

2011

Neighbor-on-Neighbor Harassment: Does the Fair Housing Act Make a Federal Case out of It ?

Robert G. Schwemm

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

Recommended Citation

Robert G. Schwemm, *Neighbor-on-Neighbor Harassment: Does the Fair Housing Act Make a Federal Case out of It ?*, 61 Case W. Res. L. Rev. 865 (2011)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol61/iss3/6>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

NEIGHBOR-ON-NEIGHBOR HARASSMENT: DOES THE FAIR HOUSING ACT MAKE A FEDERAL CASE OUT OF IT?

Robert G. Schwemm[†]

I. INTRODUCTION

“This is a nice neighborhood—we don’t want people like you here. Why don’t you go back to the ghetto where you belong.”¹ Does the federal Fair Housing Act² (“FHA”) ban such statements to a minority family who has just moved into a predominantly white neighborhood? The FHA does contain an antiharassment provision (42 U.S.C. § 3617),³ and this certainly applies to firebombings and other types of physical assault designed to drive the family out of the area.⁴ But does § 3617 also outlaw purely verbal attacks? And if so, how egregious must the remarks be before a federal case should be made out of them? For example, would substituting “Niggers” for “people like you” in the above quote make a difference?

Today, more than forty years after the FHA’s enactment in 1968,⁵ housing harassment remains pervasive.⁶ Harassment and retaliation

[†] © 2011 Robert G. Schwemm. Robert G. Schwemm is the Ashland-Spears Professor at the University of Kentucky College of Law. I thank Florence Wagman Roisman, Sara Pratt, Harry Carey, and Sarah Welling for their ideas and helpful comments on this Article.

¹ These comments are a fictional amalgamation of actual remarks made to minorities in various reported fair housing cases. *See, e.g.*, cases cited *infra* note 298.

² 42 U.S.C. §§ 3601–3619 (2006).

³ *See infra* text accompanying note 29 (setting out the full text of the provision).

⁴ *See, e.g.*, *infra* notes 39, 72–76 and accompanying text (discussing cases dealing with § 3617 violations).

⁵ Civil Rights Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73, 81–89.

⁶ *See, e.g.*, Jeannine Bell, *Restraining the Heartless: Racist Speech and Minority Rights*,

claims continue to account for a significant portion of all FHA claims.⁷ According to the U.S. Department of Housing and Urban Development (“HUD”), the agency primarily responsible for administering the FHA,⁸ well over a thousand § 3617 complaints were filed with HUD and state and local fair housing agencies in each of the past four years.⁹ A similar number of harassment claims are made each year to private fair housing groups.¹⁰ In one particularly egregious example of neighbor-on-neighbor harassment, a Latino family in 2009 was awarded over \$500,000 in damages against one of

84 IND. L.J. 963, 964 (2009) (“[I]n the past twenty years, minorities moving to all-White neighborhoods in cities across the country have faced slurs, epithets, and other expressions of racism directed at them by White neighbors who wish to drive them out of the community.”).

⁷ For modern case statistics involving FHA harassment claims, see *infra* notes 9–10. For examples of housing harassment cases dating back to the earlier years of the FHA, see *infra* notes 72 and 81.

⁸ See 42 U.S.C. § 3608(a) (2006) (giving HUD the “authority and responsibility for administering” the FHA).

⁹ Of the 10,242 FHA complaints filed with HUD and state and local fair housing agencies in fiscal year (FY) 2009, 1425 (14%) alleged violations of § 3617, making this the fourth largest category of claims of the thirteen categories reported, following only discriminatory refusals to rent, discriminatory terms and conditions, and refusals to make reasonable accommodations for disabled persons. See U.S. DEP’T OF HOUS. & URBAN DEV., THE STATE OF FAIR HOUSING: ANNUAL REPORT ON FAIR HOUSING FY 2009, at 26 (2010), available at <http://www.hud.gov/content/releases/fy2009annual-rpt.pdf> [hereinafter 2009 REPORT]. Comparable figures for prior years were: 1402 (13%) in FY 2008, 1477 (15%) in FY 2007, 1354 (13%) in FY 2006, and 1192 (13%) in FY 2005. U.S. DEP’T OF HOUS. & URBAN DEV., THE STATE OF FAIR HOUSING: FY 2008 ANNUAL REPORT ON FAIR HOUSING 6 (2009), available at <http://www.hud.gov/content/releases/fy2008annual-rpt.pdf> [hereinafter 2008 REPORT]. According to HUD, these complaint statistics represent “only a fraction of instances of housing discrimination” that actually occur. *Id.* at 2.

HUD does not break down these § 3617 claims by type of discrimination (e.g., race or sex), type of perpetrator (e.g., landlord or neighbor), or type of violation (e.g., harassment or retaliation) alleged. As to the last subcategory, however, HUD does report how many retaliation claims were made to state and local fair housing agencies and HUD in these years, with retaliation accounting for 654 of these claims (6% of the total) in FY 2009, 575 (5%) in FY 2008, 588 (6%) in FY 2007, 577 (6%) in FY 2006, and 452 (5%) in FY 2005. See 2009 REPORT, *supra*, at 22; 2008 REPORT, *supra*, at 3.

¹⁰ See NAT’L FAIR HOUS. ALLIANCE, A STEP IN THE RIGHT DIRECTION: 2010 FAIR HOUSING TRENDS REPORT 24 (2010), available at <http://www.nationalfairhousing.org/LinkClick.aspx?fileticket=APoutInxpwg%3d&tabid=3917&mid=5321> (reporting that 1,221 complaints of harassment were made to private fair housing groups in 2009 and that the primary bases of these complaints were national origin (26% of the total), familial status (25%), race (18%), sex (11%), and disability (10%)); see also NAT’L FAIR HOUS. ALLIANCE, FAIR HOUSING ENFORCEMENT: TIME FOR A CHANGE: 2009 FAIR HOUSING TRENDS REPORT 17 (2009), available at <http://www.nationalfairhousing.org/LinkClick.aspx?fileticket=dsT4nlHikhQ%3d&tabid=3917&mid=5321> (reporting that 1,141 harassment complaints were made to private fair housing groups in 2008); NAT’L FAIR HOUS. ALLIANCE, DR. KING’S DEARM DENIED: FORTY YEARS OF FAILED FEDERAL ENFORCEMENT: 2008 FAIR HOUSING TRENDS REPORT 50 (2008), available at <http://www.nationalfairhousing.org/LinkClick.aspx?fileticket=qPHxLjvaGA%3d&tabid=3917&mid=5321> (reporting that 1,246 harassment complaints were made to private groups in 2007).

its white neighbors, although the legal basis for this case was state law, not the FHA.¹¹

Given how frequently housing harassment has occurred throughout the FHA's history, one might expect that the statute's application to neighbor-on-neighbor harassment would be settled by now. But a series of court decisions over the past decade—particularly two produced by the Seventh Circuit—has raised serious doubts about how this matter should be handled.

The first of these came in 2004. Judge Posner's opinion in *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*,¹² held that homeowners subjected to anti-Jewish harassment by their neighbors could not sue under the FHA's main substantive provision (§ 3604); it also suggested that § 3617 should be interpreted so as not to apply either.¹³ *Halprin's* theory was that the FHA's protections are limited to homeseekers and do not also cover current residents.¹⁴ But the Seventh Circuit rejected this theory five years later in its en banc opinion in *Bloch v. Frischholz*.¹⁵ Among other things, *Bloch* “effectively overrule[d] *Halprin* as far as § 3617 is concerned.”¹⁶

While much of *Halprin* has now been swept aside,¹⁷ its hostility to the idea of applying the FHA to most types of neighbor-on-neighbor harassment lives on. Indeed, *Bloch* itself endorsed this part of the *Halprin* opinion by announcing that the behavior condemned by § 3617 must be “more than a ‘quarrel among neighbors’ or an ‘isolated act of discrimination,’ but rather [must be] a ‘pattern of

¹¹ See *Rodriguez v. Marrone*, No. 09 L 3194 (Ill. Cir. Ct. 2009), Fair Housing–Fair Lending Rep. (Aspen L. & Bus.), Report Bulletin ¶ 10.2 (Oct. 1, 2009); see also *Ky. Comm'n on Human Rights v. Foster*, No. 04-CI-03103 (Ky. Cir. Ct. Feb. 1, 2008) (awarding a total of \$860,000 in compensatory and punitive damages and civil penalties against three defendants for burning a cross, vandalizing property, and directing racial slurs against a black family). For other neighbor harassment cases that produced large awards, see *infra* notes 94–95, 304. For a recent example of a criminal prosecution in such a case, see *United States v. Jackson*, No. 3:10-CR-00120-KLH (W.D. La. 2010). In *Jackson*, the defendant pleaded guilty to a FHA-related crime for engaging in race-based intimidation; he placed a hangman's noose in the carport of a home next to his former employer. Press Release, U.S. Dep't of Justice, Downsville, Louisiana, Man Pleads Guilty to Federal Hate Crime (June 24, 2010), available at <http://www.justice.gov/opa/pr/2010/June/10-crt-742.html>.

¹² 388 F.3d 327 (7th Cir. 2004).

¹³ *Id.* at 330; see also *infra* notes 39–40, 45–46 and accompanying text (discussing this holding in more detail).

¹⁴ 388 F.3d at 329; see also *infra* notes 39–47 and accompanying text (discussing this theory in more detail).

¹⁵ 587 F.3d 771 (7th Cir. 2009) (en banc). For further discussion of *Bloch*, see *infra* notes 52–68 and accompanying text.

¹⁶ *Bloch*, 587 F.3d at 782.

¹⁷ Much, but not all. See *infra* note 67 and accompanying text (discussing what remains of *Halprin*).

harassment, invidiously motivated.”¹⁸ Courts throughout the country have expressed similar misgivings about applying the FHA to neighbor harassment unless it involves systematic or highly abusive behavior.¹⁹

But why should this be so? The text of § 3617 outlaws interference “with any person in the exercise or enjoyment of . . . any right granted or protected by” the FHA’s substantive provisions.²⁰ This means, according to the governing interpretive regulation, that § 3617 bans “interfering with persons in their enjoyment of a dwelling” because of race or other FHA-prohibited factor.²¹ Certainly, hostile race-based comments would seem likely to interfere with any reasonable minority’s enjoyment of his or her home. Thus, if a neighbor verbally harasses a homeowner or renter *because of* that person’s race, national origin, religion, or other factor condemned by the FHA, it would appear that this behavior is covered by § 3617.

Court opinions that have dismissed such behavior as merely a neighbors’ quarrel not worthy of being made into a “federal case” are essentially imposing some sort of de minimis defense on § 3617 cases, because they believe the FHA was not intended to impose a “civility code” on neighbors.²² But the text of § 3617—surely the best indicator of congressional intent—contains no such defense.²³ Nor is this provision analogous to the one in Title VII that the Supreme Court has interpreted to prohibit only “severe or pervasive” harassment in the employment context.²⁴ Thus, the language of § 3617 might well be interpreted to extend to even isolated hostile remarks, at least so long as that interpretation does not run afoul of the speaker’s First Amendment rights.²⁵ Furthermore, there are good reasons to suppose that congressional concerns underlying the FHA

¹⁸ 587 F.3d at 783 (quoting *Halprin*, 388 F.3d at 330).

¹⁹ See cases cited *infra* notes 69, 102, 109, 210 and accompanying text.

²⁰ 42 U.S.C. § 3617 (2006). For the full text of this provision, see *infra* text accompanying note 29.

²¹ 24 C.F.R. § 100.400(c)(2) (2010). For the full text of this regulation, see *infra* text accompanying note 156.

²² See, e.g., *infra* note 99 (discussing one district court’s reluctance to interpret § 3617 as imposing a code of civility on neighbors).

²³ See *People Helpers Found., Inc. v. City of Richmond*, 781 F. Supp. 1132, 1136 (E.D. Va. 1992) (denying the defendant-neighbors’ 12(b)(6) motion to dismiss the plaintiff’s § 3617 claim, and noting that “if the trier of fact considers that the acts of the [defendants] constituted slight or de minimis interference, such a conclusion can be adequately reflected in an appropriate award of damages”).

²⁴ See *infra* note 215 (citing cases applying the “severe or pervasive” standard in Title VII cases).

²⁵ See *infra* Part III.E (discussing First Amendment considerations).

might well be advanced by broadly interpreting § 3617 to outlaw all forms of invidious harassment among neighbors.²⁶

This Article analyzes the issue of whether § 3617 should be interpreted to outlaw invidiously motivated disputes among neighbors. Part II begins by examining § 3617's text and its relationship to the overall FHA. It then reviews § 3617 decisions in neighbor harassment cases, including *Halprin* and *Bloch*. This analysis shows that the scope of § 3617 is governed by the meaning of "interfere with" and the relationship of § 3617 to the prohibitions it references in §§ 3603–3606. These issues are further analyzed in Part III, which examines § 3617's legislative history and purpose, its interpretation by HUD and courts in other types of § 3617 cases, Supreme Court decisions in analogous Title VII cases, and the issue of whether interpreting § 3617 to outlaw a neighbor's verbal abuse would pose First Amendment problems. The Article concludes that applying § 3617 to neighbors' quarrels (i.e., making a federal case out of them) is appropriate in a much broader range of cases than *Halprin*, *Bloch*, and many other decisions have allowed.

II. § 3617: TEXT, RELATIONSHIP TO OTHER FHA PROVISIONS, AND NEIGHBOR HARASSMENT CASE LAW

A. § 3617's Text and Related Provisions

The modern FHA is primarily the product of two statutes: the original law passed in 1968²⁷ and the Fair Housing Amendments Act of 1988²⁸ ("FHAA"). The current version of § 3617 was enacted by the FHAA and provides:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the

²⁶ For the relevant legislative history of § 3617, see *infra* Part III.B.

²⁷ Civil Rights Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73, 81–89.

²⁸ Pub. L. No. 100-430, 102 Stat. 1619. Other amendments not germane to this Article have been made to the original 1968 FHA. See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION §§ 11C:1, 11E:8 (2010) (describing, respectively, FHA amendments adding "sex" to the list of prohibited bases of discrimination and changing the requirements for the "55 or over" housing-for-older-persons exemption to the prohibitions against familial status discrimination). For more on the 1988 FHAA, see *infra* notes 85–93 and accompanying text.

exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.²⁹

This language is identical in its substantive prohibitions to the version of this provision that was enacted in the original 1968 FHA.³⁰ The only change made by the 1988 amendments was procedural: the FHAA made violations of § 3617 subject to the statute's regular enforcement methods, which had previously controlled only claims under the FHA's other substantive provisions.³¹

The text of § 3617 shows that three elements are required for its violation: (1) the defendant must "coerce, intimidate, threaten, or interfere with" some person (2) "in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of" (3) a "right granted or protected by" §§ 3603–3606. As for the first element, the meaning of the four verbs—particularly "interfere with"—is crucial in determining how far § 3617 goes in outlawing neighbor-on-neighbor harassment. The second element has three alternative parts, one of which—"having aided or encouraged" another—has produced a good deal of § 3617 litigation,³² but is not generally relevant to the problem of the harassment of minorities,

²⁹ 42 U.S.C. § 3617 (2006).

³⁰ See Civil Rights Act of 1968 § 817, 82 Stat. at 89; *infra* notes 122, 128 and accompanying text (discussing the evolution of the proposed language for § 3617).

³¹ This change was accomplished by broadening the FHA's definition of "discriminatory housing practice" to include acts made unlawful by § 3617 and by deleting the second sentence in § 3617 ("This section may be enforced by appropriate civil action."). The 1988 FHAA defines "discriminatory housing practice" to mean "an act that is unlawful under section 3604, 3605, 3606, or 3617 of this title." 42 U.S.C. § 3602(f) (2006). The 1968 FHA defined the term to mean "an act that is unlawful under section 3604, 3605, or 3606 of this title." 42 U.S.C. § 3602(f) (1982); see also H.R. REP. NO. 100-711, at 21 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2182 ("Section 5(a) [of the 1988 FHAA] broadens the definition of discriminatory housing practice to include prohibitions against coercion, intimidation, threats or interference under Section 817 [codified at 42 U.S.C. § 3617].").

An act that constitutes a "discriminatory housing practice" triggers the statute's two private enforcement methods. See 42 U.S.C. § 3610(a)(1)(A)(i) (2006) (authorizing complaints to HUD by persons aggrieved by "an alleged discriminatory housing practice"); *id.* § 3613(a)(1)(A) (authorizing civil actions by persons aggrieved by "an alleged discriminatory housing practice"). This "discriminatory housing practice" phrase is not used in the provision that authorizes the FHA's third enforcement method (civil actions by the Attorney General in "pattern or practice" and "general public importance" cases), *id.* § 3614(a), which is triggered by resistance to or denial of "any of the rights granted by" the FHA. This language is similar to that used in the 1968 FHA and has always authorized § 3617-based claims by the Attorney General. See SCHWEMM, *supra* note 28, § 20:1 n.9 (discussing § 3617 claims brought by the Attorney General pursuant to this enforcement method).

For examples of § 3617 cases brought under the original second sentence of this provision in the 1968–1988 period, see *infra* notes 180–82 and accompanying text.

³² See, e.g., cases cited *infra* notes 178, 182, and 185.

whose § 3617 claims turn on whether the behavior directed against them is in response to “the exercise or enjoyment of” their own FHA rights. Finally, a person asserting a claim under § 3617 must be, or must have been, exercising or enjoying a “right granted or protected by” §§ 3603–3606.

