Nos. 10-35714, 10-35970

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND T. BALVAGE, *et al.*,

Plaintiffs-Appellees

v.

RYDERWOOD IMPROVEMENT AND SERVICES ASSOCIATION, INC.,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AS *AMICUS CURIAE*

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This brief is submitted in response to this Court's invitation of January 4, 2011, for the views of the Secretary of the United States Department of Housing and Urban Development on the issues presented in this appeal.

STATEMENT OF THE ISSUES

1. Whether a private community's failure to verify through "reliable surveys and affidavits" that 80% of the occupied units in the community are occupied by one person who is 55 years of age or older renders the community in

noncompliance with the Housing for Older Persons Act (HOPA), and, accordingly, requires the community to comply with the provisions of the Fair Housing Act (FHA) prohibiting discrimination on the basis of familial status.

2. Whether a private community that seeks to serve persons 55 years and older and has engaged in familial status discrimination can come into compliance with HOPA after May 3, 2000, by demonstrating compliance with HOPA's age verification requirements.

STATEMENT OF THE CASE

1. The Fair Housing Act, HOPA, HUD Regulations, And HUD Guidance

In 1988, Congress amended the FHA to expand the prohibition against housing discrimination by adding a ban on discrimination based on familial status. 42 U.S.C. 3604. The Act defines "familial status," *inter alia*, as a person or persons under the age of eighteen living with a parent or another person having legal custody. 42 U.S.C. 3602(k).

At the same time, Congress recognized the effect this expansion would have on retirement communities, and created an exemption in the FHA for qualified "housing for older persons" (HOPA).[1] The HOPA exception *permits* HOPA communities and facilities to discriminate on the basis of familial status. 42 U.S.C.

[1] For simplicity, this brief uses HOPA interchangeably to refer to the Housing for Older Persons Act of 1995 and the original housing for older persons exemption enacted in 1988.

3607(b)(1) (1988). Congress exempted three types of housing for older persons including, as relevant here, housing for persons 55 years of age or older. 42 U.S.C. 3607(b)(2) (1988).

The Housing for Older Persons Act of 1995 modified the criteria to qualify for housing for persons 55 years or older. 42 U.S.C. 3607(b)(2)(C) (1995); Pub. L. No. 104-76, 109 Stat. 787. These amendments were "designed to make it easier for a housing community of older persons to determine whether they qualify for the Fair Housing Act exemption." Implementation of the Housing for Older Persons Act of 1995, 64 Fed. Reg. 16, 324, 16,325 (Apr. 2, 1999) (quoting S. Rep. No. 172, 104th Cong., 1st Sess. 2 (1995)). HOPA's three requirements for housing "intended or operated for occupancy by persons 55 years of age or older" are:

(i) "at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older";

(ii) "the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent" to serve persons 55 years of age or older; *and*

(iii) "the housing facility or community complies with rules issued by [HUD] for verification of occupancy, which shall (I) provide *for verification by reliable surveys and affidavits*," and (II) include examples of policies and procedures that will guide determinations of compliance.

42 U.S.C. 3607(b)(2)(C) (emphasis added).

On April 2, 1999, HUD, pursuant to its statutory authority, issued final regulations implementing the 1995 requirements of HOPA. 64 Fed. Reg. at 16,324; 24 C.F.R. 100.304-100.308. These regulations, *inter alia*, provide an overview of HOPA (24 C.F.R. 100.304), and address HOPA's three requirements for housing intended for occupancy by persons 55 years of age or older: the 80% occupancy minimum by persons 55 years or older (24 C.F.R. 100.305); the assessment of intent that the community be operated for persons 55 years or older (24 C.F.R. 100.306); and the means to verify occupancy by persons 55 years or older (24 C.F.R. 100.307). Communities must establish procedures to routinely verify the age of occupants in each unit, conduct updates at least every two years, and maintain records of such verification. 24 C.F.R. 100.307(a)-(c), (f), (i). Moreover, the regulations identify a variety of records or means that are deemed "reliable documentation" of a person's age. 24 C.F.R. 100.307(d)-(e), (g). For example, a community can rely upon an occupant's driver's license, birth certificate, passport, certification in a lease, or affidavit as proof of the occupant's age. 24 C.F.R. 100.307(d)-(e).

