18,063, S18,065 (daily ed. Dec. 6, 1995) (statement of Sen. Brown) ("The problem [was] that the seniors housing exemption could only be allowed for facilities that were designed for the very wealthy. So we have a circumstance where, if you followed the existing HUD regulations, the rich could enjoy the exemption but the normal seniors could not.").

140. See, e.g., *Fair Housing and Exemptions for the Elderly: Hearings on H.R. 660 Before the Subcomm. on the Constitution, Federalism and Property Rights of the Senate Comm. on the Judiciary*, 104th Cong. (1995) (testimony of Kristian Jensen, CEO, Jensen's Inc.) available in 1995 WL 460655. Jensen, who was the owner of twenty-six family-managed mobile home parks in 7 states, of which twenty-two were reserved for persons fifty-five or over, testified that, "[t]he facilities and services requirements can increase the cost of housing for seniors who are often on fixed incomes . . . . The cost of facilities and services must be passed on in the form of lease or association fees to residents in these communities." *Id.*

141. See S. REP. NO. 104-172, at 9 (1995), reprinted in 1995 U.S.C.C.A.N. 778, 785 ("[Seniors] don't want or need to be told by the federal government how to live.").

terization of the 1995 HUD regulations as “federal bingo mandates,”<sup>142</sup> most of the programs and services on the HUD list were basic amenities for senior populations.<sup>143</sup> In short, the existence or non-existence of such facilities and services provided an effective way to determine whether an adult development was in fact designed to provide comfort to seniors or whether it was merely intended to exclude children.

Furthermore, compliance with the HUD regulations would not necessarily have been prohibitively expensive for developers. These regulations did not prevent housing providers from passing along to residents the cost of compliance. In addition, many renovations necessary to comply with other statutes, such as those mandating handicapped-accessible facilities, could also be used to comply with the regulations.<sup>144</sup> Finally, the “significant facilities and services” requirement could be waived in cases in which a senior community could demonstrate a pressing need for senior housing in its immediate area.<sup>145</sup>

Nevertheless, the movement to eliminate the “significant facilities and services” requirement proceeded, leading to the introduction of the Housing for Older Persons Act of 1995 in the House of Representatives. In addition to eliminating the “significant facilities and services” requirement,<sup>146</sup> that act also created a “good-faith defense” protecting those senior communities that sought in good faith to comply with the statutory requirements without being liable for monetary damages.<sup>147</sup>

Critics of the proposed act were quick to argue that outright elimination of the “significant facilities and services” requirement was too drastic a step. Some, in fact, contended that the Housing for Older Per-

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142. *See id.*

143. For example, a community could comply under the 1995 regulations by providing the following 10 facilities or services: referrals to housecleaning services, a tool loan service, security guards, meals on wheels, the presence of a doctor within two miles of the facility, monthly blood pressure checks, a community room, a television room with a community VCR, ramps (curbs cut to allow wheelchair access), and a handicapped-accessible management office. *See* 60 Fed. Reg. 43,322, 43,328-29 (1995) (to be codified at 24 C.F.R. § 100.306(c)-(d)). It would be difficult to argue that providing these services would be prohibitively expensive even for a moderate-income senior community.

144. *See id.* at 43,329 (to be codified at 24 C.F.R. § 100.306(d)(11)) (including in the list of qualifying facilities and services “accessible physical environment” facilities including benches, ramps, accessible management offices, and accessible public bathrooms).

145. *See id.* at 43,330 (to be codified at 24 C.F.R. § 100.310).

146. *See* S. Rep. No. 104-172, at 3 (1995), *reprinted in* 1995 U.S.C.C.A.N. 778, 780.