The FHA provisions referred to in § 3617, i.e., §§ 3603–3606, contain the substantive heart of the statute. The most important of these provisions is § 3604, whose subsections (a) and (b) make it unlawful, respectively, to “refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin”³³ and to “discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.”³⁴ The rest of §§ 3603–3606 outlaws various other specified discriminatory housing practices.³⁵

One other provision worth mentioning here is § 3631, which was passed along with the 1968 FHA as a separate title and which provides for criminal sanctions for anyone who “willfully **injures [sic]**, intimidates or interferes with” another’s fair housing rights “by force or threat of force.”³⁶ Although technically not a part of the FHA, § 3631’s prohibitions concerning interference with fair housing rights parallel those of § 3617, and the same behavior may produce both a criminal charge under § 3631 and a civil claim under § 3617.³⁷

Commented [JM1]: This misspelling is unfortunately in §3631.

B. § 3617 Case Law Involving Neighbor-on-Neighbor Harassment

This Section surveys neighbor-on-neighbor harassment cases under § 3617 in two subsections. The first describes the *Halprin* and

³³ 42 U.S.C. § 3604(a). A nearly identical prohibition dealing with handicap discrimination is contained in § 3604(f)(1).

³⁴ *Id.* § 3604(b). A nearly identical prohibition dealing with handicap discrimination is contained in § 3604(f)(2).

³⁵ Section 3603 provides for effective dates and certain exemptions. Section 3604’s remaining subsections deal, respectively, with discriminatory ads, notices, and statements; misrepresentations of availability; “blockbusting”; and handicap discrimination. *Id.* § 3604(c)–(f). Section 3605 outlaws discriminatory home financing and other residential real estate–related transactions. Section 3606 bans discrimination in brokerage organizations and related services.

³⁶ *Id.* § 3631 (originally passed as Title IX of the Civil Rights Act of 1968).

³⁷ *See infra* notes 72–81 and accompanying text (discussing cases involving § 3631 prosecutions).

Bloch cases mentioned in the Introduction;³⁸ the second deals with pre-*Halprin* cases, which are presented roughly in chronological order. The general conclusion of this Section is that § 3617's applicability to neighbor-on-neighbor harassment raises issues with respect to all three of the elements of a § 3617 claim identified in the previous Section (i.e., Did the defendant's behavior (1) "interfere with" (2) the plaintiff's "exercise or enjoyment of" (3) a "right" recognized by §§ 3603–3606?).

1. *Halprin* and *Bloch*

The plaintiffs in both *Halprin* and *Bloch* alleged that the defendants' conduct violated both § 3617 and one or more of the substantive provisions referred to in § 3617. In *Halprin*, the plaintiffs were a couple who owned a home in a Chicago suburb; they claimed that they were subjected to anti-Jewish epithets and other harassment by neighbors and the local homeowners' association in violation of §§ 3604(a), 3604(b), and 3617.³⁹ The Seventh Circuit held that, as homeowners, they could not pursue claims under § 3604(a) or § 3604(b) because those provisions dealt only with activities "that prevent people from *acquiring* property"—not with the mistreatment of the purchasers or renters after acquisition.⁴⁰ According to Judge Posner, in enacting § 3604 Congress was concerned only with "access to housing" and not harassment that might result from "unwanted associations" after property is acquired; if Congress *had* addressed postacquisition problems, that endeavor "would have required careful drafting in order to make sure that quarrels between neighbors did not become a routine basis for federal litigation."⁴¹

Halprin dealt with the plaintiffs' § 3617 claim somewhat differently. Judge Posner ruled that this claim could proceed,⁴² but only because a HUD regulation interpreting § 3617 purported to extend it to postacquisition situations,⁴³ and the defendants had not

³⁸ See *supra* notes 12–18 and accompanying text.

³⁹ *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 328 (7th Cir. 2004).

⁴⁰ *Id.* at 328–29 (emphasis added). Judge Posner did recognize that if hostile neighbors went so far as to burn down a minority's house, such behavior might be covered by § 3604(a)'s make "unavailable" phrase or § 3604(b)'s language barring discriminatory "privileges of sale or rental." *Id.* at 329. Short of such an extreme example amounting to "constructive eviction," however, *Halprin* held that § 3604 does not apply to discrimination encountered by current residents of a dwelling. *Id.*

⁴¹ *Id.*

⁴² *Id.* at 330–31.

⁴³ The relevant HUD regulation forbids "interfering with persons in their enjoyment of a dwelling because of . . . [such persons'] religion." 24 C.F.R. § 100.400(c)(2) (2010). *Halprin*

challenged the validity of this regulation.⁴⁴ Still, the *Halprin* opinion strongly suggested that this regulation improperly extended the FHA “contrary to the language of section 3617,” and that § 3617, properly interpreted, would no more apply to postacquisition problems than § 3604. This is because § 3617 “provides legal protection only against acts that interfere with one or more of the other sections of the Act that are referred to in section 3617.”⁴⁵ In support of this view, Judge Posner reiterated that, whether under § 3617 or any other provision of the FHA, “we do not want, and we do not think Congress wanted, to convert every quarrel among neighbors in which a racial or religious slur is hurled into a federal case.”⁴⁶

Halprin’s theory that the FHA’s protections do not extend to current residents was controversial and marked a radical departure from prior case law.⁴⁷ Some courts went along, notably the Fifth Circuit,⁴⁸ but many did not.⁴⁹ HUD and the Justice Department

conceded that the “enjoyment of a dwelling” in this regulation “can take place after the dwelling has been acquired.” 388 F.3d at 330.

⁴⁴ *Halprin*, 388 F.3d at 330.

⁴⁵ *Id.*

⁴⁶ *Id.* The *Halprin* opinion recognized that in this case, the plaintiffs had alleged “a pattern of harassment, invidiously motivated, and . . . backed by the homeowners’ association,” which meant that it was “a matter of the neighbors’ ganging up on them” and thus it was “far from a simple quarrel between two neighbors or [an] isolated act of harassment.” *Id.*

⁴⁷ Prior to *Halprin*, courts regularly recognized FHA claims by current residents. See, e.g., SCHWEMM, *supra* note 28, § 14:3 nn.1–3, 5, 29–31, 36–37 (collecting cases in which courts recognized FHA claims by current residents); see also *Halprin*, 388 F.3d at 329 (noting five such cases, but opining that none of them “contains a *considered* holding on the scope of the Fair Housing Act in general or its application to a case like the present one in particular”).

Commentators were generally critical of the *Halprin* theory. See Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 42 HARV. C.R.-C.L. L. REV. 1, 3 (2008) (“*Halprin* and its progeny were wrongly decided . . .”); Robert G. Schwemm, Cox, Halprin, and Discriminatory Municipal Services Under the Fair Housing Act, 41 IND. L. REV. 717, 729–30 (2008) (identifying six failures in the *Halprin* opinion); Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203, 206 (2006) (noting that the court’s reasoning in *Halprin*, “if applied in future cases, would result in a significantly restricted ambit for the FHA, one limited only to claims of discrimination occurring during a real estate transaction”).

⁴⁸ See *Cox v. City of Dallas*, 430 F.3d 734, 740–47 (5th Cir. 2005) (adopting the *Halprin* theory that the FHA’s protections do not extend to current residents). District court decisions endorsing the *Halprin* theory include *Lawrence v. Courtyards at Deerwood Ass’n, Inc.*, 318 F. Supp. 2d 1133, 1141–43 (S.D. Fla. 2004), and *Gourlay v. Forest Lake Estates Civic Ass’n of Port Richey, Inc.*, 276 F. Supp. 2d 1222, 1235–36 (M.D. Fla. 2003), *vacated pursuant to settlement*, No. 8:02CV1955T30TGW, 2003 WL 22149660 (M.D. Fla. Sept. 16, 2003). For descriptions of *Lawrence* and *Gourlay*, see *infra* note 213.

⁴⁹ See, e.g., Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 711–15 (9th Cir. 2009) (holding that the FHA reaches postacquisition discrimination); *United States v. Koch*, 352 F. Supp. 2d 970, 972–80 (D. Neb. 2004) (rejecting the argument that postacquisition claims cannot be maintained under the FHA); SCHWEMM, *supra* note 28, § 14:3 n.20 (citing cases that reject *Halprin*). For a description of the *Koch* case, see *infra* note 262.

continued to support § 3604 claims brought by current residents⁵⁰ and to defend HUD's regulation providing for § 3617's application to postacquisition situations.⁵¹

Eventually, as noted above, the en banc Seventh Circuit rejected the *Halprin* theory in the *Bloch* case.⁵² *Bloch* also involved Jewish homeowners; the plaintiffs complained that officers of their condominium association (i.e., some of their neighbors) adopted rules that led to removal of the plaintiffs' mezuzot from the doorposts outside their units in violation of §§ 3604(a), 3604(b), and 3617.⁵³ The Blochs also sued under the Civil Rights Act of 1866 and various state law theories.⁵⁴ The district court, relying on *Halprin*, granted

⁵⁰ See, e.g., Brief for the United States as Amicus Curiae in Support of Plaintiffs' Opposition to Defendant's 12(b)(6) Motion to Dismiss, *George v. Colony Lakes Prop. Owners Ass'n*, No. 1:05-cv-05899, 2006 WL 1735345 (N.D. Ill. June 16, 2006), 2006 WL 1437953, at *6 n.3 (stating the Justice Department's belief "that Section 3604 applies to post-acquisition discrimination" and disagreeing with *Halprin*'s contrary conclusion); Press Release, U.S. Dep't of Hous. & Urban Dev., HUD Charges Virginia Beach Landlord with Violating the Fair Housing Act (May 17, 2007), available at <http://archives.hud.gov/news/2007/pr07-067.cfm> (describing HUD's charge against an apartment owner for violating the FHA by, inter alia, "subjecting African-American tenants to stricter rules than others").

⁵¹ See, e.g., *United States v. Altmayer*, 368 F. Supp. 2d 862, 863 (N.D. Ill. 2005) (denying the defendant's 12(b)(6) motion in case prosecuted by the Justice Department and stating that until the court of appeals invalidates the regulation, the district court will apply the regulation as written); *Koch*, 352 F. Supp. 2d at 978–79 (rejecting *Halprin* in case prosecuted by the Justice Department and holding that "the plain language of section 3617 should be read to prohibit unlawful discriminatory conduct after a person has taken possession of a dwelling").

⁵² *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009) (en banc).

⁵³ *Id.* at 772–75.

⁵⁴ *Id.* at 774–75. The relevant portion of the Civil Rights Act of 1866 guarantees U.S. citizens "the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (2006). The defendants did not dispute "the legal underpinnings of the § 1982 theory" but "only whether there [were] sufficient facts to support it." 587 F.3d at 775 n.5. Based on its determination that the facts were sufficient to show intentional discrimination, the Seventh Circuit allowed the Blochs to proceed on their § 1982 claim, along with their FHA claims under § 3604(b) and § 3617 and their state-law claims. *Id.* at 787.

Section 1982 has provided an independent basis for housing-discrimination claims ever since the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Sometimes § 1982 and the FHA overlap, as in *Bloch*, and sometimes § 1982 alone provides coverage when gaps in the FHA preclude it from applying. See SCHWEMM, *supra* note 28, § 27:2 (discussing the independence of § 1982 and the FHA); see also *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951, 1961 (2008) (noting Congress's longstanding general intent to provide overlapping remedies against discrimination). Courts have not yet considered the degree to which § 1982 outlaws neighbor-on-neighbor harassment independent of the FHA, but it is clear, based on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), that § 1982 does provide a cause of action for persons who are injured by a defendant's interference with § 1982 rights. See *CBOCS W.*, 128 S. Ct. at 1955 (describing *Sullivan*'s holding); *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1936 (2008) (same). Indeed, given § 1982's language explicitly guaranteeing a right to "hold" property equal to that "enjoyed" by whites, § 1982's coverage of neighbor harassment is arguably even more clear than § 3617's. See, e.g., *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987) (holding that vandalizing a synagogue is actionable under § 1982). In any event, it is at least possible that, to the extent the FHA is

summary judgment for the defendants, and a divided panel of the Seventh Circuit affirmed,⁵⁵ but the en banc court took a decidedly different approach in a unanimous opinion.⁵⁶ It held that some postacquisition situations are indeed covered by § 3604(a) and (b).⁵⁷

The en banc decision also upheld the plaintiffs' § 3617 claim,⁵⁸ endorsing HUD's view that § 3617 covers postacquisition harassment and determining that HUD's § 3617 regulation should be given "great weight" in interpreting this provision.⁵⁹ This part of the *Bloch* opinion began by noting that a § 3617 violation could occur even without a violation of § 3604.⁶⁰ Thus:

interpreted not to apply in such a case, a plaintiff might still be able to prevail under § 1982.

⁵⁵ *Bloch*, 587 F.3d at 775.

⁵⁶ In an amazing reversal of views, Judge Posner and three other Seventh Circuit judges who had previously endorsed *Halprin's* narrow reading of the FHA changed their minds and joined the en banc opinion in *Bloch*. The eight judges who joined the *Bloch* en banc opinion included two who had joined the *Halprin* opinion (Posner and Kanne), and two others who had followed *Halprin* in ruling against the plaintiffs in the *Bloch* panel decision (Easterbrook and Bauer). *Id.* at 772. Judge Williams, who had also joined the *Halprin* opinion, took no part in the consideration of the *Bloch* case. *Id.* at 772 n.*.

⁵⁷ See *id.* at 776–79 (describing how postacquisition harassment may make housing "unavailable" under § 3604(a)); *id.* at 779–81 (describing two situations in which postacquisition claims would be possible under § 3604(b) and, in particular, discussing how § 3604(b)'s "privileges" might be involved in such cases).

⁵⁸ *Id.* at 781–83.

⁵⁹ *Id.* at 782 (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972)) (internal quotation marks omitted). Decisions between *Halprin* and *Bloch* generally agreed that this regulation is valid. See, e.g., *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, No. 01 C 4673, 2006 WL 2506223, at *1 (N.D. Ill. June 28, 2006); *George v. Colony Lake Prop. Owners Ass'n*, No. 05 C 5899, 2006 WL 1735345, at *2–3 (N.D. Ill. June 16, 2006); *King v. Metcalf 56 Homes Ass'n, Inc.*, 385 F. Supp. 2d 1137, 1142–45 (D. Kan. 2005); *United States v. Altmayer*, 368 F. Supp. 2d 862, 863 (N.D. Ill. 2005); *Richards v. Bono*, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at *6 (M.D. Fla. May 2, 2005); *United States v. Koch*, 352 F. Supp. 2d 970, 978–80 (D. Neb. 2004). But see *Jones v. South Bend Hous. Auth.*, No. 3:08-CV-596, 2009 WL 1657466, at *4–5 (N.D. Ind. June 10, 2009) (holding this regulation invalid); *Reule v. Sherwood Valley I Council of Co-Owners, Inc.*, No. Civ. A. H-05-3197, 2005 WL 2669480, at *4 n.4 (S.D. Tex. Oct. 19, 2005) (same), *aff'd*, 235 Fed. App'x 227 (5th Cir. 2007) (per curiam).

For its part, after *Halprin*, the Seventh Circuit twice avoided ruling on the regulation's validity by finding that the defendant, as in *Halprin*, waived this issue and then ruling against the plaintiff-resident's § 3617 claim on the merits. See *Walton v. Claybridge Homeowners Ass'n, Inc.*, 191 Fed. App'x 446, 450 (7th Cir. 2006); *East-Miller v. Lake Cnty. Highway Dep't*, 421 F.3d 558, 562 n.1 (7th Cir. 2005). For further discussion of *Walton*, see *infra* notes 70–71.

⁶⁰ *Bloch*, 587 F.3d at 781. Until *Bloch*, the Seventh Circuit had reserved this question, see *id.*, but numerous other courts had held that a § 3617 violation does not require a violation of some other FHA provision. See cases cited *infra* notes 182, 191. As the *Bloch* opinion put it:

To hold otherwise would make § 3617 entirely duplicative of the other FHA provisions; though its language is unique in the FHA, § 3617 would have no independent meaning. But "when the legislature uses certain language in one part of

Coercion, intimidation, threats, or interference with or on account of a person's exercise of his or her §§ 3603–3606 rights can be distinct from outright violations of §§ 3603–3606. For instance, if a landlord rents to a white tenant but then threatens to evict him upon learning that he is married to a black woman, the landlord has plainly violated § 3617, whether he actually evicts the tenant or not.⁶¹

As *Bloch* put it, because “§ 3604 prohibits discriminatory evictions, it follows that *attempted* discriminatory evictions can violate § 3617's prohibition against interference with § 3604 rights.”⁶² Thus, a § 3617 claim based on interference “with or on account of plaintiff's § 3604 rights does not require that the plaintiff actually vacate the premises.”⁶³ As a result, § 3617 “reaches a broader range of post-acquisition conduct” than § 3604.⁶⁴ These rulings meant that the plaintiffs in *Bloch* could prevail under § 3617 if they showed that the defendants interfered with the “exercise or enjoyment of their right to inhabit their condo units because of their race or religion.”⁶⁵ The

the statute and different language in another, the court assumes different meanings were intended.”

587 F.3d at 781–82 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004)).

⁶¹ 587 F.3d at 782.

⁶² *Id.* An actual discriminatory eviction would presumably violate both § 3604 and § 3617, but the applicability of two FHA provisions to this one situation did not trouble the *Bloch* court, which noted, “That §§ 3604 and 3617 might overlap in some circumstances is ‘neither unusual nor unfortunate.’” *Id.* (quoting *United States v. Naftalin*, 441 U.S. 768, 778 (1979)).

⁶³ *Id.*

⁶⁴ *Id.* *Bloch* itself provided an example of this, as the en banc opinion held that the defendants' conduct might well violate the plaintiffs' rights under § 3617, but that it did not violate their § 3604(a) rights because it had not caused their constructive eviction. *Id.* at 777–79.

⁶⁵ *Id.* at 783. According to the en banc opinion, a plaintiff in the Blochs' position must show four things to prevail on a § 3617 claim, i.e., that:

(1) she is a protected individual under the FHA, (2) she was engaged in the exercise or enjoyment of her fair housing rights, (3) the defendants coerced, threatened, intimidated, or interfered with the plaintiff on account of her protected activity under the FHA, and (4) the defendants were motivated by an intent to discriminate.