In addition, HUD established a one-year transition period that permitted certain communities or facilities that did not satisfy HOPA's 80% occupancy requirement at the time the regulations were issued an opportunity to take steps to

achieve HOPA compliance. 24 C.F.R. 100.305(e)(5). During this transition period, if a housing community or facility demonstrated an intent to be housing for persons 55 years or older and had adopted age verification procedures (two of the three HOPA criteria), it could reserve unoccupied units for occupancy by at least one person who was 55 years or older and *not* violate the FHA's prohibition of discrimination on the basis of familial status. *Ibid*. This transition period expired May 3, 2000. 64 Fed. Reg. at 16,324; see 24 C.F.R. 100.305(e)(5).

In March 2006, Bryan Greene, HUD's Deputy Assistant Secretary for Enforcement and Programs, issued a memorandum to HUD regional directors. See ER 1253-1254.[2] This memorandum stated that a community or facility that was not in compliance with HOPA by the end of the transition period had to cease reserving unoccupied units for persons aged 55 or older and could not discriminate on the basis of familial status. ER 1253. The memorandum provided guidance on how communities that did not become HOPA-compliant by the end of the transition period could achieve HOPA status. ER 1253-1254. HUD identified two methods: conversion and new construction. ER 1253. The guidance states:

> Unlike during the transition period, housing providers cannot discriminate against families with children in order to achieve 80 percent occupancy by persons 55 or older. In other words, a community or facility cannot reserve unoccupied units for persons 55 or older, advertise itself as housing for older persons, or evict families

[2] "ER __" refers to the Excerpts of Record filed by the parties in this Court. "R.__" refers to the number of a document on the district court's docket sheet.

> with children in order to reach the 80 percent threshold. If a family with children seeks to occupy a vacant unit in an existing facility before it has met all of the requirements necessary to become housing for older persons, the community or facility must permit the family to live there. Additionally, the facility may not make existing families with children feel unwelcome or otherwise encourage those families to move. * * * If the community or facility achieves the 80 percent threshold, **without discriminating against families with children**, it may then publish and adhere to policies and procedures that demonstrate an intent to provide housing for persons 55 years or older and comply with verification of occupancy rules. The facility or community cannot publish such policies or procedures in advance of meeting the 80 percent threshold (without discrimination) as such policies and procedures would have a chilling impact upon potential applicants or current occupants who are families with children.

ER 1254.

2. Procedural History

On June 2, 2010, 54 residents of the Ryderwood community in Cowlitz County, Washington, filed a Second Amended Complaint against the Ryderwood Improvement Service Association, Inc. (RISA), alleging violations of the Fair Housing Act. ER 197-213.[3] RISA is the homeowners' association that governs Ryderwood. See ER 1238.

The Ryderwood community and RISA were incorporated in 1953. ER 405, 412-416. The individual Ryderwood properties initially were transferred by deeds that restricted ownership to persons "who are bona fide recipients of a pension or

[3] Initially, four plaintiffs filed a Complaint on July 8, 2009, on behalf of themselves and a potential class of additional residents. R. 1. The plaintiffs filed their first Amended Complaint on November 11, 2009. R. 11.

retirement annuity." See, *e.g.*, ER 407. In 1975, RISA amended its bylaws to require that, *inter alia*, all homeowners or occupants other than an owner's spouse must be at least 55 years and a "bona-fide recipient of an annuity or a pension." ER 418; see ER 14.

Plaintiffs alleged, *inter alia*, that Ryderwood had not satisfied the survey verification requirement to qualify for HOPA's affirmative defense, and therefore cannot enforce the bylaws that restrict ownership; publish restrictions on ownership for persons 55 years and older; or otherwise discriminate on the basis of familial status. ER 205-207. Plaintiffs asserted that RISA's restrictions and noncompliance with HOPA unlawfully impeded their ability to sell their homes to the general public. ER 207.