147. *See* Housing for Older Persons Act of 1995, Pub. L. No. 104-76, § 3, 109 Stat. 787, 787-88 (codified as amended at 42 U.S.C. § 3607(b)(5) (Supp. I 1996)). Housing providers may only show good faith by showing that they have no actual knowledge that the housing community in question does not comply with the statute and that they have stated formally, in writing, that the community complies with the exemption requirements. *See id.* (codified at 42 U.S.C. § 3607(b)(5)(B) (Supp. I 1996)). For further discussion of the legislative history and purpose of the good faith defense, see Panjwani, *supra* note 121, at 200.

sons Act would in effect amount to a rollback of the FHAA.<sup>148</sup> These critics argued that the proposed act would not only reverse seven years of progress in curtailing discrimination based on familial status, but would also endanger the unique character of retirement communities that had grown up since passage of the FHAA.<sup>149</sup>

In other words, many of the communities that would thereafter be eligible for designation as “senior communities” would lack the amenities that characterize a community designed specifically for seniors, and would offer the senior population nothing more than a child-free environment.<sup>150</sup> Not only would families with children suffer as a result of the ease with which communities not specifically designed for seniors could designate themselves to be age-restricted developments, but seniors would also be harmed by the economically-driven tendency of builders to offer only the minimum level of services necessary to comply with the statutory requirements. In short, the proposed legislation was seen as having the potential to reduce the level of available services and facilities at all senior communities to that of mobile home parks. This was a dual mistake in the eyes of the act’s opponents, who contended that “if you’re going to be able to discriminate against families, you should be special—and you should be serving the special needs of seniors.”<sup>151</sup>

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148. See, e.g., *Fair Housing and Exemptions for the Elderly: Hearings on H.R. 660 Before the Subcomm. on the Constitution, Federalism and Property Rights of the Senate Comm. on the Judiciary*, 104th Cong. (1995) (statement of Stuart Ishimaru, Assistant Att’y Gen., U.S. Dep’t of Justice) available in 1995 WL 469531 (“Enactment of [the Housing for Older Persons Act] would weaken anti-discrimination protection based on familial status, and would allow the very proliferation of ‘all-adult’ housing facilities the [Fair Housing Amendments Act] sought to proscribe.”).

149. See *id.*

150. See, e.g., 141 CONG. REC. 518,063, 518,068 (daily ed. Dec. 6, 1995) (statement of Sen. Biden) (“What we were not concerned about [when the FHAA was enacted] is a community for the elderly with special needs where they needed ramps, where they needed special dining facilities, where there was some type of extended care, where it was in fact designed for elderly persons . . . , [and the FHAA was not enacted] just because all of a sudden we [had] become trendy and decided that kids are kind of in the way.”). See also *id.* (contending that, under the proposed act, a housing community does “not have to be a senior facility. [It] can just not like kids. [It] can just not like kids around.”). Opponents of the proposed act also contended that:

[T]he elimination of the significant facilities and services provisions . . . subverts the justification for allowing certain seniors communities to discriminate against families with children. That is, that the exception is necessary in order to facilitate senior’s [sic] ability to live in environments that are . . . “tailored to their specific needs.” In other words, the requirement was intended to ensure that housing communities claiming this exemption were indeed legitimate retirement communities designed to meet the specific needs of senior citizens [and] not just communities of seniors united by their preference to not live around children.

S. REP. NO. 104-172, at 13 (1995), reprinted in 1995 U.S.C.C.A.N. 778, 789.

151. See S. REP. NO. 104-172, at 15 (1995) reprinted in 1995 U.S.C.C.A.N. 778, 791. In addition, Sens. Paul Simon, Edward F. Kennedy, and Russell Feingold, although they voted in

"Children's advocacy groups, however, were "no match for the well-funded seniors' lobby."<sup>152</sup> The Housing for Older Persons Act of 1995 passed in both houses with only token opposition,<sup>153</sup> and became law on December 28, 1995.<sup>154</sup> On April 1, 1996, HUD promulgated new regulations reflecting the elimination of the "significant facilities and services" requirement from the statute.<sup>155</sup>