Id. (citing *East-Miller v. Lake Cnty. Highway Dep't*, 421 F.3d 558, 563 (7th Cir. 2005)). For similar descriptions of the elements required for this type of § 3617 claim, see *Walton v. Claybridge Homeowners Ass'n*, 191 Fed. App'x 446, 450 (7th Cir. 2006); *People Helpers Found., Inc. v. City of Richmond*, 781 F. Supp. 1132, 1136 (E.D. Va. 1992); *HUD v. Krueger*, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,119, at 26,026 (HUD ALJ 1996), available at 1996 WL 418886, *aff'd sub nom.* *Krueger v. Cuomo*, 115 F.3d 487 (7th Cir. 1997); *HUD v. Kogut*, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,100, at 25,895, 25,904 (HUD ALJ 1995), available at 1995 WL 225277; *HUD v. Gutleben*, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,078, ¶ 25,726 (HUD ALJ 1994), available at 1994 WL

Bloch opinion recognized that “this interpretation effectively overrules *Halprin* as far as § 3617 is concerned.”⁶⁶ But one aspect of *Halprin* remained—its determination that mere “quarrels among neighbors,” even if invidiously motivated, should not give rise to a FHA claim.⁶⁷ The *Bloch* opinion endorsed this view and thus concluded that only a “pattern of harassment” could violate § 3617.⁶⁸

This was the one part of *Halprin* that apparently was not controversial. Indeed, even before *Halprin* was decided in 2004, a number of other courts had expressed similar views in § 3617 cases⁶⁹—albeit generally in dicta, as in *Halprin* and *Bloch*⁷⁰—and no case took the contrary position in the five years between *Halprin* and the en banc decision in *Bloch*.⁷¹

2. § 3617 Case Law Before *Halprin*

By the time *Halprin* was decided in 2004, about thirty cases had been reported that involved § 3617 harassment claims brought by protected-class homeowners and renters. One of the earliest was *Stackhouse v. DeSitter*,⁷² in which a new black resident of a white

441981, *modified*, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,103 (HUD ALJ 1994). For more on the fourth element set forth in *Bloch* and these other cases, see *infra* notes 272–73 and accompanying text.

⁶⁶ 587 F.3d at 782.

⁶⁷ *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, 388 F.3d 327, 329–30 (7th Cir. 2004).

⁶⁸ 587 F.3d at 783 (quoting *Halprin*, 388 F.3d at 330) (internal quotation marks omitted).

⁶⁹ See, e.g., *Gourlay v. Forest Lake Estates Civic Ass’n of Port Richey, Inc.*, 276 F. Supp. 2d 1222, 1236 (M.D. Fla. 2003) (determining that the FHA should not be interpreted as “an all purpose cause of action for neighbors of different races, origins, faiths, or with different types or concepts of families to bring neighborhood feuds into federal court when the dispute has little or no actual relation to housing discrimination”), *vacated pursuant to settlement*, 2003 WL 22149660 (M.D. Fla. Sept. 16, 2003); *infra* notes 99–109 and accompanying text (discussing two more district court cases); *infra* note 210 (quoting an additional district court case).

⁷⁰ These views were only dicta in *Halprin* and *Bloch* because the courts there found that such a pattern was alleged, *Bloch*, 587 F.3d at 783; *Halprin*, 388 F.3d at 330, as was true in many of the other opinions that have endorsed this view. For exceptions, see cases quoted *infra* note 71; *infra* note 103 and accompanying text.

⁷¹ Only a handful of neighbor-on-neighbor harassment cases were reported between *Halprin* and *Bloch*. See district court cases cited *supra* note 48. The Seventh Circuit itself decided one in an unreported decision that rejected such a § 3617 claim asserted by a black renter acting pro se. See *Walton v. Claybridge Homeowners Ass’n, Inc.*, 191 Fed. App’x 446 (7th Cir. 2006). *Walton* held, based on *Halprin*’s view that “there is a difference between a pattern of and an isolated act of harassment,” *id.* at 451 (citing *Halprin*, 388 F.3d at 330), that a white neighbor’s remark that “there is more than one way to lynch a nigger,” *id.* (internal quotation marks omitted), was merely “a single act of harassment that could not create a hostile housing environment,” *id.* at 452 (citing *DiCenso v. Cisneros*, 96 F.3d 1004, 1008–09 (7th Cir. 1996)), and thus could not sustain an interference claim under § 3617.

⁷² 566 F. Supp. 856 (N.D. Ill. 1983), *reconsideration granted in part*, 620 F. Supp. 208

Chicago suburb alleged that a neighbor firebombed his car to intimidate the plaintiff and his family and drive them out of the area.⁷³ The defendant was convicted of arson in a separate state court proceeding.⁷⁴ With respect to the plaintiff's civil action, Judge Aspen initially questioned § 3617's applicability,⁷⁵ but then held two years later that the defendant's behavior was "squarely within the range of actions prohibited by § 3617."⁷⁶

Claims like the one in *Stackhouse*, brought by minority families who are harassed because they were about to move or had moved into predominantly white areas, presumably come within the language of § 3617 that protects a "person in the exercise or enjoyment of, or on account of his having exercised or enjoyed" FHA rights.⁷⁷ In a number of early cases involving this scenario, the harassment was so violent that the Justice Department prosecuted the offenders in criminal actions based on § 3631,⁷⁸ which was passed in 1968 as a companion title to the FHA.⁷⁹ Victims of such behavior are presumably entitled to bring civil claims under § 3617,⁸⁰ but only a handful actually did so in the first two decades of the FHA.⁸¹

(N.D. Ill. 1985).

⁷³ *Stackhouse*, 620 F. Supp. at 209, 211.

⁷⁴ *Id.* at 211.

⁷⁵ *Stackhouse*, 566 F. Supp. at 859.

⁷⁶ *Stackhouse*, 620 F. Supp. at 211.

⁷⁷ 42 U.S.C. § 3617 (2006). For the full text of this section, see *supra* text accompanying note 28.

⁷⁸ See, e.g., *United States v. White*, 788 F.2d 390 (6th Cir. 1986) (upholding the defendant's conviction for conspiring with others to burn down a black family's home); *United States v. Redwine*, 715 F.2d 315 (7th Cir. 1983) (upholding the defendants' convictions for throwing rocks at and firebombing a black family's home); *United States v. Anzalone*, 555 F.2d 317 (2d Cir. 1977) (reversing the defendants' convictions for acts of vandalism and arson directed against a black family because the defendants had been indicted by the same grand jury that heard their immunized testimony), *aff'd on reh'g*, 560 F.2d 492 (2d Cir. 1977). In addition, some § 3631 prosecutions were brought against defendants who targeted white homeowners for physical violence and threats because they had brought black friends into their homes. E.g., *United States v. Wood*, 780 F.2d 955 (11th Cir. 1986); see also *United States v. Johns*, 615 F.2d 672 (5th Cir. 1980) (involving defendants who targeted an interracial couple).

⁷⁹ See *supra* note 36 and accompanying text.

⁸⁰ See, e.g., *United States v. Pospisil*, 127 F. Supp. 2d 1059, 1062–64 (W.D. Mo. 2000) (granting summary judgment in favor of § 3617 claim brought on behalf of minority family whose home was the target of the defendants' cross burning, which had already resulted in criminal convictions under § 3631); cf. *United States v. Vartanian*, 245 F.3d 609, 612 (6th Cir. 2001) (noting that targets of the defendant's behavior had, before the defendant's § 3631 conviction, filed civil suit under state fair housing law that "resulted in a judgment and a substantial monetary award in favor of the plaintiffs").

⁸¹ See, e.g., *Stirgus v. Benoit*, 720 F. Supp. 119, 121, 123 (N.D. Ill. 1989) (holding that the plaintiff's allegation that firebombing of her home deprived her of the right to enjoy and hold property on an equal basis with white citizens was sufficient to support a § 3617 claim); *Seaphus v. Lilly*, 691 F. Supp. 127, 138–39 (N.D. Ill. 1988) (holding that the plaintiff's

Also beginning in the 1980s, some courts held sexual harassment claims actionable under § 3617.⁸² There are, however, two noteworthy distinctions between the sex-based and race-based harassment claims brought during this period. First, the race-based cases often involved only a § 3617 claim, whereas all of the sex harassment decisions found liability under § 3604(b) or some other FHA provision as well as under § 3617. Indeed, many held that the standards for judging a defendant's conduct were the same under § 3617 as under the FHA's other provisions (i.e., the § 3617 claim was not independently valuable to the plaintiff).⁸³ Second, although some of the defendants in the sex harassment cases lived near the plaintiffs, they were generally sued in their role as landlords or other housing providers, not neighbors.⁸⁴

allegation that the defendants attempted to force the plaintiff from his home might support a claim under § 3617); *Waheed v. Kalafut*, No. 86 C 6674, 1988 WL 9092, at *4 (N.D. Ill. Feb. 2, 1988) (holding that the allegation that the defendant attempted to oust a black family from their home was sufficient to support a § 3617 claim). Virtually all of these early § 3617 harassment cases arose, like *Stackhouse*, in the Chicago area. *See Ohana v. 180 Prospect Place Realty Corp.*, 996 F. Supp. 238, 241 (E.D.N.Y. 1998) (noting that most prior cases recognizing such a § 3617 claim have "come from the Northern District of Illinois").

⁸² *See, e.g., Grieger v. Sheets*, 689 F. Supp. 835, 840–41 (N.D. Ill. 1988) (holding that the plaintiff, who refused the defendant's sexual demands, was intimidated, threatened, or interfered with by him as required for a § 3617 claim); *New York ex rel. Abrams v. Merlino*, 694 F. Supp. 1101, 1103–04 (S.D.N.Y. 1988) (holding that the plaintiffs can succeed under § 3617 if they can demonstrate severe and pervasive sexual harassment as well as a relationship between that harassment and housing). For more modern sex harassment cases brought under § 3617, see *infra* notes 113, 301–06 and accompanying text.

⁸³ *See* SCHWEMM, *supra* note 28, § 11C:2 nn.36–37 and accompanying text.

⁸⁴ *See, e.g., Greiger*, 689 F. Supp. at 836 (defendant sued in role as landlord); *see also* cases cited *infra* note 113.

In some cases, harassment by other neighbors was alleged, but the issue was whether the defendant-landlord should be held liable for this harassment, not whether these other neighbors were liable. The courts are divided as to whether a landlord or other housing provider may be held liable for tolerating neighbor-on-neighbor harassment. *Compare* *Neudecker v. Boisclair Corp.*, 351 F.3d 361, 364–65 (8th Cir. 2003) ("Yes" in § 3617 case), *Scialabba v. Sierra Blanca Condo. No. One Ass'n*, No. 00 C 5344, 2000 WL 1889664, at *4 (N.D. Ill. Dec. 27, 2000) ("Yes" in case alleging a "violation of § 3604(f)(1), in conjunction with § 3617"), *Wilstein v. San Tropai Condo. Master Ass'n*, No. 98 C 6211, 1999 WL 262145, at *11 (N.D. Ill. Apr. 22, 1999) ("Yes" under the FHA), *Reeves v. Carrollsburg Condo. Unit Owners Ass'n, Fair Housing-Fair Lending Rep. (Aspen L. & Bus.)* ¶ 16,250, at 16,250.6–7 (D.D.C. 1997), *available at* 1997 WL 1877201 ("Yes" under the FHA and §§ 1981–1982), *and* *Bradley v. Carydale Ents.*, 707 F. Supp. 217, 223–25 (E.D. Va. 1989) ("Yes" in case brought under 42 U.S.C. §§ 1981–1982 and state and local fair housing laws), *with* *Haynes v. Wilder Corp. of Del.*, 721 F. Supp. 2d 1218, 1228 (M.D. Fla. 2010) ("Neither the FHA nor the ADA requires a landlord to intervene in a purely private dispute among tenants."); *Lawrence v. Courtyards at Deerwood Ass'n, Inc.*, 318 F. Supp. 2d 1133, 1141–43 (S.D. Fla. 2004) ("No" in FHA case), *and* *Ohio Civil Rights Comm'n v. Akron Metro. Hous. Auth.*, 892 N.E.2d 415, 417–20 (Ohio 2008) ("No" under Ohio fair housing law). The issue of this type of vicarious liability comes up in other situations as well. *See, e.g., Egan v. Schmock*, 93 F. Supp. 2d 1090, 1095 (N.D. Cal. 2000) (declining to hold husband liable for wife's racially motivated harassment of an Indian

In the 1990s and early 2000s before *Halprin*, many more cases involving § 3617 claims of race- or sex-based harassment were reported. Before dealing with these cases, it is important to describe the ways in which the FHAA impacted them. As noted above, the FHAA made § 3617 claims subject to the FHA's regular enforcement methods.⁸⁵ It left intact § 3631 (the criminal-interference statute) as well as most of the other substantive prohibitions to which § 3617 refers (i.e., §§ 3603–3606). It did, however, add “familial status” and “handicap” to the bases of discrimination forbidden by these provisions.⁸⁶ Additionally, in response to Congress's perception that continuing high levels of housing discrimination had resulted in part from the inadequate enforcement system of the 1968 FHA,⁸⁷ the FHAA strengthened both the private and governmental enforcement mechanisms of the FHA.⁸⁸ The FHAA's new enforcement system provided, inter alia, that private complaints, including those now based on § 3617, could be filed with HUD and could ultimately result in charges that were prosecuted by government lawyers either before HUD administrative law judges or in federal court.⁸⁹ Finally, the FHAA directed HUD to promptly issue rules interpreting the new

family under agency theory in FHA case); SCHWEMM, *supra* note 28, § 11C:2 n. 58 (citing FHA cases dealing with housing provider's vicarious liability for employee's harassment of the plaintiff); cf. *Faragher v. City of Boca Raton*, 524 U.S. 775, 790–92, 807–08 (1998) (describing the circumstances under which an employer is liable for harassment by its employees under Title VII); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760–65 (1998) (same).

⁸⁵ See *supra* notes 29–31 and accompanying text.

⁸⁶ SCHWEMM, *supra* note 28, § 5:3. The only other major substantive change dealt with expanding § 3605's prohibition of mortgage discrimination and other residential real estate-related transactions. See *id.* § 18:1 nn.5–14 and accompanying text.

⁸⁷ One of the FHAA's key goals was to provide the 1968 FHA with “an effective enforcement system” in order to make the FHA's promise of nondiscrimination “a reality,” because the 1988 Congress saw the original FHA as having been “ineffective because it lack[ed] an effective enforcement mechanism.” H.R. REP. NO. 100-711, at 13, 15–16 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2174, 2176–77.

⁸⁸ The FHAA strengthened all three of the FHA's enforcement techniques by (1) establishing an expedited administrative complaint procedure that could result in injunctive relief, damages, and civil penalties; (2) eliminating the punitive damage cap, lengthening the statute of limitations, and making attorney's fees awards easier to obtain in private litigation; and (3) authorizing the Justice Department to collect monetary damages for aggrieved persons in its “pattern or practice” and “general public importance” cases. See 42 U.S.C. §§ 3610–3614 (2006); SCHWEMM, *supra* note 28, § 5:3 nn.6–9 and accompanying text; *id.* § 24:1–2. See generally *id.* ch. 24–26 (discussing the FHA's three enforcement methods).

⁸⁹ See SCHWEMM, *supra* note 28, ch. 24 (discussing complaints to HUD). Private complainants could also bypass this system and file suit directly in court, as was also true under the 1968 FHA. See 42 U.S.C. § 3613(a) (describing enforcement of FHA in civil action by private persons); SCHWEMM, *supra* note 28, § 24:1 n.11 and accompanying text (discussing same).

FHA.⁹⁰ HUD complied in early 1989, and the resulting regulations included one on the meaning of § 3617.⁹¹ As noted above, HUD's § 3617 regulation played a key role in both *Halprin* and *Bloch*,⁹² and it was also available for guidance—indeed, was required to be given *Chevron* deference⁹³—in all other § 3617 cases after 1989.

Most of the reported § 3617 decisions involving minority harassment between 1989 and *Halprin* favored the claimants. Five of these were HUD administrative decisions that found § 3617 violations after an evidentiary hearing.⁹⁴ The behavior in three of these cases involved only verbal attacks on the complainants; two of the three involved a series of such attacks,⁹⁵ but in the third, liability was based only on a single conversation.⁹⁶

Court decisions during this period generally took the form of pretrial rulings that focused on whether the plaintiffs' complaint was sufficient to state a claim under § 3617, rather than trial-based

⁹⁰ 42 U.S.C. § 3601, note on Initial Rulemaking. Prior to the FHAA, HUD had issued a few FHA regulations pursuant to a provision in the 1968 FHA giving HUD the "authority and responsibility for administering" the FHA. *Id.* § 3608(a). The FHAA made explicit HUD's authority to issue such regulations and indeed mandated that HUD do this within 180 days of the FHAA's passage. *Id.* § 3601, note on Initial Rulemaking.

⁹¹ 24 C.F.R. § 100.400 (2010). For the text of this regulation, see *infra* note 156 and accompanying text.

⁹² See *supra* notes 42–43 and accompanying text (discussing *Halprin*); *supra* note 60 and accompanying text (discussing *Bloch*).

⁹³ For a discussion of *Chevron* deference, see *infra* notes 152–54 and accompanying text.