In the spring of 2010, the parties filed cross-motions for partial summary judgment on several issues, including whether Ryderwood satisfies HOPA. Plaintiffs argued that RISA was not HOPA-compliant because it did not conduct its first survey until 2006, which was deficient; and its 2007 survey also was rife with error and the data established that less than *10%* of its residents were over 55. ER 866-871; R. 14 at 11-12; R. 29 at 5-6, 20-22. Plaintiffs also asserted generally that, because RISA continued to discriminate after the transition period, it did not achieve its 80% occupancy without discrimination. See R. 14 at 11-12.

RISA asserted that, because the community has always been limited to persons 55 years and older, it has always exceeded the 80% occupancy minimum. R. 17 at 20-21. RISA relied on its 2007 survey methodology and results to assert that it is now HOPA-compliant. ER 472-483; R. 25 at 22; R. 37 at 10-11. RISA asserted that it collected proof that 227 (91.2%) of 249 occupied units were occupied by at least one person who was 55 years or older. ER 894; see R. 17 at 20; R. 25 at 19. RISA did not have documentation on 22 of the 249 occupied units and an additional 21 units in the community were unoccupied. ER 894. RISA also asserted that a representative asked homeowners to present proof of age through driver's licenses and other reliable records. R. 25 at 22.

RISA further claimed that it took various steps *before* 2007 to ensure that its residents were 55 years and older that were an alternative to HOPA's survey requirement. ER 398-403; R. 17 at 21-23; R. 25 at 22-24. For example, a member of each household was required to join RISA and, purportedly, as of 1996, all new RISA members had to attest to their age. R. 17 at 21. RISA also stated that it maintained directories of residents. R. 25 at 23. RISA admitted that it did not conduct formal surveys of occupants' ages until 2005 (completed in 2006) and

2007. RISA did not address the validity of its 2006 survey efforts in its summary judgment pleadings. See R. 25 at 22-24.[4]

3. District Court Rulings

On June 4, 2010, the district court granted summary judgment, in part, to plaintiffs, and denied defendant's motion for summary judgment. ER 12-26.[5]

The district court summarized the statutory and regulatory requirements under HOPA, and noted that the transition period ended May 3, 2000. ER 16-17, 22-23. The court also quoted HUD's 2006 memorandum, which it read to mean that a community that had not complied with all of HOPA's requirements by the end of the transition period may not, after the transition period, engage in discrimination based on familial status in efforts to become HOPA-compliant. ER 22. The court gave HUD's regulations *Chevron* deference. ER 23. The court further stated that an agency's interpretation of its own regulations is entitled to "a measure of deference," ER 23 (quoting *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation*, 129 S. Ct. 2458, 2473 (2009)), which means that "an agency's interpretation of its own regulation is controlling unless 'plainly erroneous or

[4] Plaintiffs contested the process and data from RISA's 2006 survey and stated that the adequacy of the 2006 survey "is not necessary" to determine liability. R. 14 at 11 n.4.

[5] The court ruled that material questions of fact prevented ruling on plaintiffs' other FHA claims, including retaliation. ER 25.

inconsistent with the regulation,'" ER 23 (citing *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)).

The district court found that RISA has operated and governed its community as a retirement community for persons 55 years and over throughout its existence. ER 23-24; see ER 399-400, 1250. The district court stated that, "[c]urrently, RISA continues to take affirmative steps to inform residents, prospective purchasers, and the public at large, that Ryderwood is a community for residents fifty-five years of age and older." ER 15. In addition, the district court found, "assuming all facts in favor of RISA, the record is clear that RISA did not attempt to comply with the HOPA until at least 2005." ER 23. The district court's summary judgment order did not make any other finding as to the time period of RISA's liability, and did not make any findings concerning whether the 2006 or 2007 surveys satisfied HOPA's third criterion.