#### V. APPLYING THE HOUSING FOR OLDER PERSONS ACT: A DISTRICT COURT TAKES A PRO-FAMILY STANCE

Although at least one federal court has determined that the Housing for Older Persons Act of 1995 does not apply retroactively,<sup>156</sup> only one reported state or federal decision has thus far construed the substantive provisions of the act. In *Simovits v. Chanticleer Condominium Ass'n*,<sup>157</sup> the court took a resoundingly pro-family stance, holding that the 1995 amendments to the Fair Housing Act did not preclude the court from strictly construing the remaining requirements of the FHAA.<sup>158</sup> In so doing, the *Simovits* court signalled that, despite the predictions of certain commentators,<sup>159</sup> the federal judiciary retains the power to combat discrimination if it has the will to do so.

*Simovits* was not a remarkably difficult test case. Stephen and Kathleen Simovits owned a condominium in the Chanticleer Condominium Complex, an eighty-four-unit facility located in Hinsdale, Illi-

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favor of the proposed statute, expressed their intention to "monitor" the effects of the Housing for Older Persons Act with an eye to repeal if discrimination increased. See Panjwani, *supra* note 121, at 200-01.

152. Allen, *supra* note 61, at 319.

153. On November 19, 1995, the House of Representatives passed the proposed act by an overwhelming 424-5 vote. The Senate passed the act, as amended, on December 6, 1995, by a vote of 94-3. See 141 CONG. REC. S18,063, S18,070 (daily ed. Dec. 6, 1995). On December 18, 1995, the House concurred in the Senate amendment in a non-roll-call vote. See 141 CONG. REC. H14,966, H14,972 (daily ed. Dec. 18, 1995).

154. See Housing for Older Persons Act of 1995, Pub. L. No. § 104-76, 109 Stat. 787 (codified as amended at 42 U.S.C. § 3607(b)(2)(C), (5) (Supp. I 1996)).

155. See 61 Fed. Reg. 14,378 (1996) (removing 24 C.F.R. §§ 100.305, .306, .307, .310, .315, .316, including the "significant facilities and services" checklist certification).

156. See *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 839 (9th Cir.), *amended in part by* 125 F.3d 1281 (9th Cir. 1997). In reaching its conclusion, the court noted that "nothing in the language or history of the [act] indicates that Congress intended it to apply to cases predating its enactment" and that retroactivity was disfavored because "applying the [act] would substantially alter the legal rights and obligations of both housing providers and residents." *Id.* at 839. The court also found that retroactive application would conflict with the general federal savings statute, 1 U.S.C. § 109 (1994), which provides that a change in statutory law does not extinguish any pre-existing liability incurred under a prior statute. See *id.*

157. 933 F. Supp. 1394, 1402 (N.D. Ill. 1996).

158. *Id.* at 1402.

159. *Cf., e.g.,* Allen, *supra* note 61, at 311 (contending that pro-family precedent might be irrelevant since the enactment of the Housing for Older Persons Act of 1995).

nois.<sup>160</sup> In 1985, the condominium association had adopted a restrictive covenant which provided that “no minor children under the age of eighteen (18) years may reside in any unit purchased after the effective date of this amendment’ without the prior written approval of the Board of Managers.”<sup>161</sup> Although many residents were over the age of fifty-five years, there was no requirement to that effect.<sup>162</sup> In fact, the association president described the complex as “intended for people who are ‘any age over 18,’”<sup>163</sup> and units had been sold to persons under fifty-five.<sup>164</sup>

The roots of *Simovits* began in 1993, when the plaintiffs purchased their condominium for \$130,000.<sup>165</sup> Prior to the closing, the restrictive covenant was explained to them. Although Mr. Simovits informed the association board that he believed the covenant was illegal, the plaintiffs signed a statement agreeing to abide by its restrictions.<sup>166</sup> Until the plaintiffs attempted to sell their apartment, nothing further came of their objection to the restrictive covenant.