⁹⁴ See *HUD v. Simpson*, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,082, at 25,760 (HUD ALJ 1994), available at 1994 WL 497538 (holding that the respondent-neighbors' two-year campaign of harassment against Hispanic family that included numerous incidents of physical conduct and verbal abuse interfered with the family "in the enjoyment of a dwelling" in violation of § 3617 and awarding \$180,000 in emotional distress damages to three members of the family plus other monetary relief and \$20,000 in civil penalties); *HUD v. Lashley*, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,039 (HUD ALJ 1992), available at 1992 WL 406539 (awarding maximum civil penalty and \$67,000 in damages against two respondent-neighbors for violating § 3617 by verbally abusing a minority family and attempting to firebomb their home); cases cited *infra* notes 95–96.

⁹⁵ *HUD v. Gutleben*, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,078, ¶¶ 25,726–28 (HUD ALJ 1994), available at 1994 WL 441981 (determining that the respondent-neighbor interfered with black tenants in violation of § 3617 by a series of remarks that included racial epithets directed at the complainants' children and efforts to convince their landlord to evict complainants), modified, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,103 (HUD ALJ 1994); *HUD v. Johnson*, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,076 (HUD ALJ 1994), available at 1994 WL 391135 (awarding maximum civil penalty and \$300,000 in emotional distress damages for the respondent-neighbor's violation of § 3617 based on lengthy campaign of verbal abuse and threats directed against a minority tenant and his white friend).

⁹⁶ *HUD v. Weber*, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,041, ¶ 25,424 (HUD ALJ 1993), available at 1993 WL 42262 (finding a § 3617 violation where the respondent-neighbor made threats and otherwise "verbally assaulted" the Hmong complainant while the latter was inspecting next-door house as a prospective tenant). For further discussion of the *Weber* case, see *infra* note 276.

rulings.⁹⁷ The allegations in virtually all of these cases set forth a series of verbal and sometimes even physical attacks by the defendants, with the courts generally holding that such behavior, if proved, would violate the minority plaintiffs' rights under § 3617.⁹⁸

In some cases, however, district courts expressed skepticism about applying § 3617 to a neighbors' dispute even when a lengthy pattern of harassment was alleged.⁹⁹ One of these was *Egan v. Schmock*,¹⁰⁰ a

⁹⁷ One case that did go to trial during this period was *United States ex rel. Smith v. Hobbs*, 44 F. Supp. 2d 788, 789–90 (S.D.W.Va. 1999), where, after a jury verdict for the black plaintiffs, the court—albeit without mentioning § 3617—granted a permanent injunction barring the defendant-neighbors from continuing to “interfere” with the plaintiffs’ FHA rights in a case in which the defendants repeatedly hurled egregious racial epithets and threats of physical violence while brandishing weapons.

⁹⁸ See, e.g., *United States v. Altmayer*, 368 F. Supp. 2d 862, 863 (N.D. Ill. 2005) (denying the defendant’s 12(b)(6) motion to dismiss the government’s § 3617 claim, which was based on an alleged “extended pattern of harassment” against the intervenor-plaintiffs, because the harassment was “backed by the homeowners’ association to which the plaintiffs belong, [making it] a matter of the neighbors’ ganging up on them”); *Ohana v. 180 Prospect Place Realty Corp.*, 996 F. Supp. 238, 239–43 (E.D.N.Y. 1998) (denying the defendant-neighbors’ 12(b)(6) motions to dismiss the plaintiffs’ § 3617 claim, which alleged “a series of discriminatory acts . . . [that] took the form of racial and anti-Jewish slurs and epithets, threats of bodily harm, and noise disturbances”); *Byrd v. Brandenburg*, 922 F. Supp. 60, 62–65 (N.D. Ohio 1996) (granting the black plaintiffs summary judgment on liability on their §§ 3617, 3604(a), and 1982 claims based on the defendant-neighbor’s tossing a Molotov cocktail onto porch of the plaintiffs’ home); *Johnson v. Smith*, 810 F. Supp. 235, 236–39 (N.D. Ill. 1992) (denying defendant-neighbors’ 12(b)(6) motion to dismiss the plaintiffs’ § 3617 claim, which alleged that the defendants burned a cross in the plaintiffs’ yard and broke a window in their home because three of the children in the home were mixed race); see also *Johns v. Stillwell*, No. 3:07cv00063, 2008 WL 2795884, at *1 (W.D. Va. July 18, 2008) (denying the defendant-landlord’s 12(b)(6) motion to dismiss the plaintiffs’ claims under §§ 3604(a)–(c) and 3617, which alleged that the defendant and the plaintiffs’ neighbors engaged “in a pattern of racial harassment and intimidation” over a six-year period that included verbal abuse and destruction of property (the court dealt exclusively with the § 3604(c) claim because the defendant’s motion to dismiss did not challenge the other claims)); *Bryant v. Polston*, No. IP 00-1064-C-T/G, 2000 WL 1670938, at *2–3 (S.D. Ind. Nov. 2, 2000) (denying the defendant-neighbors’ 12(b)(6) motion to dismiss the white plaintiffs’ claim under § 3617, which alleged that the defendants subjected them to “a continuous pattern of racially derogatory remarks, acts of intimidation and gestures of violence or bodily harm with a gun” because the plaintiffs entertained blacks in their home); see also *People Helpers Found., Inc. v. City of Richmond*, 781 F. Supp. 1132, 1133–36 (E.D. Va. 1992) (denying the defendant-neighbors’ 12(b)(6) motion to dismiss the plaintiff’s § 3617 claim, which accused the defendants of making numerous derogatory and threatening remarks and otherwise working to stop the plaintiff-organization from operating a group home for disabled minorities in the defendants’ neighborhood).

For further discussion of the *Ohana* decision, see *infra* notes 260–64 and accompanying text.

⁹⁹ In addition to the *Egan* and *Weisz* opinions discussed in the text, see *infra* text accompanying notes 100–08, such skeptical comments also appeared in *Sporn v. Ocean Colony Condominium Ass’n*, 173 F. Supp. 2d 244, 251 (D.N.J. 2001), a case involving several FHA claims based on handicap and familial-status discrimination. The § 3617 claim in *Sporn* was based on allegations that, in retaliation for the plaintiffs’ having filed a HUD complaint accusing their condominium officials of discriminating against families with children, those officials and other neighbors responded by “shunning” the plaintiffs. *Id.* Because this claim was based on the defendants’ response to the plaintiffs’ FHA complaint rather than to their status as families with

2000 case that dismissed a § 3617 claim by a California minority family who alleged that the defendant-neighbors had engaged in numerous acts of physical harassment and verbal abuse against the plaintiffs over a nine-year period.¹⁰¹ The *Egan* court rejected the theory that “any discriminatory conduct which interferes with an individual’s enjoyment of his or her home” violates § 3617, because this would mean that “any dispute between neighbors of different races or religions could result in a lawsuit in federal court under the FHA.”¹⁰² Instead, the court held that only those acts that are “designed to drive the victim out of his or her home” should be actionable.¹⁰³

Another district court dismissal of a § 3617 claim based on a neighbors’ dispute occurred in 1996 in a case from the New York City area, *United States v. Weisz*.¹⁰⁴ The Justice Department brought this case on behalf of a Catholic family (the Cronins), who claimed that a Jewish neighbor (Pearl Weisz) harassed them over an eighteen-month period “because of the Cronins’ religion.”¹⁰⁵ The *Weisz* court discounted the religious nature of this dispute, concluding that the defendant’s behavior was prompted by the Cronins’ conduct, not their religion.¹⁰⁶ The court conceded that some of the alleged incidents

children or disabled persons, it is not like the cases discussed in this section. (For a further discussion of retaliation claims based on § 3617, see *infra* notes 187–89 and accompanying text.) In the course of granting summary judgment for the defendants, however, the *Sporn* court did express specific concerns about interpreting § 3617 too broadly in cases involving neighbor harassment, commenting that § 3617 does not “impose a code of civility” on neighbors nor does it “require that neighbors smile, say hello or hold the door for each other.” 173 F. Supp. 2d at 251. For a further discussion of *Sporn*, see *infra* notes 206–11 and accompanying text.

¹⁰⁰ 93 F. Supp. 2d 1090 (N.D. Cal. 2000).

¹⁰¹ *Id.* at 1092–93.

¹⁰² *Id.* at 1093.

¹⁰³ *Id.* Based on this standard, the *Egan* court dismissed the FHA claim with leave to amend the complaint to add an allegation that the defendants’ harassment was “designed to drive [the plaintiffs] out of [their] home.” *Id.*

¹⁰⁴ 914 F. Supp. 1050 (S.D.N.Y. 1996).

¹⁰⁵ *Id.* at 1053 (internal quotation marks omitted).

¹⁰⁶ According to the *Weisz* court, the complaint’s allegations

recite nothing more than a series of skirmishes in an unfortunate war between neighbors. There is no indication in any of these allegations that defendant Weisz was feuding with the Cronins because Weisz was Jewish and the Cronins were Roman Catholic. For all that appears from the complaint’s factual allegations, Weisz was offended by the Cronins’ conduct, not by their faith. For all that appears, Weisz would have been just as offended by the Cronins’ alleged offensive behavior, public intoxication, basketball pole, trespass upon Weisz’s property and harassment of her children if the Cronins had also been Orthodox Jews; or for that matter, Episcopalians, Baptists, Mohammedans, Buddhists, agnostics, or atheists.

Id. at 1054–55.

“add Jewish elements into the narrative, [but] they reflect nothing more than the defendant’s methods of making life miserable for the Cronins. They do not support an inference that Weisz wished to make life miserable for the Cronins because they were Roman Catholics.”¹⁰⁷ As a result, *Weisz* held that the conduct alleged “does not fall within § 3617,”¹⁰⁸ opining that a § 3617 complaint

must allege conduct on the part of a defendant which in some way or other implicates the concerns expressed by Congress in the FHA. If it were otherwise, the FHA would federalize any dispute involving residences and people who live in them. Nothing in the statute or its legislative history supports so startling a proposition.¹⁰⁹

None of these cases produced an appellate decision, but the Eleventh Circuit did decide a case with somewhat similar facts in *Sofarelli v. Pinellas County*,¹¹⁰ which involved a white homeowner who allegedly was harassed by the defendant-neighbors because they feared he would rent to blacks.¹¹¹ The district court dismissed Sofarelli’s § 3617 claim, but the court of appeals reversed, holding that the neighbors’ “leaving a note threatening ‘to break [Sofarelli] in half’ if he did not get out of the neighborhood and running up to one of Sofarelli’s trucks, hitting it, shouting obscenities and spitting at Sofarelli,” along with making racial slurs in a local newspaper, constituted actionable behavior under § 3617.¹¹² In addition to *Sofarelli*, a number of appellate courts decided sex harassment cases that included § 3617 claims, but these decisions followed the lead of earlier sex-based cases in not providing a detailed analysis of the

¹⁰⁷ *Id.* at 1055.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1054.

¹¹⁰ 931 F.2d 718 (11th Cir. 1991).

¹¹¹ *Id.* at 720–21. Sofarelli’s complaint alleged that his efforts to transport his house by trailer had been interfered with by county officials and his prospective new neighbors. *Id.* at 720. The claims against the county defendants, which were based on 42 U.S.C. § 1983, were dismissed by the trial court, a ruling that was affirmed on appeal. *Id.* at 722–23.

¹¹² *Id.* at 721–22 (alteration in original). The defendant-neighbors stated in a local newspaper article that they “don’t want the house on their block partly because they’re afraid black people might move in,” and “What’s stopping him (Sofarelli) from selling it to coloreds? . . . Once that happens, the whole neighborhood is gone.” *Id.* at 722 (omission in original) (internal quotation marks omitted). In reversing the trial court’s dismissal of Sofarelli’s § 3617 claim against these defendants, the Eleventh Circuit held that their alleged behavior “clearly constitute[s] coercion and intimidation under § 3617” and that, if the proof showed that the neighbors “interfered with the house move in order to prevent someone of a particular race from being able to move into their neighborhood, Sofarelli would be able to establish a colorable claim against them under the Fair Housing Act.” *Id.*

plaintiffs' § 3617 claims separate from their § 3604 claims—both of which were thought to be governed by a “severe or pervasive” standard.¹¹³

3. Summary of Neighbor Harassment Case Law

Cases decided before *Halprin* generally recognized that minority homeowners could invoke § 3617 to challenge invidiously motivated harassment by their neighbors. *Halprin* jolted this consensus by suggesting that *nothing* in the FHA should be interpreted to provide protection for current residents unless they were forced out of their homes, but this suggestion was ultimately rejected by *Bloch*.

After *Bloch*, the question has again become not whether neighbor harassment can justify a § 3617 claim, but how egregious such harassment must be. One HUD administrative decision in the 1990s held that a single hostile conversation could suffice; but many courts, including the Seventh Circuit in *Bloch*, opined that § 3617 should be interpreted to require sufficiently abusive or systematic behavior so as not to apply to simple neighborhood quarrels.

But there are problems with this interpretation. To the extent this interpretation seeks to impose the same “severe or pervasive” standard on § 3617 that governs § 3604 sex harassment cases, it ignores the independence of § 3617 from the FHA’s other substantive provisions. In particular, it ignores the fact that the language in § 3617 is quite different from the prohibition of discriminatory “terms and conditions” in § 3604(b) and Title VII, which is often invoked in the sex harassment cases.¹¹⁴ Furthermore, imposing a “severe or pervasive” standard on § 3617 ignores a key goal of the FHA: to

¹¹³ See, e.g., *Krueger v. Cuomo*, 115 F.3d 487, 491–92 (7th Cir. 1997) (affirming HUD ALJ’s decision, described *infra* note 262, that landlord violated both §§ 3604(b) and 3617); *DiCenso v. Cisneros*, 96 F.3d 1004, 1008–09 (7th Cir. 1996) (ruling for defendant-landlord based on conclusion that his harassment of female tenant did not meet the “severe or pervasive” standard); *Honce v. Vigel*, 1 F.3d 1085, 1090 (10th Cir. 1993) (same); see also *Reeves v. Carrollsburg Condo. Owners Ass’n*, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 16,250, at 16,250.4–6 (D.D.C. 1997), available at 1997 WL 1877201 (holding that the plaintiff established a prima facie case of hostile-environment sexual harassment by showing that the defendant’s conduct met the “severe or pervasive” standard); SCHWEMM, *supra* note 28, § 11C:2 nn.35–36 (citing additional cases). Post-*Halprin* cases have followed the same pattern. See, e.g., *Quigley v. Winter*, 598 F.3d 938, 946–48 (8th Cir. 2010) (affirming decision against landlord under FHA’s basic prohibitions of housing harassment based on “severe or pervasive” standard as well as under § 3617).

Like the pre-FHAA sex harassment cases, the defendants in these more modern cases were sued in their role as housing providers, not neighbors. E.g., *Quigley*, 598 F.3d at 944–45; *Krueger*, 115 F.3d at 489–90; *DiCenso*, 96 F.3d at 1005–06; *Honce*, 1 F.3d at 1087–88.

¹¹⁴ For more on this point, see *infra* text accompanying notes 214–25.

encourage integration and therefore presumably to protect minority families who make integrative moves.¹¹⁵

To be true to the text of § 3617—and therefore presumably to Congress’s intent—a proper interpretation of § 3617 in neighbor harassment cases must determine whether the defendant’s behavior “interfere[d] with” the plaintiff’s “exercise or enjoyment of” a “right granted or protected” by §§ 3603–3606.¹¹⁶ These are the three elements that *Bloch* and other cases have recognized as required for a § 3617 claim, along with the requirement that the defendant be motivated by an intent to discriminate.¹¹⁷ The next Part examines other sources that shed light on the meaning of these three elements of § 3617.

III. MORE EVIDENCE ON WHAT § 3617 MEANS BY “TO INTERFERE WITH” THE “EXERCISE OR ENJOYMENT OF” A “RIGHT” PROTECTED BY §§ 3603–3606

A. Overview

Part II determined that some of the issues in neighbor harassment cases require a further analysis of the key phrases used in § 3617. This Part examines various sources of guidance as to the meaning of these phrases. Section B examines § 3617’s legislative history. Section C discusses HUD’s regulations interpreting the FHA. Section D explores additional § 3617 cases, beyond those involving neighbor-on-neighbor harassment, as well as the Supreme Court’s interpretations of Title VII’s analogous provision. Section E considers First Amendment implications. Section F summarizes the insights derived from these sources.

B. § 3617’s Legislative History

The legislative history of § 3617 contains no statements that directly address the meaning of its key phrases, but some general comments were made about this provision’s purpose, and its textual evolution is worth recounting. Like most of the FHA’s other substantive prohibitions enacted in 1968, § 3617 changed very little during the two-year period that Congress dealt with this legislation.¹¹⁸

¹¹⁵ For more on this point, see *infra* text accompanying notes 144–48.

¹¹⁶ For the full text of § 3617, see *supra* text accompanying note 29.

¹¹⁷ See *supra* note 65 (quoting the test from *Bloch*).

¹¹⁸ For a detailed description of this two-year process, see Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act’s Most Intriguing Provision*, 29 *FORD. URB. L.J.* 187, 197–200 (2001). For a description of how the

The FHA's legislative process began in 1966 when President Johnson proposed a fair housing bill,¹¹⁹ which included a provision almost identical to § 3617.¹²⁰ Later in 1966, the House passed an amended version of the Johnson bill with no changes to this provision,¹²¹ but that bill failed in the Senate.¹²²

In 1967, Senator Mondale introduced a new fair housing bill that included some slight changes to § 3617's predecessor.¹²³ The substantive language of Mondale's version of § 3617 was ultimately enacted in the 1968 FHA, reenacted in the 1988 FHAA, and remains in effect today.¹²⁴ In early 1968, the Mondale bill was proposed as an amendment to another civil rights bill then pending on the Senate

FHA's substantive provisions evolved, see *id.* at 200–06.

¹¹⁹ The Johnson Administration's proposal was embodied in two identical bills. S. 3296, 89th Cong. (1966); H.R. 14765, 89th Cong. (1966). For the text of Senate Bill 3296, see 112 CONG. REC. 9394–97 (1966).