Relying on HUD's 2006 memorandum, the court concluded that "[t]he memo is clear that under the regulations, once the transition period ended in May of 2000, any existing community seeking to comply with the HOPA is required to cease discrimination *during the period of gaining compliance*." ER 23-24 (emphasis added). The court held that HUD's 2006 interpretation "is neither plainly erroneous nor inconsistent with HUD's regulations." ER 24; see ER 26. Given that RISA admitted "that it has never ceased discriminating against persons

under the age of fifty-five," the court concluded that RISA was not in compliance with HOPA's requirements and could not avail itself of the affirmative defense. ER 24; see ER 26. Thus, the district court denied defendant's motion for summary judgment on this issue. ER 24.

The district court reiterated these conclusions in granting plaintiffs' motion for summary judgment on their claim of familial status discrimination and RISA's failure to establish HOPA's affirmative defense. ER 24-26. The court summarily stated that it "agrees with Plaintiffs that the 2006 Memo is entitled to deference in its interpretation of the regulations, the appropriate application of the 'transition period,' and compliance with the HOPA after such period ended. Therefore, the Court concludes that RISA is not entitled to the HOPA exception *because it has not shown compliance with the regulations governing it.*" ER 26 (citation omitted; emphasis added).

On August 11, 2010, the district court granted plaintiffs' request for a preliminary injunction. ER 5-11. In this order, the court addressed defendant's liability in the present tense. See ER 6-8. "[T]he Court has already concluded that RISA has not met the qualifications for a HOPA exception. * * * Thus, RISA's continued enforcement of its age restrictions are violating the FHA." ER 7-8. Relying on its summary judgment ruling, the court found that plaintiffs were likely to prevail on the merits, and found the other factors for injunctive relief in favor of

plaintiffs. ER 6-9. The court ordered that RISA indefinitely cease enforcing any age restrictions "on the sale, rental, or residency of homes in Ryderwood"; notify all home owners, real estate agents, title companies, and escrow companies that it has ceased enforcement of its age restrictions; remove signs stating that Ryderwood is a 55 and older community; and amend its bylaws to remove all restrictions based on age. ER 9-10.

SUMMARY OF ARGUMENT

In order to assert HOPA's affirmative defense, a community must satisfy all three statutory and regulatory criteria. 42 U.S.C. 3607(b); 24 C.F.R. 100.304-100.307. The district court correctly held that RISA was not HOPA-compliant between May 2000 and September 2007, because it had not satisfied one criterion: *i.e.*, Ryderwood did not verify through "reliable surveys and affidavits" that 80% of all occupants were at least 55 years old. The district court, however, did not make adequate findings about whether RISA became HOPA-compliant *after* September 2007. Accordingly, this Court should remand the case for the district court to determine whether RISA's 2007 survey satisfies HOPA's age verification requirement.

Contrary to the district court's apparent conclusion, a community like Ryderwood, which has continuously operated as a retirement community for persons age 55 or older, can qualify for the HOPA defense after May 3, 2000 (the

end of the regulatory transition period). It may do so by establishing that it *currently* satisfies the three statutory and regulatory criteria, even if it did not satisfy HOPA's age verification requirement before the transition ended. Such a community is not barred now or in the future from asserting the HOPA defense, notwithstanding the fact that it may have engaged in familial status discrimination after the transition period and prior to establishing compliance with HOPA's age verification requirement. To the extent the district court held otherwise, its ruling is in error.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT RISA WAS NOT HOPA-COMPLIANT BEFORE SEPTEMBER 2007, BUT ERRED TO THE EXTENT THAT IT HELD THAT, BECAUSE RISA HAD ENGAGED IN FAMILIAL STATUS DISCRIMINATION SINCE MAY OF 2000, IT WOULD *NEVER* BE ENTITLED TO THE HOPA EXEMPTION

A. Standard Of Review

This Court reviews a grant of summary judgment *de novo*. *Harris* v. *Itzhaki*, 183 F.3d 1043, 1050-1051 (9th Cir. 1999); *Covey* v. *Hollydale Mobilehome Estates*, 116 F.3d 830, 834 (9th Cir. 1997). The Court must assess, viewing the evidence in the light most favorable to the nonmoving party, "whether any genuine issues of material fact exist for trial and whether the district court correctly applied the relevant substantive law." *Ibid*.