In May 1995, the plaintiffs put their condominium up for sale, at the initial asking price of \$187,500.<sup>167</sup> A prospective buyer expressed interest in the condominium; however, the plaintiffs decided not to negotiate with her “because she had a minor child and they did not wish to cause any problems.”<sup>168</sup> Subsequently, due to a lack of interested buyers, they were forced to lower their asking price twice, reducing it by almost \$20,000.<sup>169</sup>

In early November, another buyer expressed interest in the condominium. This time, the prospective buyer was the parent of three minor children.<sup>170</sup> The plaintiffs informed the president of the association that they had a potential buyer with minor children.<sup>171</sup> The president reminded them and their realtor of the covenant forbidding sales to families with children under eighteen, following which the prospective buyer

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160. See *Simovits* 933 F. Supp. at 1397.

161. *Id.* Residents violating this covenant were subject, by the terms of their ownership agreement, to injunctive relief and a \$10,000. See *id.*

162. See *id.*

163. *Id.*

164. See *id.* The last two sales of Chanticleer units prior to the trial in the case were to persons under the age of fifty-five. See *id.*

165. See *id.*

166. See *id.* Mr. Simovits testified at trial that his lawyer told him that, “despite his belief regarding the illegality of the Covenant, he had to sign this statement in order to finalize the closing on the condominium.” *Id.* at 1397 n.3.

167. See *id.* at 1397.

168. *Id.*

169. See *id.*

170. See *id.* at 1397, 1398.

171. See *id.*



decided not to make an offer.<sup>172</sup> On November 8, 1995, counsel for the association called the plaintiffs and warned them again that they were prohibited from selling to persons with minor children.<sup>173</sup>

The association's attorney had a somewhat different message for the board. In a letter to the association, he opined that "the statutory exemptions to the [Fair Housing Act] are 'strictly construed'" and that the restrictive covenant was of "questionable legality."<sup>174</sup> In a meeting held on November 14, however, the board decided to continue to prevent the plaintiffs from selling to a buyer with minor children.<sup>175</sup>

The association prepared for litigation by conducting an informal survey of condominium residents in order to determine the percentage who were fifty-five years of age or older.<sup>176</sup> However, "in compiling the survey, [the association president] speculated as to the residents' ages . . . [and] did not take any steps to verify these presumptions."<sup>177</sup> In a second survey taken in May 1996, in preparation for a hearing, the president obtained affidavits verifying the ages of some residents, but he "resorted to guessing the ages of those residents who did not submit an affidavit."<sup>178</sup>

In the meantime, on April 15, 1996, the plaintiffs entered into a contract to sell their apartment for \$145,000 to a childless couple.<sup>179</sup> Shortly thereafter, plaintiffs filed suit in federal court under the Fair Housing Act, alleging that the restriction had denied them "numerous opportunities to sell their condominium at a higher price."<sup>180</sup> They were joined in their lawsuit by a non-profit fair housing agency.<sup>181</sup>

The parties agreed to expedited discovery and trial, and the case was tried less than six weeks after the plaintiffs had filed suit.<sup>182</sup> Thus, the *Simovits* case provided a remarkably early first opportunity to examine the Housing for Older Persons Act. Because the allegedly discriminatory conduct continued beyond the enactment of the 1995 amendments to the Fair Housing Act and the subsequent HUD regulations, the issue of retroactivity was not raised, and the amended statute

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172. *See id.* at 1398.

173. *See id.*

174. *Id.*

175. *See id.*

176. *See id.*

177. *Id.*

178. *Id.*

179. *See id.* Ironically, the association agreed to waive the covenant for these prospective buyers, who were young and wished to start a family. *See id.* It is unclear why the association was unwilling to take such a step earlier.

180. *Id.*

181. *See id.* at 1394, 1398.