¹²⁰ The bill's version of § 3617 provided:

No person shall intimidate, threaten, coerce, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of any right granted by section 403 or 404.

112 CONG. REC. 9397 (1966). The enacted version provided:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title. This section may be enforced by appropriate civil action.

42 U.S.C. § 3617 (1970) (emphasis added) (emphasizing the differences between the two).

¹²¹ See 112 CONG. REC. 18,739–40 (1966) (reporting the result of the roll-call vote for the amended version of House Bill 14765).

¹²² See 112 CONG. REC. INDEX 1183 (1966) (describing House Bill 14765 and the Senate's inability to pass a motion for cloture on the bill).

¹²³ S. 1358, 90th Cong. (1967). For the text of this bill, see *Fair Housing Act of 1967: Hearings Before the Subcomm. on Hous. & Urban Affairs of the S. Comm. on Banking & Currency on S. 1358, S. 2114, and S. 2280 Relating to Civil Rights and Housing*, 90th Cong. 439–59 (1967). Senate Bill 1358 was identical to the fair housing title of a civil rights bill proposed by the Johnson Administration in 1967 (Senate Bill 1026 and House Bill 5700), a copy of which is set forth in *Civil Rights Act of 1967: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary on S. 1026, S. 1318, S. 1359, S. 1362, S. 1462, H.R. 2516 and H.R. 10805 Proposed Civil Rights Act of 1967*, 90th Cong. 36–42 (1967).

Apart from the needed changes in the numbers of the referenced sections within this provision, the Mondale version of § 3617 made only three changes to the original version, see *supra* note 120, which were: (1) to add “or protected” to “any right granted . . . by” these referenced sections; (2) to reorder the first three verbs; and (3) to change the introductory phrase regarding how such behavior was forbidden, a change that was also made to the other substantive provisions of the bill.

¹²⁴ See *supra* notes 29, 120.

floor.¹²⁵ This amendment was later withdrawn in favor of a substitute fair housing proposal offered by Senator Dirksen,¹²⁶ which, with minor amendments not relevant here, was eventually enacted.¹²⁷ Senator Dirksen's version of § 3617 was substantively identical to the Mondale proposal.¹²⁸

The evolution of § 3617 shows that virtually all of its key language was in the original 1966 Johnson Administration proposal. What led the drafters of this proposal to choose this language? None of the Administration's explanations regarding its proposed bill focused on the specific words or purpose of § 3617.¹²⁹ A congressional analysis noted that it was "intended to protect Negroes and others from threats, etc., not only by parties to any negotiation or prospective transaction

¹²⁵ See 114 CONG. REC. 2270–72 (1968) (proposal printed); *id.* at 2279 (amendment formally offered by Sen. Mondale).

¹²⁶ For the text of the Dirksen proposal, see 114 CONG. REC. 4570–73 (1968).

¹²⁷ See 114 CONG. REC. 9620–21 (1968) (House passage of Senate-passed version); Lyndon B. Johnson, Remarks Upon Signing the Civil Rights Act (Apr. 11, 1968), in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON: 1968–69, at 509–10 (1970) (presidential signing). For a description of the Senate amendments, see Schwemm, *supra* note 118, at 205 n.76.

¹²⁸ See bills cited *supra* notes 119, 121, 123; see also 114 CONG. REC. 9612 (1968) (noting, in a comparative analysis of Dirksen's Senate-passed version of § 3617 and the 1966 House-passed version of this provision, that these versions were "comparable").

The Dirksen proposal did, however, relocate this provision toward the end of the statute and provided for its enforcement only by "appropriate civil action" rather than pursuant to the private enforcement procedures set up for other FHA violations. 114 CONG. REC. 4570–73 (1968). All prior versions, beginning with the original Johnson Administration proposal, had placed § 3617's predecessor immediately after the bill's other substantive prohibitions and made all of these prohibitions subject to the FHA's enforcement procedures. See bills cited *supra* notes 119, 121, 123. Senator Dirksen offered no explanation for these changes. See 114 CONG. REC. 4574 (1968) (statement of Sen. Dirksen). In any event, this change in § 3617 by Senator Dirksen was the one reversed by the 1988 FHAA, see *supra* note 29 and accompanying text, which means that the original Johnson Administration proposal regarding § 3617 is procedurally consistent with the modern version of this provision, as well as being nearly identical substantively.

¹²⁹ The Attorney General's explanation of the overall bill included only general statements about coverage. 112 CONG. REC. 9399 (1966). With respect to the provision that became § 3617, the Attorney General merely stated that this provision would "prohibit coercion, intimidation or interference with the right of a person to obtain housing and its financing without discrimination or to aid others in exercising such rights." *Id.* With respect to the bill's overall substantive provisions, he noted, "The bill would reach . . . such acts as mobs blocking a minority-group family from moving into a neighborhood . . ." *Id.* The Attorney General also noted that a related title provided for criminal prosecutions for those who interfered by the use of force or the threat of force in "activities protected by Federal law or the Constitution." *Id.* For more on this related criminal provision, see *supra* notes 36–37 and accompanying text.

In its 1968 analysis of the Dirksen proposal, the Justice Department simply listed the bill's various prohibitions, including those contained in § 3617, without providing any additional explanation of their specific meaning. 114 CONG. REC. 4906–08 (1968). As for § 3617, the Justice Department stated, "The bill would also make it unlawful to coerce, intimidate threaten or interfere with persons seeking to exercise or enjoy the rights granted or protected by [this title]." *Id.* at 4908.

but from any third parties who seek to forestall the same” and that it “reaches similar conduct in retaliation for having negotiated the purchase or rental of a dwelling and/or for having consummated the same.”¹³⁰ This analysis also noted that “there is some doubt whether [the other substantive] sections protect persons against retaliation because they have filed a complaint, testified or assisted in any proceeding under this title”¹³¹ and that “Congress on other occasions has expressly provided [such] a safeguard.”¹³²

But the language proposed for the FHA was significantly broader than the antiretaliation provisions in these other laws. For example, the comparable Title VII provision bars only employers and the three other entities covered by Title VII from discriminating against employees and other persons they deal with because those persons have “opposed any practice made . . . unlawful” by Title VII or made a charge or otherwise “participated in any manner in [a Title VII] investigation, proceeding, or hearing.”¹³³ In contrast, the Johnson Administration’s proposal for what became § 3617 went beyond Title VII’s provision in two major ways by: (1) using four separate verbs to describe the forbidden behavior, rather than requiring a defendant “to discriminate against” someone; and (2) describing three types of protected activities that go beyond Title VII’s protection of those who have “opposed” unlawful practices or “participated” in Title VII proceedings.¹³⁴ Under well-established principles of statutory construction, Congress’s decision to make these additions, once

¹³⁰ 112 CONG. REC. 18,117 (1966) (written submission of the Legislative Reference Service of the Library of Congress).

¹³¹ *Id.* at 18,118.

¹³² *Id.* As a footnote to this observation, the analysis cited the antiretaliation provisions of Title VII of the 1964 Civil Rights Act, the National Labor Relations Act, and a New York State fair housing law that outlawed “similar conduct.” *Id.* n.*; see also *infra* note 133 and accompanying text (quoting Title VII).

¹³³ 42 U.S.C. § 2000e-3(a) (2006). For a discussion of Supreme Court cases interpreting this provision, see *infra* notes 216–30 and accompanying text.

¹³⁴ In addition, the proposal for § 3617 went beyond its Title VII counterpart in at least two more ways: (1) by making the behavior described unlawful, regardless of who engages in it; and (2) by describing the victim of such unlawful behavior as “any person,” instead of limiting protection to those in an employment or other business relationship with the defendant.

A related piece of evidence that Congress intended to broaden the scope of § 3617 is the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621–634 (2006), which banned many of the same employment practices outlawed by Title VII if engaged in because of age, *id.* § 623, and which included an antiretaliation provision that used language virtually identical to Title VII’s, *id.* § 623(d). Thus, in the same time period that Congress was adopting language for § 3617 that went well beyond Title VII’s comparable provision, it was choosing not to make such additions to a different civil rights statute that it felt was more similar to, and should remain verbally consistent with, Title VII.

enacted, must be seen an intentional effort to add substantive coverage to the FHA's provision.¹³⁵

Although not mentioned in the FHA's legislative history, two other recently enacted civil rights statutes contained antiharassment provisions that were more similar to the language proposed in 1966 for § 3617 than Title VII's antiretaliation provision. One was Title II of the Civil Rights Act of 1964, whose prohibitions against discrimination in public accommodations were followed by a provision declaring that "[n]o person shall . . . intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by [the substantive provisions] of this title."¹³⁶ The other was the Voting Rights Act of 1965 ("VRA"), which made it unlawful for anyone to "intimidate, threaten, or coerce" any person for voting, attempting to vote, or "urging or aiding any person to vote or attempt to vote," or "exercising any power or duties under" the VRA's other substantive provisions.¹³⁷

¹³⁵ These principles include, first and foremost, that a statute's text is the primary source of its meaning. *See, e.g.*, *CSX Transp., Inc. v. Alabama Dept. of Revenue*, 131 S. Ct. 1101, 1107 (2011) ("We begin, as in any case of statutory interpretation, with the language of the statute.") (citing *Hardt v. Reliance Standard Life Ins. Co.*, 130 S.Ct. 2149, 2156 (2010)); *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) ("The starting point for [the] interpretation of a statute is always its language." (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 44 U.S. 102, 108 (1980))). As a corollary, another basic tenet of statutory construction requires that every word or phrase in the text be accorded some meaning. *See, e.g.*, *Bilski v. Kappos*, 130 S. Ct. 3218, 3228–29 (2010) (invoking the "canon [of statutory interpretation] against interpreting any statutory provision in a manner that would render another provision superfluous" (citing *Corley v. United States*, 129 S. Ct. 1558, 1566 (2009))); *Samantar v. Yousuf*, 130 S. Ct. 2278, 2288 (2010) ("[W]e should not construe the statute in a manner that . . . would render a statutory term superfluous." (alteration in original) (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003)) (internal quotation marks omitted)); *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (noting that a court must give effect, if possible, to every clause and word of a statute); *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62–63 (2006) (analyzing the language of Title VII's substantive and antiretaliation provisions); *supra* note 60 (analyzing the language of § 3617).

¹³⁶ 42 U.S.C. § 2000a-2(b) (2006). For early cases decided under this provision, see *United States v. Original Knights of Ku Klux Klan*, 250 F. Supp. 330, 356 (E.D. La. 1965) (enjoining private individuals and organizations from engaging in behavior that "intimidated, harassed, and in other ways interfered with the civil rights of Negroes" in violation of Title II and other federal laws); *United States v. Clark*, 249 F. Supp. 720, 730 (S.D. Ala. 1965) (enjoining city and county law enforcement officials from interfering with blacks who asserted their Title II rights); *see also United States v. Johnson*, 390 U.S. 563 (1968) (upholding criminal convictions under 18 U.S.C. § 241 of defendants who physically assaulted blacks seeking to exercise their Title II rights). Title II's antiharassment provisions have produced few reported cases since the FHA's enactment in 1968.

¹³⁷ 42 U.S.C. § 1973i(b); *see also id.* § 1973j(c) (providing criminal sanctions for anyone who "interferes with any right secured by" the VRA). The VRA's antiharassment provisions have produced few reported decisions. *See, e.g.*, *Olagues v. Russoniello*, 770 F.2d 791, 804–05 (9th Cir. 1985) (declining to recognize a private right of action for damages under § 1973i(b)).

This language in the VRA was described in an early § 3617 decision as “essentially identical” to § 3617’s,¹³⁸ but this is not accurate. Although use of the three verbs “intimidate, threaten, or coerce” in both the VRA and Title II does appear to have been copied in the 1966 proposal that became § 3617, the latter’s addition of a fourth verb—“interfere with”—along with its articulation of the activities protected are noteworthy differences. These changes must be considered important additions to a proper interpretation of § 3617.¹³⁹ As we have seen, § 3617’s addition of “interfere with” is particularly crucial to resolving the issue at the heart of this Article.¹⁴⁰

To summarize, the FHA’s § 3617 is now much like it was when originally proposed in 1966. It was described then as an antiretaliation provision comparable to Title VII’s,¹⁴¹ and indeed it does protect those who are later discriminated against for asserting their FHA rights.¹⁴² But § 3617’s broader language shows that it was intended to do much more. Whether this broader scope of § 3617 covers neighbor-on-neighbor harassment turns on two issues: (1) what types of behavior are included in the four verbs used—particularly “interfere with”; and (2) whether this behavior is directed at its target because the latter was engaged “in the exercise or enjoyment of” a “right granted or protected by” the FHA’s §§ 3603–3606. The legislative history of § 3617 provides little guidance in answering these questions.

An additional comment about the FHA’s general legislative history is worth making here.¹⁴³ As the *Bloch* opinion noted in construing § 3617 to apply to some types of neighbor harassment, such a construction is “consistent with Congress’ intent in enacting the FHA—‘the reach of the proposed law was to replace the ghettos by truly integrated and balanced living patterns.’”¹⁴⁴ The *Bloch* court here was quoting the Supreme Court’s first FHA decision, *Trafficante*

¹³⁸ *Northside Realty Assocs., Inc. v. Chapman*, 411 F. Supp. 1195, 1199 (N.D. Ga. 1976).

¹³⁹ See *supra* note 135 and accompanying text.

¹⁴⁰ See *supra* Part II.B. For additional discussion of the meaning of § 3617’s “interferes with” phrase, see *infra* Part III.D.2.

¹⁴¹ See *supra* note 132 and accompanying text.

¹⁴² See *infra* notes 187–89 and accompanying text.

¹⁴³ See generally *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1615 (2010) (examining statute’s “context and history” in order to provide additional support for the Court’s reading of its text, and noting that “[i]n reading a statute we must not look merely to a particular clause, but consider in connection with it the whole statute” (quoting *Dada v. Mukasey*, 128 S. Ct. 2307, 2317 (2008)) (internal quotation marks omitted)).

¹⁴⁴ *Bloch v. Frischholz*, 587 F.3d 771, 782 (7th Cir. 2009) (en banc) (quoting *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972)).

v. Metropolitan Life Insurance Co.,¹⁴⁵ which in turn had quoted Senator Mondale as advocating this statute as a way of replacing the ghettos “by truly integrated and balanced living patterns.”¹⁴⁶ Clearly, the goal of racial integration was important to the Congress that passed the 1968 FHA.¹⁴⁷ As *Bloch* recognized, the congressional desire that the FHA result in integrated living patterns has important implications for the proper interpretation of § 3617 in neighbor-on-neighbor harassment cases.¹⁴⁸ This lesson will be further explored later.¹⁴⁹

C. HUD’s § 3617 Regulation

In early 1989, HUD issued a lengthy set of FHA regulations that became effective along with the amendments adopted by the 1988 FHAA on March 12, 1989.¹⁵⁰ Each of the FHA’s substantive

¹⁴⁵ 409 U.S. 205, 211 (1972). *Trafficante* was a unanimous decision upholding the standing of white residents of a large apartment complex to complain about their landlord’s racial discrimination against black applicants. For more on this case’s guides to interpreting the FHA, see *infra* note 201.

¹⁴⁶ *Trafficante*, 409 U.S. at 211 (quoting 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale)) (internal quotation marks omitted); see also 114 CONG. REC. 2276 (1968) (additional remarks of Senator Mondale decrying the prospect that “we are going to live separately in white ghettos and Negro ghettos”); *id.* at 2275–76, 2279 (additional remarks of Senator Mondale stating that the FHA reflects Congress’s commitment “to the principle of living together” and to promoting integrated neighborhoods where residents of difference races would live together in “harmony”).

¹⁴⁷ In addition to Senator Mondale’s comments, *supra* note 146 and accompanying text, proponents of the FHA in both the Senate and the House repeatedly argued that it was intended not only to expand housing choices for individual minorities, but also to foster racial integration for the benefit of all Americans. On the House side, for example, Congressman Cellar, the Chairman of the Judiciary Committee, spoke of the need to eliminate the “blight of segregated housing and the pale of the ghetto,” 114 CONG. REC. 9559 (1968), and Congressman Ryan saw the FHA as a way to help “achieve the aim of an integrated society,” *id.* at 9591. According to Senator Javits, the intended beneficiaries of the FHA were not only blacks and other minority groups, but “the whole community.” *Id.* at 2706. In general, Congress was aware of the recently published conclusion of the National Commission on Civil Disorders that the nation was dividing into two racially separate societies, see SCHWEMM, *supra* note 28, § 5:2 nn.12–20 and accompanying text, and thus intended the FHA to remedy segregated housing patterns and the problems associated with them—segregated schools, lost suburban job opportunities for minorities, and the alienation of whites and blacks caused by the “lack of experience in actually living next to” each other. *Id.* at 2275 (statement of Senator Mondale); see also *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 94–95 (1977) (stating that Congress in the FHA “made a strong national commitment to promote integrated housing” for the benefit of “both whites and blacks” (citing *Trafficante*, 409 U.S. 205)). For more on the integration theme in the FHA’s legislative history, see SCHWEMM, *supra* note 28, §§ 2:3, 7:3.

¹⁴⁸ *Accord* *United States v. Koch*, 352 F. Supp. 2d 970, 977–78 (D. Neb. 2004) (interpreting § 3617 broadly based in part on recognition of Congress’s desire in the FHA to eliminate housing discrimination and to promote harmony in innercity neighborhoods).

¹⁴⁹ See *infra* notes 275–81 and accompanying text.