This Court will review the grant of a preliminary injunction for abuse of discretion. *Landrigan* v. *Brewer*, 625 F.3d 1132, 1133-1134 (9th Cir. 2010). The latter review is "limited and deferential," to consider "whether the district court (1) employed the proper preliminary injunction standard and (2) whether the court correctly apprehended the underlying legal issues in the case." *Ibid*. (quoting *Guzman* v. *Shewry*, 552 F.3d 941, 948 (9th Cir. 2009)).

It also is well established that a court, including this Court, will give considerable deference and controlling weight to, *inter alia*, an agency's implementing regulations that present a "reasonable interpretation" or "reasonable construction" of a statute. *Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 714-716 (2011); see *United States* v. *Mead Corp.*, 533 U.S. 218 (2001); *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 838 (1984); *Harris*, 183 F.3d at 1051-1052 (*Chevron* deference afforded HUD's regulations interpreting the FHA). A regulation will be rejected only if it is "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Mead*, 533 U.S. at 227.

A court will also give a "fair measure of deference to an agency administering its own statute," including its interpretations of its regulations, depending on "the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *Mead*, 533

U.S. at 228 (citing *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944)); *Pronsolino* v. *Nastri*, 291 F.3d 1123, 1133 (9th Cir. 2002) (EPA regulations implementing the Clean Water Act receive *Chevron* deference; "at the least," "substantial deference under *Skidmore*" is given to directives and national guidance interpreting EPA regulations), cert. denied, 539 U.S. 926 (2003).[6] In addition, this Court will defer to an agency's interpretation of its implementing regulations that are presented, as here, as amicus, as long as that interpretation is not "plainly erroneous or inconsistent with the regulations." *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871, 873-874 (2011) (quoting *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)).

B. RISA Cannot Assert HOPA's Affirmative Defense Prior To 2007 Because RISA Failed To Satisfy HOPA's Criterion Of Conducting Timely, Verifiable Surveys Of Its Occupants

The HOPA exemption is an affirmative defense under the FHA. See *Hooker* v. *Weathers*, 990 F.2d 913, 916 (6th Cir. 1993); *United States* v. *Fountainbleu Apartments L.P.*, 566 F. Supp. 2d 726, 734 (E.D. Tenn. 2008). Exemptions to the FHA, such as HOPA, "are to be construed narrowly, in recognition of the

[6] That is not to say that the *Skidmore* standard is the only standard of deference this Court may give to agency interpretations. See *Barnhart* v. *Walton*, 535 U.S. 212, 221-222 (2002). In fact, this Court has given *Chevron* deference to HUD's policy interpretations under the Real Estate Settlement Procedures Act. See *Schuetz* v. *Banc One Mortg. Corp.*, 292 F.3d 1004, 1012 (9th Cir. 2002), cert. denied, 537 U.S. 1171 (2003).

important goal of preventing housing discrimination." *United States* v. *City of Hayward*, 36 F.3d 832, 837 (9th Cir. 1994) (quoting *Massaro* v. *Mainlands Section 1 & 2 Civil Ass'n Inc.*, 3 F.3d 1472, 1475 (11th Cir. 1993), cert. denied, 513 U.S. 808 (1994)), cert. denied, 516 U.S. 813 (1995); see also *Simovits* v. *Chanticleer Condo. Ass'n*, 933 F. Supp. 1394, 1402 n.18 (N.D. Ill. 1996). The community bears the burden of proof for this affirmative defense. See *Fair Hous. Advocates Ass'n, Inc.* v. *City of Richmond Heights*, 209 F.3d 626, 635 (6th Cir. 2000); *Massaro*, 3 F.3d at 1475.