182. A bench trial was held before Magistrate Judge Arlander Keys on May 23 and 24, 1996. *See id.* at 1396, 1397 n.1.

was applied.<sup>183</sup>

The association's argument rested upon a single slender reed. It admitted that it had never published or adhered to policies or procedures demonstrating an intent to provide housing to persons fifty-five years of age or older.<sup>184</sup> Further, the association failed to implement age verification procedures prior to being sued.<sup>185</sup> In short, by failing to comply with the HUD regulations,<sup>186</sup> the association "ha[d], in fact, conceded its liability under the Fair Housing Act."<sup>187</sup>

In an effort to avoid "conced[ing] its liability," the association argued that by enacting the Housing for Older Persons Act, Congress intended that the 1995 regulations would no longer apply. In response to this argument, the *Simovits* court quoted the admonition of *Massaro* that "exemptions from the Fair Housing Act are to be construed narrowly, in recognition of the important goal of preventing housing discrimination."<sup>188</sup> In effect, the association argued that Congress intended to go beyond the plain language of the Housing for Older Persons Act and provide a liberal exemption for adults-only communities regardless of their intent to provide senior housing.

The court disagreed.<sup>189</sup> In rejecting the association's argument, however, the court went beyond the holding that would necessarily dispose of this relatively easy case. Rather, the court went a step further and reaffirmed the principles of *Massaro*, setting the stage for strict application of the remaining statutory requirements in future familial discrimination cases.<sup>190</sup> The court stated that "[c]learly, only the provisions relating to the 'significant facilities and services requirement' were deleted" by the 1995 amendments.<sup>191</sup> The court further stated that Congress' purpose was specifically and narrowly "to eliminate the burden of the 'significant facilities and services' requirement,"<sup>192</sup> and that "nothing in the legislative history suggests that Congress intended the policies and procedures prong to change."<sup>193</sup>

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183. *See id.* at 1401 n.15.

184. *See id.* at 1402.

185. *See id.* at 1403.

186. *See* 60 Fed. Reg. 43,322, 43,330 (1995) (to be codified at 24 C.F.R. § 100.316(b)(1)-(6)).

187. *Simovits*, 933 F. Supp. at 1402; *see also* *Rogers v. Windmill Pointe Village Club Ass'n*, 967 F.2d 525, 527-28 (11th Cir. 1992) (per curiam) (holding that occupancy may not be established by testimony alone or by mere survey without further information as to its methods and validity).

188. *Simovits*, 933 F. Supp. at 1402 n.18 (quoting *Massaro*, 3 F.3d at 1475).

189. *See id.* at 1402.

190. *See id.* at 1402 n.18.

191. *Id.* at 1402.

192. *Id.* (quoting S. REP. NO. 104-172, at 2 (1995), reprinted in 1995 U.S.C.C.A.N. 778, 779).

193. *Id.* The court noted that "the statutory language describing the [policies and procedures] test in the amended statute is exactly the same as it was in the old statute." *Id.*

Thus, the court concluded that “because the policies and procedures prong remains entirely unchanged, so do the criteria for analyzing it.”<sup>194</sup> Based on this principle, and on the standards previously articulated by HUD and by the Eleventh Circuit in *Massaro*, the court found that the absence of an explicit rule or regulation restricting occupancy to persons fifty-five years of age or older and the failure to verify the ages of the condominium residents placed the covenant outside the exemption provided by the Fair Housing Act.<sup>195</sup> Significantly, the court found the association’s argument that it was “in effective compliance” with the fair housing law unpersuasive in light of the principles set forth in *Massaro*.<sup>196</sup> Compliance with the Fair Housing Act, said the court, was to be measured just as strictly as it had been prior to the 1995 amendments, with the removal of the “significant facilities and services” requirement as the only relaxation.