¹⁵⁰ See Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232–3317 (Jan. 23, 1989) (codified at scattered parts of 24 C.F.R.).

provisions, including § 3617, was the subject of one or more of these regulations.¹⁵¹ Pursuant to the Supreme Court's directive in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹⁵² these regulations must be given substantial deference in interpreting the FHA¹⁵³—i.e., courts must follow these regulations so long as they are a “permissible” or “reasonable” construction of the FHA.¹⁵⁴

The regulation interpreting § 3617 first tracks the statutory language of this provision and then identifies five types of conduct outlawed by § 3617.¹⁵⁵ Among the types of conduct identified as unlawful, and the one most relevant to the problem of neighbor harassment, is: “Threatening, intimidating or interfering with persons in their enjoyment of a dwelling because of the race, color, religion, sex, handicap, familial status, or national origin of such persons, or of visitors or associates of such persons.”¹⁵⁶

¹⁵¹ See 24 C.F.R. §§ 100.50–148 (2010) (regulating discriminatory housing practices and residential real estate–related transactions). For a discussion of the § 3617 regulation, which appears in section 100.400, see *infra* notes 155–56 and accompanying text.

¹⁵² 467 U.S. 837 (1984).

¹⁵³ See, e.g., *Meyer v. Holley*, 537 U.S. 280, 287–88 (2003) (relying on HUD regulation to interpret the FHA). For a list of decisions that have accorded deference to HUD's FHA regulations, see SCHWEMM, *supra* note 28, § 7:5 n.17. For more on *Chevron* deference in the context of § 3617 cases involving neighbor harassment, see *infra* notes 263–67 and accompanying text.

¹⁵⁴ See *Chevron*, 467 U.S. at 842–45 (instructing that unless “Congress has directly spoken to the precise question at issue”—i.e., the statute “unambiguously expressed intent of Congress”—courts are to follow an agency's regulations so long as they are a “permissible” or “reasonable” construction of the statute, giving them “controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute”).

¹⁵⁵ See 24 C.F.R. § 100.400. The five types of unlawful conduct are identified in subsection (c) of this regulation, which states that the conduct made unlawful by § 3617 “includes, but is not limited to” these five examples. *Id.* § 100.400(c).

¹⁵⁶ *Id.* § 100.400(c)(2). The four other types of unlawful conduct identified in this regulation are:

(1) Coercing a person, either orally, in writing, or by other means, to deny or limit the benefits provided that person in connection with the sale or rental of a dwelling or in connection with a residential real estate-related transaction because of race, color, religion, sex, handicap, familial status, or national origin. . . .

(3) Threatening an employee or agent with dismissal or an adverse employment action, or taking such adverse employment action, for any effort to assist a person seeking access to the sale or rental of a dwelling or seeking access to any residential real estate-related transaction, because of the race, color, religion, sex, handicap, familial status, or national origin of that person or of any person associated with that person.

(4) Intimidating or threatening any person because that person is engaging in activities designed to make other persons aware of, or encouraging such other persons to exercise, rights granted or protected by this part.

(5) Retaliating against any person because that person has made a complaint, testified, assisted, or participated in any manner in a proceeding under the Fair Housing Act.

In connection with issuing its FHA regulations, HUD also published extensive comments on these regulations. The comments relating to the § 3617 regulation noted that the conduct outlawed by this provision can “involve harassment of persons because of race [or other prohibited factor],”¹⁵⁷ and that the regulation’s illustrations of prohibited conduct “indicate that a broad range of activities can constitute a discriminatory housing practice.”¹⁵⁸ The HUD commentary also stated that “persons who are not involved in any aspect of the sale or rental of a dwelling are nonetheless prohibited from engaging in conduct to coerce, intimidate, threaten or interfere with persons in connection with protected activities.”¹⁵⁹

This last comment reflects § 3617’s legislative history and confirms prior case law holding that neighbors’ conduct may be subject to § 3617.¹⁶⁰ Also, in outlawing invidiously motivated interference with “persons in their enjoyment of a dwelling,”¹⁶¹ HUD’s regulation provided important support for the proposition that

Id. § 100.400(c).

Paragraph (1) may apply to neighbor harassment, but it is limited to “coercing” behavior, whereas paragraph (2), *see supra* text accompanying note 155, uses § 3617’s other three verbs (i.e., “threatening, intimidating or interfering with”). Paragraphs (3) and (4) deal with situations where the target of the unlawful behavior is a housing provider or other person engaged in “aiding or encouraging” others to exercise their FHA rights. For more on this type of § 3617 case, see *infra* notes 176 and 182–85 and accompanying text. Paragraph (5) deals with retaliation against persons who have filed or helped with FHA complaints. For more on this type of § 3617 case, see *infra* notes 187–89 and accompanying text.

¹⁵⁷ Implementation of Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3257 (Jan. 23, 1989) (codified at 24 C.F.R. pt. 100).

¹⁵⁸ *Id.* Among such prohibited activities, the HUD commentary identified: “Threatening or intimidating actions include acts against the possessions of persons, such as damage to automobiles or vandalism, which limit a person’s ability to have full enjoyment of a dwelling.” *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ For a discussion of § 3617’s legislative history, see *supra* note 129; *supra* text accompanying note 130. For prior case law involving neighbors’ conduct, see *supra* notes 72–76 and 80–81 and accompanying text.

Given the fact that the 1988 FHAA reenacted verbatim § 3617’s substantive prohibitions, *see supra* notes 27–28 and accompanying text, Congress presumably intended to incorporate settled judicial interpretations into the meaning of this provision. *See, e.g.,* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 130 S. Ct. 1605, 1616 (2010) (“We have often observed that when ‘judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.’” (omission in original) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998))). For purposes of this doctrine, a settled judicial interpretation may be based on a limited number of lower court opinions. *See id.* (employing this doctrine based on three federal appellate decisions).

¹⁶¹ 24 C.F.R. § 100.400(c)(2); *see also supra* note 158 (setting forth HUD commentary that actions in violation of § 3617 include those that “limit a person’s ability to have full enjoyment of a dwelling”).

current residents may invoke § 3617's protections. Again, this proposition simply reflected § 3617's prior case law and general legislative history,¹⁶² but reinforcing this view apparently was necessary, as demonstrated by some courts' subsequent willingness to ignore these sources and suggest that § 3617 did not apply to neighbor-on-neighbor or any other form of postacquisition harassment.¹⁶³

Unfortunately, one thing HUD's regulation and commentary on § 3617 did not do was to give any significant insight into the meaning of the four verbs used in this provision to define the behavior it bans. Thus, for example, the HUD regulation that is most relevant to neighbor harassment simply parrots the statutory language by outlawing "[t]hreatening, intimidating, or interfering with" persons in the enjoyment of their homes.¹⁶⁴ True, the concept of "enjoyment" mentioned here as the key to § 3617's scope may have implications for how "interfere with" and the other verbs used should be interpreted, as does HUD's commentary that "a broad range of activities" may violate § 3617.¹⁶⁵ But these are merely suggestive; the fact is that HUD has not provided a working definition for § 3617's verbs. For guidance on this issue, we must turn to other sources.

D. Precedents from Other Types of § 3617 Cases and Title VII's Analogous Provision

1. Overview: § 3617's Independence from §§ 3603–3606 Violations

In addition to neighbor-on-neighbor harassments cases, § 3617 has produced two other distinct types of claims.¹⁶⁶ One is brought by housing providers who claim that their efforts to help protected-class members have been interfered with in violation of § 3617's protection

¹⁶² See *supra* notes 47, 49, 82 and accompanying text (prior case law allowing current residents to invoke § 3617); *supra* notes 144–49 and accompanying text (legislative history of the FHA); see also *supra* note 160 (prior case law and legislative history suggesting that neighbors' conduct is subject to § 3617).

¹⁶³ See *supra* notes 44–45, 48 and accompanying text (discussing case law that interprets § 3617 as not extending to postacquisition disputes).

¹⁶⁴ 24 C.F.R. § 100.400(c)(2).

¹⁶⁵ Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3257 (Jan. 23, 1989) (codified at 24 C.F.R. pt. 100); see also *supra* text accompanying note 158 (discussing HUD's commentary on its § 3617 regulation).

¹⁶⁶ In addition, some § 3617 cases do not fit neatly into any of these categories. See, e.g., *United States v. Am. Inst. of Real Estate Appraisers*, 442 F. Supp. 1072, 1079 (N.D. Ill. 1977) (upholding § 3617 claim against certain appraisal organizations that were accused of supporting the practice of evaluating houses based in part on racial demographics and observing that § 3617 has been "broadly applied to reach all practices which have the effect of interfering with the exercise of rights under the Act"), *appeal dismissed*, 590 F.2d 242 (7th Cir. 1978).

of persons who have “aided or encouraged” others in the exercise or enjoyment of their FHA rights.¹⁶⁷ Another type of § 3617 claim is analogous to retaliation claims under Title VII,¹⁶⁸ and thus reflects § 3617’s historical link to Title VII’s antiretaliation provision.¹⁶⁹ This type of claim alleges harm suffered as a result of the plaintiff having filed or otherwise helped with a FHA complaint.¹⁷⁰ All types of § 3617 cases have had occasion to interpret what § 3617 means by “interfere with” and what this provision’s relationship to §§ 3603–3606 “rights” should be.

The relationship of a § 3617 claim to the provisions it refers to has never been clear.¹⁷¹ As late as 2004, Judge Posner suggested that § 3617 could not extend beyond violations of §§ 3603–3606.¹⁷² Although this view was subsequently corrected in *Bloch*,¹⁷³ decisions in the post-*Bloch* era still occasionally opine, albeit wrongly, that a plaintiff is not permitted “to assert a § 3617 claim without establishing a viable claim as to a substantive violation of rights protected under the statute.”¹⁷⁴

One reason for this confusion is that a large portion of § 3617 cases, including *Halprin* and *Bloch*,¹⁷⁵ have challenged behavior that allegedly violated both § 3617 and one or more of the FHA’s other provisions, with the courts generally focusing primarily on the non-§ 3617 claims. Examples include many early FHA cases brought by housing developers in their role as “aiders” of minorities’ housing rights. These cases often involved a defendant-municipality’s refusal to allow construction of affordable housing for minorities. The refusal was challenged as violating §§ 3603–3606 as well as “interfering

¹⁶⁷ For more on this type of § 3617 claim, see *infra* notes 177, 183–86 and accompanying text.

¹⁶⁸ See 42 U.S.C. § 2000e-3(a) (2006) (outlawing discrimination against employees “for making charges, testifying, assisting, or participating” in proceedings under Title VII). For more on the meaning of Title VII’s antiretaliation provision, see *infra* notes 216–30 and accompanying text.

¹⁶⁹ See *supra* note 132 and accompanying text (noting the discussion of Title VII’s antiretaliation provision in the legislative history of § 3617).

¹⁷⁰ For more on such retaliation claims under § 3617, see *infra* notes 187–89 and accompanying text.

¹⁷¹ See, e.g., *United States v. Weisz*, 914 F. Supp. 1050, 1054 (S.D.N.Y. 1996) (commenting, almost thirty years after passage of the FHA, that “[t]he necessity of a nexus between § 3617 and the sections enumerated therein is not free from doubt”).

¹⁷² *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, 388 F.3d 327, 330 (7th Cir. 2004).

¹⁷³ See *supra* notes 60–66 and accompanying text (discussing *Bloch*).

¹⁷⁴ *H & J Consulting Servs., LLC v. City of Gainesville, Ga.*, No. 2:08-CV-0028-WCO, slip op. at 19 (N.D. Ga. Apr. 26, 2010).

¹⁷⁵ See *supra* note 39 and accompanying text (discussing *Halprin*); *supra* note 53 and accompanying text (discussing *Bloch*).

with” the developer and its prospective tenants in violation of § 3617.¹⁷⁶ In such cases where the plaintiffs prevailed, courts typically noted that their finding of § 3617 liability was based solely on the defendant’s violation of another FHA provision, usually § 3604(a).¹⁷⁷ Similarly, in cases where the defendants prevailed, a number of decisions gave short shrift to the § 3617 claim once the court determined that no violation of the FHA’s other substantive prohibitions had occurred.¹⁷⁸ Thus, the § 3617 claim in these cases turned out, as a practical matter, to be superfluous. For some courts in the 1970s, this raised the question whether a § 3617 violation could

¹⁷⁶ See, e.g., *United States v. City of Birmingham*, Mich., 727 F.2d 560, 561 (6th Cir. 1984) (city prevented the development of low-income senior-citizen and family housing); *United States v. City of Black Jack, Mo.*, 508 F.2d 1179, 1181 (8th Cir. 1974) (city charged with passing a zoning ordinance that interfered with the right of equal housing opportunity); *United States v. City of Parma, Ohio*, 494 F. Supp. 1049, 1095–1101 (N.D. Ohio 1980) (city persistently resisted construction of low-income housing), *aff’d as modified on other grounds*, 661 F.2d 562 (6th Cir. 1981); land-use cases cited *infra* notes 177–78; see also *Malone v. City of Fenton, Mo.*, 592 F. Supp. 1135, 1156 (E.D. Mo. 1984) (holding that plaintiff-developer has standing under § 3617’s “interference with persons who aid” language), *aff’d without opinion*, 794 F.2d 680 (8th Cir. 1986); *U.S. General, Inc. v. City of Joliet*, 432 F. Supp. 346, 352 (N.D. Ill. 1977) (holding, in case brought by housing developer, that “§ 3617 grants a right of action to persons who have been interfered with as they aided others in their exercise of rights protected by § 3604”).

¹⁷⁷ E.g., *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1288 (7th Cir. 1977) (noting that the defendant’s violation of § 3617 depends on § 3604(a)); *Atkins v. Robinson*, 545 F. Supp. 852, 865–866 (E.D. Va. 1982) (noting that the validity of the § 3617 claim depends “on whether the defendants’ veto of the proposed development ran afoul of § 3604” (citing *Metro. Hous. Dev. Corp.*, 558 F.2d at 1288 n.5)), *aff’d*, 733 F.2d 318 (4th Cir. 1984); see also *Dunn v. Midwestern Indem. Mid-Am. Fire & Cas. Co.*, 472 F. Supp. 1106, 1111 (S.D. Ohio 1979) (holding that the defendant’s insurance redlining, having been found to violate § 3604, “also violates § 3617”).

¹⁷⁸ E.g., *Burrell v. City of Kankakee*, 815 F.2d 1127, 1130–31 (7th Cir. 1987) (noting that the plaintiffs asserted that the city violated their rights under §§ 3604 and 3617, but deciding for the defendants after finding that “the evidence does not support a violation of Section 3604(a)”; *Anderson v. City of Alpharetta*, 737 F.2d 1530, 1531–32 n.2 (11th Cir. 1984) (implicitly applying the same standard for both §§ 3604 and 3617); *Malone*, 592 F. Supp. at 1165–66 (“[T]his Court will not separately analyze plaintiffs’ § 3617 claim because the § 3604(a) analysis applies equally to said claim.”); see also *Southend Neighborhood Improvement Ass’n v. Cnty. of St. Clair*, 743 F.2d 1207, 1210 n.4 (7th Cir. 1984) (noting that, in a case alleging that residents of minority neighborhood were harmed by county’s failure to maintain its tax delinquent properties in the plaintiffs’ neighborhood, plaintiffs’ § 3617 and § 3604(a) claims could be analyzed together).

For more modern versions of the same phenomenon, see *Maki v. Laakko*, 88 F.3d 361, 365 (6th Cir. 1996) (rejecting the plaintiffs’ § 3617 claim after holding against their § 3604 claim on the ground that the “harassment claim . . . does nothing to advance their discrimination claim”); *AHF Cmty. Dev., LLC v. City of Dallas*, 633 F. Supp. 2d 287, 302–03 (N.D. Tex. 2009) (agreeing with the defendant in exclusionary-zoning case that plaintiff-developer, having lost on its § 3604(a) and (b) claims, cannot pursue a § 3617 claim); *infra* note 249 and accompanying text (citing additional cases that preclude a § 3617 claim if a violation of § 3604 is not proven).

occur without the defendant's conduct having also violated §§ 3603–3606.¹⁷⁹

Many early FHA decisions, however, did recognize that § 3617 creates a cause of action independent of the statute's other substantive provisions.¹⁸⁰ The most important of these was the Ninth Circuit's 1975 decision in *Smith v. Stechel*,¹⁸¹ which upheld a § 3617 claim by two apartment managers who had been fired for not carrying out their employer's orders not to rent to minorities.¹⁸²

As the *Stechel* opinion pointed out, this type of case involves a situation where the minorities' §§ 3603–3606 rights "have actually been respected by persons who suffer consequent retaliation,"¹⁸³ and thus the plaintiffs come within that part of § 3617 that protects

¹⁷⁹ See, e.g., *Metro. Hous. Dev. Corp.*, 558 F.2d at 1288 n.5 ("We decline to decide whether section 3617 can ever be violated by conduct that does not violate any of the four earlier sections."); *Dunn*, 472 F. Supp. at 1111 ("It is unclear whether a violation of § 3617 can be established without first establishing a violation of §§ 3604, 3605 or 3606.")

¹⁸⁰ See, e.g., *Warner v. Perrino*, 585 F.2d 171, 173 (6th Cir. 1978) ("Section 3617 provides a separate cause of action . . ."); *Smith v. Stechel*, 510 F.2d 1162, 1164 (9th Cir. 1975) ("Section 3617 does not necessarily deal with a discriminatory housing practice . . ."); *New York ex rel. Abrams v. Merlino*, 694 F. Supp. 1101, 1103–04 (S.D.N.Y. 1988) ("[E]ven if a claim is not made out under §§ 3603–3606, a claim may still be maintained pursuant to § 3617 . . ."); *Stackhouse v. DeSitter*, 620 F. Supp. 208, 210 (N.D. Ill. 1985) ("We now hold that § 3617 may be violated absent a violation of § 3603, 3604, 3605 or 3606."); *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 497–98 (S.D. Ohio 1976) (commenting that "a reasonable and practical interpretation of § 3617" allows for an independent violation); see also *Malone*, 592 F. Supp. at 1166 (recognizing in dicta that "[t]here are situations where a § 3617 violation may occur without a violation of § 3604(a)"); cases cited *infra* notes 185, 188 (dealing on the merits with claims based solely on § 3617).