Congress amended the HOPA criteria in 1995 in order to provide a "clear, bright line standard of when a seniors housing community is in fact 'housing for older persons' for purposes of the Fair Housing Act." S. Rep. No. 172, 104th Cong., 1st Sess. 2 (1995) (S. Rep. No. 172). As noted, to qualify for the affirmative defense under HOPA, RISA must satisfy three criteria: it must show that at least 80% of the occupied units are occupied by persons who are 55 years and older; it must have established policies and procedures evidencing an intent to serve that targeted group; and it must conduct surveys every two years, through verified means, and maintain data that record evidence that, in fact, 80% of the community's units are occupied by persons age 55 and older. 42 U.S.C. 3607(b); 24 C.F.R. 100.304(a)(2).

In 1995, Congress primarily focused on eliminating the requirement that a HOPA community provide "significant facilities and services" to senior residents. S. Rep. No. 172 at 2. HOPA, however, also added the requirement that a community must "compl[y] with rules issued by the Secretary for verification of occupancy" by "reliable surveys and affidavits." 42 U.S.C. 3607(b)(2)(C)(iii). Congress described the new criteria as the "simple, fact-based definition of housing for older persons." S. Rep. No. 172 at 6. These changes were made because of the difficulty in satisfying the earlier standards, and "to make it easier for a housing community of older persons to determine whether they qualify" for the HOPA exemption. *Id*. at 2.

In accordance with the statutory mandate, HUD issued regulations that require a community to produce "verification of compliance with § 100.305 [the 80% occupancy standard] through reliable surveys and affidavits." 24 C.F.R. 100.307(a). The regulations require that a community "develop procedures for routinely determining the occupancy of each unit," and ensure that at least one occupant is 55 years or older. These procedures "may be part of a normal leasing or purchasing arrangement." 24 C.F.R. 100.307(b). In addition, the procedures must identify how a community will undertake "regular updates, through surveys or other means, of the initial information supplied by the occupants." 24 C.F.R. 100.307(c). The updates must take place at least every two years. *Ibid*. The

regulations identify numerous documents that are deemed "reliable documentation of the age of the occupants," including a driver's license, birth certificate, passport, immigration card, military identification, a certification in a lease, or affidavit asserting a person's age. 24 C.F.R. 100.307(d). If an occupant does not cooperate in the survey, a community also may rely on certain information provided by third persons or other documents. 24 C.F.R. 100.307(g).

Courts interpreting the 1988 and 1995 versions of HOPA have held consistently that the community or facility must "at least meet the * * * three requirements to qualify for the exemption." *Hayward*, 36 F.3d at 837; see also *Massaro*, 3 F.3d at 1474 (addressing challenge to "one prong of the three-part statutory test"); *Fountainbleu Apartments*, 566 F. Supp. 2d at 735; *Simovits*, 933 F. Supp. at 1402. While one criterion was changed in 1995, the conjunctive language of the 1988 and 1995 statutory texts makes clear that all three criteria must be met for the HOPA exemption. 42 U.S.C. 3607(b); *Simovits*, 933 F. Supp. at 1402.

Here, HUD's regulations track the statutory requirements and unequivocally state that a community must satisfy all three criteria to qualify for the exemption. 24 C.F.R. 100.304(a)(2) (the exemption applies only if a community satisfies the statute as well as §§ 100.305, 100.306, *and* 100.307). In addition, the regulations require that RISA verify occupants' ages through reliable action and maintain records that reflect a thorough and comprehensive assessment of the community's