Thus, despite the somewhat unsympathetic plaintiffs in *Simovits*,<sup>197</sup> the court converted a straightforward case into a powerful statement against discrimination. Of course, it remains to be seen whether *Simovits* will be followed by other courts, and what ultimate effect the Housing for Older Persons Act will have on the availability of housing for families with children. *Simovits* suggests that there may be little real-world effect; however, another appellate court has opined that the amendments effected by the Housing for Older Persons Act “substantially alter the legal rights and obligations of both housing providers and residents.”<sup>198</sup> Regardless of whether the remaining statutory requirements are strictly construed, it is clear that the 1995 amendments removed a significant hurdle to obtaining the fifty-five-and-over exemption. At the same time, however, communities qualifying for exemption as a result of these amendments may in fact lack many of the amenities that seniors have come to expect. Moreover, the elimination of the “significant facilities and services” requirement removes a safeguard—however controversial and often litigated—that has proven important over

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194. *Id.*

195. *See id.* at 1403.

196. *See id.* at 1402 n.18. “The Association’s argument for ‘effective compliance’ directly conflicts with [*Massaro*’s] principle of narrow construction.” *Id.*

197. The association asserted laches and unclean hands as defenses to the complaint, on the grounds that the plaintiffs had not challenged the covenant until they put their apartment up for sale and that Mr. Simovits had earlier run for a position on the association board on a platform indicating support for the covenant. *See id.* at 1397, 1404-05.

198. *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 839 (9th Cir.), *amended in part by* 125 F.3d 1281 (9th Cir. 1977). *See also* Panjwani, *supra* note 121, at 201 (stating that the Housing for Older Persons Act might lead to an increase in the number of adults-only communities which qualify for the 55-and-under exception because developments in which less than 50 percent of the population is over 55 years of age may qualify under the new baseline standard).

the last nine years in preventing discrimination against families with children.

## VI. CONCLUSION

The substantial difficulties in obtaining and retaining senior community status under the Fair Housing Amendments Act of 1988 led to a change in the statute. By eliminating the "significant facilities and services" requirement, however, the Housing for Older Persons Act of 1995 may have gone too far. The arguments put forth by critics of the 1995 act, combined with evidence that housing discrimination against families with children continues to pervade society,<sup>199</sup> are sufficient to raise realistic concerns that the Housing for Older Persons Act may result in increased discrimination against children. Furthermore, many housing complexes that would qualify for exempt status under the act might be senior communities in name only, with few or no amenities designed to fulfill the needs of elderly residents.

*Simovits* shows a commitment by at least one federal court to go as far as possible, within the current law, to protect families against invidious discrimination by realtors and developers. If this commitment is to be perpetuated throughout the nation, however, both federal and state officials must pursue additional measures to preserve the rights of families with children while simultaneously accommodating the needs of seniors.

At the federal level, it seems unlikely that Congress will repeal the Housing for Older Persons Act or reinstate the requirement for "significant facilities and services." As the *Simovits* court pointed out, however, the requirement of demonstrating an intent to provide specialized housing for seniors was not eliminated by the 1995 act.<sup>200</sup> With this in mind, there is nothing preventing courts from continuing to consider the availability of such services in determining whether housing providers in fact demonstrate the requisite intent to serve adults fifty-five and over, which is necessary to obtain exemption from the anti-discrimination provisions of the Fair Housing Act. One federal court, in fact, has done exactly that, although it dealt with a claim that accrued before the 1995 amendments.<sup>201</sup>

Courts should also follow *Simovits* by applying strict standards to

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199. See Allen, *supra* note 61, at 303-04 (citing various statistics including a 1992 housing discrimination audit in Oakland reporting that 68% of housing providers continued to discriminate against families with children despite the Fair Housing Amendments Act).

200. See *Simovits*, 933 F. Supp. at 1401-03.

201. See *Tropics Residents Club v. California Tropics Investors* 1992, No. C-95-3979 MHP, 1997 U.S. Dist. LEXIS 14292, at \*1, \*32 n.17 (N.D. Cal. May 5, 1997).

determine whether seniors communities "publish and adhere to policies and procedures" as required to obtain the fifty-five-and-over exemption. With the availability of the good-faith defense provided by the Housing for Older Persons Act to shield well-meaning senior communities from costly monetary damages, courts can easily justify a requirement of strict statutory compliance in order to protect families with children.