¹⁸¹ 510 F.2d 1162 (9th Cir. 1975).

¹⁸² *Id.* at 1163–64. According to the *Stechel* opinion, § 3617 was the only FHA provision "applicable to the facts of this case." *Id.* at 1164. The Ninth Circuit then noted:

Section 3617 does not necessarily deal with a discriminatory housing practice, or with the landlord, financier or brokerage service guilty of such practice. It deals with a situation where no discriminatory housing practice may have occurred at all because the would-be tenant has been discouraged from asserting his rights, or because the rights have actually been respected by persons who suffer consequent retaliation. It also deals with situations in which the fundamental inequity of a discriminatory housing practice is compounded by coercion, intimidation, threat or interference.

Id.

In *Stechel*, the Ninth Circuit reversed the trial court's decision to dismiss the plaintiffs' § 3617 claims for being untimely under the FHA's private enforcement provisions. *Id.* *Stechel* held that, unlike claims under §§ 3603–3606, § 3617 was not made subject to the limitations period of these other provisions. *Id.*; accord *Warner*, 585 F.2d at 173 (noting that § 3617 includes no time limitation); *Merlino*, 694 F. Supp. at 1103 ("There is persuasive authority for the proposition that Congress 'designedly' refrained from including § 3617 within the limitation period of § 3612 . . ."). As described above, the 1968 FHA's alternative enforcement system for § 3617 claims was later eliminated by the 1988 amendments to this statute. For a discussion of the 1988 changes, see *supra* note 31 and accompanying text.

¹⁸³ 510 F.2d at 1164.

persons who are harmed “on account of . . . having aided or encouraged” others in exercising their FHA rights.¹⁸⁴ After *Stechel*, a number of other decisions upheld such “aided or encouraged” claims by real estate agents who were fired or otherwise harmed for not discriminating against minorities.¹⁸⁵ These holdings were confirmed in HUD’s 1989 regulation dealing with § 3617, which specifically outlaws “adverse employment actions” against employees and agents for assisting others in obtaining housing free from discrimination.¹⁸⁶

Another situation in which a § 3617 claim may arise without a violation of the FHA’s other substantive provisions involves retaliation against someone who has filed or otherwise participated in a FHA proceeding.¹⁸⁷ Only a few such § 3617 cases were reported before passage of the 1988 FHAA,¹⁸⁸ but many more have occurred since then.¹⁸⁹

The exact relationship between § 3617 and the substantive provisions it refers to will be discussed in greater detail later.¹⁹⁰ For now, it seems clear, based on HUD’s regulations and case law, that a § 3617 claim may be made without an outright violation of §§ 3603–3606.¹⁹¹ This is crucial for neighbor-on-neighbor harassment cases.

¹⁸⁴ 42 U.S.C. § 3617 (2006). For the full text of § 3617, see *supra* text accompanying note 29.

¹⁸⁵ See, e.g., *Wilkey v. Pyramid Constr. Co.*, 619 F. Supp. 1453, 1455 (D. Conn. 1985) (allowing a rental agent who “refus[ed] to execute her employer’s allegedly racially discriminatory housing policies” to invoke § 3617); *Meadows v. Edgewood Mgmt. Corp.*, 432 F. Supp. 334, 337 (W.D. Va. 1977) (holding that, although a cause of action exists for retaliation for aid and encouragement, the resident-apartment-manager plaintiffs failed to prove their case by a preponderance of the evidence); *Tokaji v. Toth*, 1 EOHRC Rep. (P-H) ¶ 13,679 (N.D. Ohio 1974) (denying the defendant-landlord’s 12(b)(6) motion to dismiss claim brought by managers of an apartment building he owned for allegedly evicting them after they refused to follow his policy of not renting to blacks); see also *Vercher v. Harrisburg Hous. Auth.*, 454 F. Supp. 423, 424 (M.D. Pa. 1978) (stating that a city housing social services coordinator “discharged for his efforts to secure fair housing rights for others . . . would clearly have a cause of action under § 3617”).

¹⁸⁶ 24 C.F.R. § 100.400(c)(3) (2010). For the full text of § 100.400(c)(3), see *supra* note 156.

¹⁸⁷ HUD’s regulation recognizes § 3617’s coverage of this situation, see *supra* note 156 (quoting 24 C.F.R. § 100.400(c)(5)), and reflects § 3617’s historical link to Title VII’s antiretaliation provision, see *supra* note 132 and accompanying text.

¹⁸⁸ Two of the few examples were *Izard v. Arndt*, 483 F. Supp. 261, 264–65 (E.D. Wis. 1980) (dismissing § 3617 claims by fair housing organization and its director based on landlords’ suit against them allegedly for helping a black couple bring FHA claims against the landlords), and *Meadows*, 432 F. Supp. at 336–37 (rejecting for lack of factual support § 3617 claim by apartment managers who were fired allegedly for helping black tenant assert her FHA rights by filing a HUD complaint).

¹⁸⁹ See, e.g., SCHWEMM, *supra* note 28, § 20:5 nn.2–3 (collecting cases); cases cited *supra* note 99; *infra* notes 196–205 and accompanying text.

¹⁹⁰ See *infra* Part III.D.3.

¹⁹¹ Several post-FHAA cases have also endorsed this proposition, including *Bloch*. See *Walker v. City of Lakewood*, 272 F.3d 1114, 1126–31 (9th Cir. 2001); *United States v. City of*

The would-be defendants in such cases are often not themselves housing providers, i.e., could generally not be the target of a §§ 3603–3606 claim for, say, making housing “unavailable” under § 3604(a) or for imposing discriminatory “terms or conditions” under § 3604(b).¹⁹² In the most violent types of neighbor abuse, as illustrated by Judge Posner’s arson hypothetical in *Halprin*,¹⁹³ the offending behavior may be so severe that it “constructively evicts” the minority plaintiffs from their home, thereby prompting a § 3604(a) “make unavailable” claim as well as a § 3617 “interference” claim.¹⁹⁴ Short of such an extreme

Hayward, 36 F.3d 832, 836 (9th Cir. 1994); *Sofarelli v. Pinellas Cnty.*, 931 F.2d 718, 722 (11th Cir. 1991); *United States v. Koch*, 352 F. Supp. 2d 970, 978–79 (D. Neb. 2004); *United States v. Pospisil*, 127 F. Supp. 2d 1059, 1063–64 (W.D. Mo. 2000); *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 613 n.7 (D.N.J. 2000); *Egan v. Schmock*, 93 F. Supp. 2d 1090, 1092–93 (N.D. Cal. 2000); *Ohana v. 180 Prospect Place Realty Corp.*, 996 F. Supp. 238, 239–43 (E.D.N.Y. 1998); *United States v. Scott*, 788 F. Supp. 1555, 1562 (D. Kan. 1992); *Johnson v. Smith*, 810 F. Supp. 235, 238–39 (N.D. Ill. 1992); *HUD v. Weber*, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,041, at 25,424 (HUD ALJ 1993), available at 1993 WL 246392; case cited *supra* notes 61–65 and accompanying text; *cf. Burlington N. & Sante Fe Ry. Co. v. White*, 548 U.S. 53, 59–67 (2006) (interpreting Title VII’s antiretaliation provision separately from the statute’s other substantive provisions).

Decisions to the contrary continue to be issued within the Fifth Circuit, which initially chose to follow *Halprin*, *see supra* note 48 and accompanying text, and has not yet corrected this position with a *Bloch*-like decision. *See, e.g., AHF Cmty. Dev., LLC v. City of Dallas*, 633 F. Supp. 2d 287, 302–03 (N.D. Tex. 2009) (citing *Reule v. Sherwood Valley I Council of Co-Owners, Inc.*, 235 Fed. App’x 227 (5th Cir. 2007) (described *supra* note 59)); *McZeal v. Ocwen Fin. Corp.*, 252 F.3d 1355, 2001 WL 422375, at *2 (5th Cir. 2001) (unpublished per curiam decision stating that “[b]ecause his § 3605 claim fails, [plaintiff’s] claim under § 3617 must also fail”); *see also Petty v. Portofino Council of Coowners, Inc.*, 702 F. Supp. 2d 721, 728–30 (S.D. Tex. 2010) (following *Cox* in holding that § 3617, along with § 3604(a) and (b), requires that a defendant’s conduct affect “the availability of housing, not merely the habitability of housing,” but finding the plaintiffs’ complaint adequate in alleging that the defendant made its condominium complex unavailable on a nondiscriminatory basis).

¹⁹² *See supra* text accompanying notes 31–32 (quoting these provisions in full); *cf. Woods v. Foster*, 884 F. Supp. 1169, 1175 (N.D. Ill. 1995) (suggesting that sexual-harassment claim against nonprofit homeless shelter may be more appropriate under § 3617 than § 3604(a) because the former provision “is not limited to acts of ‘sale’ or ‘rental’”). In some situations, however, would-be defendants are *both* neighbors and housing-opportunity providers. For example, in both *Halprin* and *Bloch*, the defendants were neighbors as well as officers of a condominium board or the local homeowners’ association. *See supra* note 40 and accompanying text (discussing *Halprin*); *supra* note 53 and accompanying text (discussing *Bloch*). This also often occurs in sex harassment cases where the defendant is a landlord who lives near the plaintiff. *See supra* note 113.

¹⁹³ *See supra* note 40.

¹⁹⁴ Another, albeit nonviolent, example of how similar conduct might violate §§ 3604 and 3617 is provided in the HUD regulations, which identify, as respective §§ 3604(a) and 3617 violations, “[d]ischarging or taking other adverse action against an employee, broker or agent because he or she refused to participate in a discriminatory housing practice” and “[t]hreatening an employee or agent with dismissal or an adverse employment action, or taking such adverse employment action, for any effort to assist a person seeking” nondiscriminatory access to housing. 24 C.F.R. §§ 100.70(d)(1), 100.400(c)(3) (2010). This example also demonstrates, however, how a § 3617 violation may occur without a corresponding § 3604 violation (e.g.,

example, however, a minority family who is the target of a neighbor's invidiously motivated harassment may well not have a claim against that neighbor under any FHA provision other than § 3617.

2. The Meaning of "Interfere With" in § 3617 and Title VII's Analogous Provision

The problem here is to determine how egregious a neighbor's conduct toward a minority resident must be before it "interferes with" that persons's fair housing rights in violation of § 3617. Courts in other types of § 3617 cases generally agree that an interference claim need not involve violent behavior and at least some forms of verbal abuse will suffice.¹⁹⁵ Beyond this, however, judicial opinions have expressed quite different views about how broadly § 3617's "interferes with" phrase should be interpreted. Two decisions in § 3617 retaliation cases illustrate this difference.

In *Walker v. City of Lakewood*,¹⁹⁶ the Ninth Circuit adopted an expansive view of "interferes with" in overturning summary judgment against a fair housing organization that claimed the defendant-city violated § 3617 by not renewing a contract with the plaintiff in retaliation for the latter's participation in a FHA suit.¹⁹⁷ The Ninth Circuit first held that the plaintiff-organization (referred to as "FHF") was engaged in the § 3617-protected activity of "aiding or encouraging" others in the exercise of their FHA rights.¹⁹⁸ The court then decided that the adverse action that FHF suffered as a result of the defendant's nonrenewal of its contract qualified as "interference" under § 3617.¹⁹⁹ The rationale for this conclusion included three points: (1) that the Supreme Court has directed that the FHA's language should be broadly construed;²⁰⁰ (2) that the language used in

when the adverse employment action is only threatened, but not actually carried out).

¹⁹⁵ In addition to *Walker* and *Hayward*, discussed *infra* notes 196–204 and accompanying text and note 203, respectively, see, for example, *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 613–14 (D.N.J. 2000) (finding that threat or use of force was not necessary to maintain a claim); *People Helpers, Inc. v. City of Richmond*, 789 F. Supp. 725, 733 n.5 (E.D. Va. 1992) (same, but in summary-judgment context); *People Helpers Found., Inc. v. City of Richmond*, 781 F. Supp. 1132, 1135–36 (E.D. Va. 1992) (same, but in the context of a 12(b)(6) motion); cases cited *supra* notes 95–96 (same); see also *Mich. Prot. & Advocacy Serv., Inc. v. Babin*, 18 F.3d 337, 347 (6th Cir. 1994) ("Section 3617 is not limited to those who used some sort of 'potent force or duress' . . .").

¹⁹⁶ 272 F.3d 1114 (9th Cir. 2001).

¹⁹⁷ *Id.* at 1128–31.

¹⁹⁸ *Id.* at 1128.

¹⁹⁹ *Id.* at 1128–30.

²⁰⁰ *Id.* at 1129 (citing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972)). The

§ 3617, in contrast to the related criminal provision in § 3631, does not require “a showing of force or violence for coercion, interference, intimidation, or threats to give rise to liability;”²⁰¹ and (3) that, in determining the “plain meaning” of the four triggering verbs in § 3617, dictionary definitions should be consulted, and such definitions were broad enough to encompass the defendant’s behavior.²⁰² As for the third point, *Walker* quoted a prominent dictionary from the time of the 1968 FHA that defined “interference” as “the act of meddling in or hampering an activity or process.”²⁰³

Supreme Court’s conclusion in *Trafficante* that the FHA carries out a “policy that Congress considered to be of the highest priority” and should be given “a generous construction,” 409 U.S. at 210–12, was reaffirmed in *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995). *See also* *Meyer v. Holley*, 537 U.S. 280, 290 (2003) (agreeing that the FHA’s objective is an “overriding societal priority”); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982) (noting the FHA’s “broad remedial intent”).

²⁰¹ *Walker*, 272 F.3d at 1128. For more on § 3631, see *supra* notes 36–37 and accompanying text.

²⁰² *Walker*, 272 F.3d at 1128–29; *see also* *People Helpers Found., Inc. v. City of Richmond*, 789 F. Supp. 725, 733 n.5 (E.D. Va. 1992) (providing broad interpretation of interference under § 3617 based on view that its words “mean exactly what they say”); *People Helpers Found., Inc. v. City of Richmond*, 781 F. Supp. 1132, 1135–36 (E.D. Va. 1992) (same).

Walker’s interpretive technique reflects the modern Supreme Court’s regular practice of relying on definitions in dictionaries that were commonly used at the time of a law’s enactment to help interpret words in civil rights and other statutes. *See, e.g.*, *Crawford v. Metro. Gov’t of Nashville & Davidson Cnty.*, 129 S. Ct. 846, 850 (2009) (interpreting Title VII); *Burlington N. & Sante Fe Ry. Co. v. White*, 548 U.S. 53, 60 (2006) (same); *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 69 n.9 (1989) (interpreting the Civil Rights Act of 1871, 42 U.S.C. § 1983); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610–11 (1987) (interpreting the Civil Rights Act of 1866). The theory is that Congress intends a statute’s words to bear their contemporary common meaning. *See, e.g.*, *Bilski v. Kappos*, 130 S. Ct. 3218, 3226 (2010) (“[U]nless otherwise defined [in the statute], words will be interpreted as taking their ordinary, contemporary, common meaning.” (quoting *Diamond v. Diehr*, 450 U.S. 175, 182 (1981)) (internal quotation marks omitted)); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (“In the absence of [a statutory] definition, we construe a statutory term in accordance with its ordinary and natural meaning.” (citing *Smith v. United States*, 508 U.S. 223, 228 (1993))); *see also* *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994) (relying, in choosing among various dictionary definitions of the relevant term in a statute, primarily on those dictionaries that were available at the time of the statute’s enactment).

²⁰³ *Walker*, 272 F.3d at 1129 (quoting WEBSTER’S THIRD NEW INT’L DICTIONARY 1178 (14th ed. 1961)) (internal quotation marks omitted). The *Walker* opinion also noted that a prior Ninth Circuit opinion dealing with § 3617 had “explained that ‘interference,’ in particular, ‘has been broadly applied to reach all practices which have the effect of interfering with the exercise of rights under the federal fair housing laws.’” *Id.* (quoting *United States v. City of Hayward*, 36 F.3d 832, 835 (9th Cir. 1994)).

In *Hayward*, the Ninth Circuit upheld a § 3617 claim that accused the defendant-city of ordering a mobile-home-park owner (Borello) to reduce rents under the city’s rent-control ordinance following the park’s termination of its adults-only policy. *Hayward* held that the rent reduction “interfered with” Borello on account of its having encouraged families with children to live there. 36 F.3d at 835. After citing a number of § 3617 cases where “[c]ourts have found various types of conduct to constitute ‘interference,’” *id.*, the *Hayward* opinion rejected a number of the defendant’s arguments opposing § 3617’s applicability to its rent-reduction order.

Applying this definition to the facts at hand, the Ninth Circuit held that FHF's evidence "demonstrates that the City 'interfered,' or meddled, with its ability to conduct its fair housing activities."²⁰⁴ *Walker* also opined that the City's conduct, "while certainly interference, might also be considered coercion or threats."²⁰⁵

Among these failed arguments was that

there was no "interference" because the [City]'s decision did not cause [Borello] to change the park's policies or practices. Section 3617 does not require one such as Borello who is interfered with to capitulate to the interference. . . . In response to terminating a discriminatory practice, the City penalized Borello by forcing Borello to forego a portion of its income with no corresponding savings in costs. This alone was sufficient as a matter of law to constitute interference.

Id. at 836.