occupants. See 24 C.F.R. 100.307(a)-(d); *Massaro*, 3 F.3d at 1478. A HOPA community was required to establish the procedures to identify a community's baseline data of its occupants' ages within 180 days of May 3, 1999, and conduct a "re-survey" every two years after that date. 24 C.F.R. 100.307(a)-(c); 64 Fed. Reg. 16,328, 16,330 (Apr. 2, 1999). HUD explained that the requirement of periodic, "re-survey" updates is essential to ensure a community's compliance with the 80% occupancy mandate and the record-keeping required to verify occupant data. "[I]f surveys are not required to be updated periodically the quality of the recordkeeping will deteriorate and create the opportunity for the excessive litigation Congress sought to prevent." *Ibid*. HUD also explained that the re-survey efforts need not be as comprehensive as the initial, baseline survey, since a community can work from the original data collected and ensure that persons counted before remain occupants. *Ibid*. Thus, a community's initial effort must be comprehensive, because it is the starting or base point for the community's updates.

Given that HUD's regulations track the statute and set forth, pursuant to its statutory mandate, a detailed yet flexible process by which communities can satisfy the verifiable survey requirement, the regulations are a "reasonable" interpretation of the statute and warrant *Chevron* deference. *Mayo Found.*, 131 S. Ct. at 714-716; *Harris*, 183 F.3d at 1051-1052. The regulations' attention to how a community may conduct a survey of occupants reflects a reasoned approach,

because a survey is the most effective means by which a community can collect reliable, baseline data. Direct and timely communication with current occupants ensures that a community has verifiable data since the occupants themselves will provide the primary source documentation. While surveys are not the only means by which a community can satisfy the verification procedure, the references in the statute and regulations to surveys would be rendered meaningless if a court did not require a community to present evidence of a verified survey or show substantive efforts that are akin to a survey. See 42 U.S.C. 3607(b); 24 C.F.R. 100.307. When a community conducts a survey yet fails to collect and maintain reliable documentation that verifies the age of an occupant, it has not complied with HOPA and therefore does not qualify for the HOPA exemption. See *Simovits*, 933 F. Supp. at 1401-1402.

To be sure, means other than a survey can establish the baseline data regarding occupants' ages. For example, if a community had required all new occupants to provide proof of age, or attest to one's age, for several years prior to 2000, the community may have sufficient, reliable information to compile a report that reflects the ages of all occupants without a need for one-to-one survey contact. The mere possession of various records collected over the years, however, without more, is inadequate to satisfy the verification obligation. A community must

collate information from its files to assess whether, in fact, it has verifiable data of all current occupants and it satisfies the 80% occupancy requirement.

"[F]or the purpose of this appeal, RISA does not dispute that in the years 2000-04, it failed to conduct a formal 'HOPA survey' to verify Ryderwood residents' ages, as HOPA regulations provide at 24 C.F.R. 100.304-307." Appellant's Br. 2; see Appellant's Br. 17. Before the district court and on appeal, RISA has referred to, but not substantively relied upon, its 2006 survey to satisfy the HOPA survey verification criterion. See, *e.g.*, Appellant's Br. 2, 17; R. 17 at 20. On appeal, RISA refers to its pre-2006 efforts as evidence only of its *intent* to be a community for persons 55 and older, and not as evidence to satisfy the separate survey requirement. Appellant's Br. 17-18, 24, 26-27. RISA's counsel's comments at oral argument also suggest that RISA did not satisfy HOPA's verification requirement before 2007. RISA, however, *does* rely on its 2007 survey as evidence it satisfied HOPA's verification criterion. Appellant's Br. 26-28; R. 25 at 22. Given RISA's concession, and its failure to substantively argue before the district court or this Court how the 2006 survey satisfies HOPA, RISA has waived any claim that it is entitled to the HOPA exemption until September 2007, when it completed its survey. See *Martinez-Serrano* v. *INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) (failure to present argument in opening appellate brief waives the issue for the Court's consideration), cert. denied, 522 U.S. 809 (1997).