At the state level, many jurisdictions continue to require senior communities to provide "significant facilities and services" to their residents in order to qualify for exempt status under state anti-discrimination laws.<sup>202</sup> These states should not be as quick to amend their statutes to conform to federal law as they have been in the past.<sup>203</sup> Federal law

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202. As of this writing, 21 states have "significant facilities and services" requirements. *See* ALA. CODE § 24-8-3(7)(c)(1) (Supp. 1997); COLO. REV. STAT. ANN. § 24-34-502(7)(b)(I) (West 1990 & Supp. 1997); DEL. CODE ANN. tit. 6, § 4602(15)(c)(1) (1993); GA. CODE ANN. § 8-3-205(b)(1)(C)(i) (1997); IND. CODE ANN. § 22-9.5-3-4(c)(1) (West Supp. 1997); IOWA CODE ANN. § 216.12(4)(a) (West Supp. 1997); KAN. STAT. ANN. § 44-1018(c)(2)(A) (1993); LA. REV. STAT. § 51:2605(C)(1)(a) (West Supp. 1998); MINN. STAT. ANN. § 363.02(2)(2)(b)(iii)(A) (West Supp. 1998); MO. ANN. STAT. § 213.040(9)(3)(a) (West 1996); NEB. REV. STAT. § 20-322(4)(b)(iii)(A) (1997); N.H. REV. STAT. ANN. § 354-A:15(IV)(a) (1995); N.J. STAT. ANN. § 10:5-5(mm)(3)(a) (West Supp. 1997); N.C. GEN. STAT. § 41A-6(e)(3) (1990); R.I. GEN. LAWS § 34-37-4.1(a)(5)(ii) (1995); S.C. CODE ANN. § 31-21-30(8)(c)(i) (Law. Co-op. 1991); TENN. CODE ANN. § 4-21-602(f)(2)(A)(ii) (Supp. 1997); VT. STAT. ANN. tit. 9, § 4503(b)(2)(A) (1993); VA. CODE ANN. § 36-96.7(A)(1) (Michie 1996); W. VA. CODE § 5-11A-8(b)(2)(C) (1994); WIS. STAT. ANN. § 106.04(5m)(a)(1e)(a) (1997).

203. Since the Housing for Older Persons Act was enacted, five states have amended their fair housing laws to conform to the relaxed federal standards. *See* Act of July 18, 1996, No. 89-520, § 5, 1996 Ill. Legis. Serv. 2253, 2254-55 (West) (codified at 775 ILL. COMP. STAT. ANN. 5/3-106(I) (West Supp. 1997)); Act of Apr. 11, 1997, ch. 85, 1997 Me. Legis. Serv. 669 (West) (codified at ME. REV. STAT. ANN. tit. 5, § 4581(2)(C) (West Supp. 1997)); Act of Apr. 2, 1997, ch. 194, 1997 Mont. Laws 194 (codified at MONT. CODE ANN. § 49-2-305(10) (1997)); Act of June 9, 1997, ch. 235, 1997 Or. Laws 235 (to be codified at OR. REV. STAT. § 659.033); Act of May 16, 1997, ch. 400, § 3, 1997 Wash. Legis. Serv. 1783, 1787-88 (codified at WASH. REV. CODE ANN. § 49.60.222(6) (West Supp. 1998)). In addition, the Wisconsin Assembly passed a bill that would amend Wisconsin Statutes § 106.04(5m)(a)(1e)(a) to eliminate the "significant facilities and services" requirement. *See* H.R. 46, 93d Leg., Reg. Sess. (Wis. 1997). The bill is currently awaiting action by the Wisconsin Senate. This legislation is in keeping with a general trend among state fair housing laws to maintain parity with federal standards. *See, e.g.*, Act of Apr. 11, 1997, ch. 85, 1997 Me. Legis. Serv. 669 (West) (captioned "An Act to Conform State Laws Regarding Fair Housing for Older Persons with Federal Laws"). In fact, the fair housing laws of seven states specifically provide that housing for older persons shall be evaluated according to Federal standards. *See* CAL. GOV'T CODE § 12955.9(b)(2)-(3) (Deering Supp. 1997); CONN. GEN. STAT. ANN. § 46a-64b(6) (West 1995); HAW. REV. STAT. ANN. § 501-231(b)(1) (Michie Supp. 1997); KY. REV. STAT. ANN. § 344.365(3) (Michie Supp. 1997); MD. ANN. CODE art. 49B, § 20(l)(I)(iv) (1994); MONT. CODE ANN. § 49-2-305(10)(c) (1997); WASH. REV. CODE ANN. § 49.60.222(6) (West Supp. 1998). Of these, the California definition is particularly intriguing in that it specifically provides that the California exemption shall be equivalent to that provided in the FHAA and implementing regulations, without reference to amendments. *See* CAL. GOV'T CODE § 12955.9(b)(2)-(3) (Deering Supp. 1997). Thus far, it appears that no California court has determined whether the Housing for Older Persons Act operates to alter the scope of the senior exemption under the California statute.

specifically permits states to provide protection equal to or greater than that provided by the Fair Housing Act;<sup>204</sup> thus, states are free to retain the family-friendly "significant facilities and services" requirement of the FHAA. Those states that retain this requirement should evaluate it on the merits, and not eliminate it solely to maintain parity with federal standards.

If the "significant facilities and services" requirement is retained, some mechanism should be established to prevent suits under the fair housing laws from crippling housing providers. One recently suggested possibility, is pre-certification of senior communities.<sup>205</sup> Under a variation on this mechanism, a condominium or other housing development intending to qualify for the senior housing exemption would submit a draft charter and facilities plan to HUD or to a competent state agency. That agency would then approve or disapprove the application for fifty-five-and-over exemption status. Approval would establish the facility's status as a senior community without resort to costly and potentially disastrous litigation. A pre-certification statute could also provide for a rebuttable presumption that any complex receiving agency approval complies with the statute, placing the burden of proof on the aggrieved party to show that the community does not meet statutory requirements.<sup>206</sup>

If such a mechanism were enacted at the state level in conjunction with clearly-defined "significant facilities and services" regulations similar to those promulgated by HUD in 1995, then families with children would be protected from discrimination while seniors would still be assured of affordable housing with amenities suited to their needs. The anti-discrimination aim of the FHAA would be met, and seniors, and senior communities, would be able to enjoy the convenience of adult housing without the inconvenience of murky statutory provisions and the constant threat of lawsuits.

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204. See 42 U.S.C. § 3615 (1994). It is noteworthy that at least one state fair housing law contains no senior housing exemption at all. See Theresa M. Beiner, *An Overview of the Arkansas Civil Rights Act of 1993*, 50 ARK. L. REV. 165, 212 (1997).

205. Elena R. Minicucci, Note, *Housing for Older Persons Exemption in the Fair Housing Amendments Act of 1988: Can Mr. Wilson Really Stop Dennis the Menace from Moving in Next Door?*, 19 NOVA L. REV. 761, 790-92 (1995).

206. This would change the existing allocation of the burden of proof in federal fair housing litigation, under which the defendant must prove compliance with the statutory requirements. See *Simovits v. Chanticleer Condominium Ass'n*, 933 F. Supp. 1394, 1401 (N.D. Ill. 1996). Reallocating the burden of proof would be a fair means of removing some of the burdens of litigation from housing communities making good-faith efforts to comply with fair housing statutes. In addition to being consistent with the ordinary rule which places the burden of proof on the plaintiff in civil cases.