Even if this Court considered this evidence, however, it is clear that RISA's pre-2007 efforts fail to satisfy HOPA's age verification requirements. Cf. 24 C.F.R. 100.307. Requiring new residents to join RISA and purportedly attest to their age does not establish that all members or an occupant of all households have signed this verification, nor has RISA so claimed. RISA also has not shown that it has compiled a list of RISA members and compared this data with occupants for any given year to verify that the 80% occupancy requirement was met. Notwithstanding the bylaws' requirement that homeowners be at least 55 years old, RISA membership forms dated from 1990-1992 did not specifically require that a resident report his or her age. See, *e.g.*, ER 948, 1006, 1150. While RISA reports that membership forms were changed in 1996, (ER 401), this change, absent any compilation of data, is also insufficient to meet the verified survey requirement. The limited evidence of the 2006 survey efforts precludes any finding that RISA was entitled to the HOPA exemption before September 2007. See, *e.g.*, ER 946-947. Accordingly, to the extent the district court held that RISA was not HOPA-compliant before September 2007, its judgment should be affirmed.

C. The District Court Erred In Holding That RISA's Pre-2007 Failure To Comply With HOPA's Age Verification Requirements Prevents It From Taking Advantage Of HOPA's Affirmative Defense After Coming Into Compliance With Those Requirements

HUD issued final regulations implementing HOPA in April 1999. Those regulations identified a transition period during which a community that intended

to operate as housing for older persons, but had not yet complied with HOPA's requirements because it did not satisfy HOPA's 80%-occupancy threshold, could engage in familial-status discrimination by reserving unoccupied units for persons 55 years old and older in order to meet that threshold. 24 C.F.R. 100.305(e)(5). HUD created the one-year transition period "to allow communities which wish to qualify for the 55-and-older exemption to qualify * * * [through] a balanced approach that achieves a common sense solution to a problem with equities on both sides." 64 Fed. Reg. at 16,326. But HUD made clear that such communities could not discriminate on the basis of familial status in order to satisfy the 80% threshold after May 2000 (the end of the transition period).

In holding that RISA is not entitled to rely on HOPA's affirmative defense now and in the future because it operated as a community for persons age 55 and older after the end of the transition period without complying with HOPA's age-verification requirements, the district court relied on HUD's 2006 policy guidance. That guidance clarifies that a community that had not reached the 80% occupancy threshold by the end of the transition period was not permitted to discriminate on the basis of familial status in order to do so. ER 1254 ("Unlike during the transition period, housing providers cannot discriminate against families with children in order to achieve 80 percent occupancy by persons 55 or older."). However, the district court's reliance on that guidance in this case was error

because the guidance does not address the circumstances presented here. The guidance addresses how a community that had not reached the 80% occupancy threshold by the end of the transition period could convert to housing for older persons and take advantage of the HOPA exception. It does not address how a community that has consistently maintained the 80% threshold but has failed to comply with HOPA's age-verification requirements can come into compliance with HOPA and take advantage of HOPA's affirmative defense going forward. Nor does the guidance dictate what should happen prospectively if a community maintains the 80% threshold after the end of the transition period by engaging in familial-status discrimination. Thus, to the extent the district court concluded that HUD's 2006 guidance dictated that RISA is not entitled now or in the future to take advantage of the HOPA exception, that reliance was incorrect.

Nothing in HUD's 2006 guidance forbids a housing community that has continuously operated as housing for persons 55 and over from availing itself of the HOPA exemption on a prospective basis simply because it has previously failed to comply with age-verification requirements. Because it is not clear from the record whether RISA is currently complying with HOPA's age-verification requirements, this Court should vacate the district court's judgment and remand for further proceedings. See pp. 7-8, 10, *supra*. If RISA is complying with that

requirement, the district court should then determine in the first instance whether RISA is entitled to HOPA's affirmative defense now and going forward.

CONCLUSION

The district court's judgment should be affirmed in part and reversed in part, and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached Brief for the Secretary of the United States Department of Housing and Urban Development as *Amicus Curiae*:

(1) complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), because it contains 5,630 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

s/ Jennifer Levin Eichhorn
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Dated: February 18, 2011

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2011, I electronically filed the foregoing Brief for the Secretary of the United States Department of Housing and Urban Development as *Amicus Curiae* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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