In *Michigan Protection & Advocacy Service, Inc. v. Babin*, 18 F.3d 337 (6th Cir. 1994), a case that the *Hayward* court cited, the Sixth Circuit rejected various FHA claims against neighbors by an organization whose efforts to operate a group home for disabled persons in their area were frustrated when the neighbors bought the desired property at a higher price than the organization had offered. *Id.* at 341-48. As for the § 3617 claim, the Sixth Circuit, though recognizing this provision's breadth as quoted above, *id.* at 347, did "not believe that the neighbors' act of purchasing the house constituted 'interference' within the meaning of the FHAA," *id.* at 348. The *Babin* opinion conceded that the neighbors' actions may have "interfered with" the plaintiff-organization's ability to obtain the property, but "this interference is not direct enough to warrant a finding of liability," because "the neighbors' actions did not prevent [the plaintiff] from . . . continuing to bid for the property." *Id.* Thus, *Babin* held that the type of "interference" that takes the form merely of economic competition by third-party bidders is not actionable under § 3617.

²⁰⁴ *Walker*, 272 F.3d at 1129. In support of this conclusion, *Walker* noted the following:

The City supervised the [FHF] more closely than it had before, by sending city officials to monthly meetings, and also asked the FHF to "curtail the amount of exposure" it gave discrimination complaints. Additionally, the City contacted other cities to complain about the FHF and also filed suit against the FHF for breach of contract, which required time and money to defend. Lastly, the City refused to renew the FHF's contract, which altogether prevented the organization from working in Lakewood.

Id. at 1129 (footnote omitted) (citing *Cal. Acrylic Indus. Inc. v. NLRB*, 150 F.3d 1095, 1099 (9th Cir. 1998)). In justifying its citation to a NLRA case, the *Walker* court pointed out that "[t]he similarity of the language of the two statutes is a strong indication that they should be treated in the same manner." *Id.* at 1130 n.7 (citing *Bachelor v. Am. W. Airlines*, 259 F.3d 1112 (9th Cir. 2001)). It might also be noted that § 3617's legislative history shows that it was designed to provide similar protection to that contained in the NLRA's antiretaliation provision. See *supra* note 133.

²⁰⁵ 272 F.3d at 1130. The court also quoted extensively from the dictionary, noting:

To "coerce" is "to compel to an act or choice by force, threat, or other pressure." And, more relevant for this case, "coercion" includes "the application of sanctions or force by a government [usually] accompanied by the suppression of constitutional liberties in order to compel dissenters to conform." Finally, a "threat" is "an expression to inflict evil, injury, or other damage on another."

Id. at 1129 (alteration in original) (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 439, 2382 (14th ed. 1961)). Among the evidence suggesting that the defendant's behavior rose to the

In contrast to *Walker*, a district court provided a narrow interpretation of “interferes with” in *Sporn v. Ocean Colony Condominium Ass’n*.²⁰⁶ The *Sporn* court awarded summary judgment in favor of neighbors who had allegedly “shunned” the plaintiffs in retaliation for the latter’s complaining about their condominium’s fair housing violations.²⁰⁷ According to the court, such behavior was simply not egregious enough to come within the concept of interference under § 3617.²⁰⁸ *Sporn* based this conclusion in part on its determination that prior § 3617 cases had involved more severe treatment of the plaintiffs than “shunning” (*Walker* was not mentioned)²⁰⁹ and on its own view that such serious behavior was the only legitimate concern of § 3617.²¹⁰

In holding that “shunning”-type actions “do not constitute ‘coercion, intimidation, threats or interference’ within the meaning of § 3617,”²¹¹ *Sporn* interpreted “interferes with” to reflect the severity of the other three triggering verbs used in § 3617. This interpretive

level of coercion or a threat, the Ninth Circuit cited the following:

The City suggested it would not renew the contract if the FHF did not apologize when Ebner [the City’s Director of Community Development] sent a letter stating that “[t]he handling of The Park apartments case, and in particular the press conference, leaves us with serious concerns for the future. . . .” Further evidence of coercion is the letter from Ebner stating that payments would be withheld until the organization apologized.

Id. at 1130 (second alteration and omission in original) (citing *Lear Siegler Inc. v. NLRB*, 890 F.2d 1573 (10th Cir. 1989)). However, *Walker* held that the defendant’s action could not be considered “intimidation,” because this would “require a showing that the City’s activities had generated fear in the FHF. There has been no such showing.” *Id.* at 1129 n.4 (citation omitted).

²⁰⁶ 173 F. Supp. 2d 244 (D.N.J. 2001).

²⁰⁷ *Id.* at 251. For more on the *Sporn* case, see *supra* note 99.

²⁰⁸ *Id.* at 251–52.

²⁰⁹ *Id.* at 252.

²¹⁰ According to the *Sporn* court:

The Fair Housing Act is remedial legislation designed to address the very important goal of providing accessibility to housing without regard to race, color, religion, sex, familial status, national origin or disability. Consistent with this goal, the prohibitions of § 3617 operate to ensure that situations that need to [be] remedied can be brought to the attention of those with the power to effectuate the necessary changes. Section 3617 does not, however, purport to impose a code of civility on those dealing with individuals who have exercised their FHA rights. Simply put, § 3617 does not require that neighbors smile, say hello or hold the door for each other. To hold otherwise would be to extend § 3617 to conduct it was never intended to address and would have the effect of demeaning the aims of the Act and the legitimate claims of plaintiffs who have been subjected to invidious and hurtful discrimination and retaliation in the housing market.

Id. at 251–52 (citation omitted).

²¹¹ *Id.* at 251.

technique is embodied in the canon *noscitur a sociis* (“a word is known by the company it keeps”), which has been endorsed on occasion by the Supreme Court,²¹² and has been used by at least two other district courts to ascribe a narrow meaning to § 3617’s “interferes with.”²¹³ Other district courts have agreed that § 3617

²¹² See, e.g., *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486–87 (2006) (“[A] word is known by the company it keeps—a rule that ‘is often wisely applied to avoid the giving of unintended breadth to the Act of Congress.’” (alteration in original) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961))); *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) (“[W]ords . . . are known by their companions.” (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995); *Jarecki*, 367 U.S. at 307)); see also *S.D. Warren Co. v. Me. Bd. of Env’tl. Prot.*, 547 U.S. 370, 378 (2006) (“That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.” (quoting *Beecham v. United States*, 511 U.S. 368, 371 (1994)) (internal quotation marks omitted)); *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) (“[W]ords grouped in a list should be given related meaning.” (quoting *Massachusetts v. Morash*, 490 U.S. 107, 114–15 (1989)) (internal quotation marks omitted)). But see *United States v. Stevens*, 130 S. Ct. 1577, 1588 (2010) (declining to follow this canon where the phrase at issue “contains little ambiguity”); *Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 840 (2008) (declining to follow this canon because “the overall statutory context” suggests a different meaning).

²¹³ In one, *Housing Investors, Inc. v. City of Clanton, Ala.*, 68 F. Supp. 2d 1287 (M.D. Ala. 1999), the court rejected a § 3617 claim based on the defendants’ opposition to the plaintiffs’ proposal for an affordable housing development, and commented:

The words *coerce*, *intimidate*, and *threaten* are clearly words that suggest force, violence, undue pressure, abuse of power, and measures intended to induce fear. The conjunction *or* does imply that the final word, *interfere*, need not equate exactly with the preceding words, but the context established by all of these words strung together is that impermissible interference must be more than peaceable opposition through legal channels.

Id. at 1301. However, in a later part of this opinion, the court was willing to assume, albeit in dicta, that “one [bigoted] comment could constitute a § 3617 violation.” *Id.*

The second was *Gourlay v. Forest Lake Estates Civic Ass’n*, 276 F. Supp. 2d 1222 (M.D. Fla. 2003), vacated pursuant to settlement, 2003 WL 22149660 (M.D. Fla. Sept. 16, 2003). In *Gourley*, the § 3617 claim was based on a homeowners’ association’s use of litigation and other “interferences” techniques to prevent the plaintiff-couple from having foster children in their home. *Id.* at 1225–27. The court determined that this claim hinged on the meaning of “interferes with” in § 3617, because the other three verbs in this provision require “either violent conduct or threatening conduct.” *Id.* at 1235. Although conceding that interference “could conceivably extend broadly to any conduct that limits a protected persons [sic] use or enjoyment of a dwelling,” *id.*, the *Gourley* opinion held:

Under the canons of statutory construction, however, the general word *interfere* should be interpreted in reference to and in context with the first three words of this provision. This Court concludes that the use of the phrase “interference” in Section 3617 extends only to discriminatory conduct that is so severe or pervasive that it will have the effect of causing a protected person to abandon the exercise of his or her housing rights.

Id. Although this decision was ultimately vacated pursuant to a settlement, *Gourley*’s tough standard for interference claims under § 3617 was later endorsed by another district court in Florida. See *Lawrence v. Courtyards at Deerwood Ass’n, Inc.*, 318 F. Supp. 2d 1133, 1145 (S.D. Fla. 2004) (declining to hold homeowners’ association liable under § 3617 for its failure to stop neighbor’s harassment of black plaintiffs based on the court’s conclusion that “to constitute

should be limited to severe behavior,²¹⁴ with some concluding that the same “severe or pervasive” standard that governs harassment claims under § 3604(b) and Title VII is the proper measure of an interference claim under § 3617.²¹⁵

This goes too far. Whatever the proper standard for a § 3604(b) “terms and conditions” harassment claim, the language and purpose of that provision are distinctly different from those of § 3617. In an analogous situation involving Title VII, the Supreme Court in 2006 held in *Burlington Northern & Santa Fe Railway Co. v. White*²¹⁶ that

actionable interference, in the absence of a violation of sections 3603–3606, the discriminatory conduct must be pervasive and severe enough to be considered as threatening or violent” (citing *Gourlay*, 276 F. Supp. 2d at 1236)).

²¹⁴ See, e.g., *Whitfield v. Pub. Hous. Agency*, No. Civ.03-6096 PAM/RLE, 2004 WL 1212082, at *4–5 (D. Minn. May 19, 2004) (holding that the defendant’s negotiating demand that the plaintiff give up some of her rights could have been refused and therefore “[t]here is no allegation of undue coercion or intimidation that would rise to the level of a [§ 3617] violation”); *Egan v. Schmock*, 93 F. Supp. 2d 1090, 1092–93 (N.D. Cal. 2000) (described *supra* notes 100–03 and accompanying text); *Salisbury House, Inc. v. McDermott*, No. CIV.A 96-CV-6486, 1998 WL 195693, at *13 (E.D. Pa. Mar. 24, 1998) (holding that “some type of force or compulsion” is required for a § 3617 violation); see also *Wood v. Briarwinds Condo. Ass’n Bd. of Dirs.*, 369 Fed. App’x 1, 3 (11th Cir. 2010) (affirming dismissal of pro se plaintiff’s § 3617 claim because his allegations—that the defendant had his van towed, assessed him fines, and took photographs of him—“failed to allege conduct that rises to the level of coercion or intimidation under the FHA”); *East-Miller v. Lake Cnty. Highway Dep’t*, 421 F.3d 558, 564 (7th Cir. 2005) (questioning, but not deciding, “whether the actions here were frequent and severe enough to give rise to” a § 3617 claim).

²¹⁵ See, e.g., *Gourlay*, 276 F. Supp. 2d at 1135 (described *supra* note 213); see also *East-Miller*, 421 F.3d at 564 (noting possible use of “severe and pervasive” standard); *Groteboer v. Eyota Econ. Dev. Auth.*, 724 F. Supp. 2d 1018, 1025 (D. Minn. 2010) (holding that the plaintiff “must show severe and pervasive harassment”); *Lawrence*, 318 F. Supp. 2d at 1145 (using “severe and pervasive” standard).

The “severe or pervasive” standard generally governs sex-based hostile-environment claims both under the FHA’s § 3604(b), see cases cited *supra* note 113, and under Title VII’s prohibition of discriminatory “terms, conditions, or privileges” in 42 U.S.C. § 2000e-2(a)(1), see, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998) (“For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive.”); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (labeling the “severe or pervasive” standard as “crucial” in sexual-harassment claims); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (applying the “severe or pervasive” standard to Title VII claim); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (holding that party carries its burden of showing a hostile work environment by satisfying the “severe or pervasive” standard); see also *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115–16 (2002) (noting that “severe or pervasive” standard applies in race-based hostile-environment claim); cf. *Gregory v. Dillard’s, Inc.*, 494 F.3d 694, 717–19 (8th Cir. 2007) (Colloton, J., dissenting) (noting that the “severe or pervasive” standard is used to evaluate employment-harassment cases brought under 42 U.S.C. § 1981 and advocating use of this standard for evaluating § 1981 interference claims in the retail-shopping context).

²¹⁶ 548 U.S. 53 (2006).

that statute’s antiretaliation provision should be interpreted differently from its key substantive provision.²¹⁷ The *Burlington* Court noted:

The language of the substantive provision differs from that of the antiretaliation provision in important ways. . . .

. . . [T]he question is whether Congress intended its different words to make a legal difference. We normally presume that, where words differ as they differ here, “Congress acts intentionally and purposely in the disparate inclusion or exclusion.”²¹⁸

The *Burlington* opinion also held that Title VII’s antiretaliation provision served a distinct purpose from the statute’s substantive provision. Thus:

[T]he two provisions differ not only in language but in purpose as well. The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee’s efforts to secure or advance enforcement of the Act’s basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.

. . . [D]ifferences in the purpose of the two provisions . . . justify this difference in interpretation.²¹⁹

These differentiating factors are even more dramatic in the FHA. The language of § 3617, unlike that of § 3604(b), does not even use the term “discriminate” (as Title VII’s antiretaliation provision

²¹⁷ *Id.* at 57 (holding that Title VII’s antiretaliation provision, 42 U.S.C. § 2000e-3(a), is not confined to “actions and harms . . . that are related to employment or occur at the workplace,” *i.e.*, those that only affect “the terms and conditions of employment”); *see also* *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951, 1960–61 (2008) (affirming that *Burlington* held that “Title VII’s antiretaliation provision . . . had a broader reach than the statute’s substantive provision”).

²¹⁸ 548 U.S. at 61–63 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

²¹⁹ *Id.* at 63, 67 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800–01 (1973)). “Thus, purpose reinforces what language already indicates, namely, that the antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment.” *Id.* at 64 (citing *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 319 (2006)).

does),²²⁰ and § 3617's purposes go well beyond merely outlawing retaliation for participating in FHA proceedings.²²¹ Furthermore, the distinction between § 3617 and § 3604(b) is also supported by the HUD regulation that interprets § 3617 to outlaw interfering with persons in the "enjoyment" of their home,²²² a much broader concept than HUD's interpretation of harassing behavior that runs afoul of § 3604(b).²²³

Thus, it seems clear that district court decisions limiting § 3617 interference claims to behavior that is "severe or pervasive" enough to violate a resident's rights under § 3604(b)²²⁴ are too restrictive. And the same is true for those decisions that would restrict neighbor harassment claims to conduct that is "designed to drive the individual out of his or her home."²²⁵ Section 3617 may well cover these situations, but it goes farther.

One limit on how much farther is suggested by the second part of the Supreme Court's opinion in the *Burlington* case, which held that Title VII's antiretaliation provision covers "those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant."²²⁶ Thus, according to the *Burlington* opinion, this provision in Title VII "protects an individual

²²⁰ Compare *supra* text accompanying note 34 (quoting § 3604(b)), with *supra* text accompanying note 29 (quoting § 3617). Title VII's antiretaliation provision "prohibits an employer from 'discriminat[ing] against' an employee or job applicant because that individual 'opposed any practice' made unlawful by Title VII or 'made a charge, testified, assisted, or participated in' a Title VII proceeding or investigation." *Burlington*, 548 U.S. at 56 (alteration in original) (quoting 42 U.S.C. § 2000e-3(a)).

²²¹ See, e.g., cases cited *supra* notes 176, 182-85 and accompanying text.

Two civil rights statutes passed in the 1990s use language in their antiretaliation provisions that is more similar to § 3617 than to Title VII. See Family Medical Leave Act of 1993 § 105, 29 U.S.C. § 2615(a)(1) (2006) ("It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter."); Americans with Disabilities Act of 1990 § 503, 42 U.S.C. § 12203(b) (2006) (providing an antiharassment provision that is virtually identical in its operative language to § 3617). Both of these provisions have produced substantial litigation, but rarely have the cases provided any useful insight into the meaning of the terms (e.g., "interfere") that are used in § 3617 but not Title VII. See, e.g., *Wray v. Nat'l R.R. Passenger Corp.*, 10 F. Supp. 2d 1036, 1040 (E.D. Wis. 1998) (noting in dicta in ADA case that the defendant's actions may have been "unpleasant and intimidating" and therefore sufficiently negative to come within the operative verbs in § 12203(b)); see also 29 C.F.R. § 825.400-.404 (2010) (providing regulations for enforcement of the Family Medical Leave Act that do not define "interfere" for purposes of § 2615(a)(1)).

²²² 24 C.F.R. § 100.400(c)(2) (2010).

²²³ See *id.* §§ 100.65, 100.70(b) (describing and providing examples of conduct that violates § 3604(b)).

²²⁴ See, e.g., cases cited *supra* note 215.

²²⁵ *Egan v. Schmock*, 93 F. Supp. 2d 1090, 1093 (N.D. Cal. 2000).

²²⁶ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006).

not from all retaliation, but from retaliation that produces an injury or harm.²²⁷ Furthermore:

We speak of *material* adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth “a general civility code for the American workplace.” An employee’s decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. The antiretaliation provision seeks to prevent employer interference with “unfettered access” to Title VII’s remedial mechanisms. It does so by prohibiting employer actions that are likely “to deter victims of discrimination from complaining to the EEOC,” the courts, and their employers. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence.²²⁸

The Court in *Burlington* emphasized that the “standard for judging harm must be objective,” i.e., how “a reasonable employee” would react to the defendant’s behavior.²²⁹ Finally, *Burlington* determined that “the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. . . . [A]n ‘act that would be immaterial in some situations is material in others.’”²³⁰

The basic standards set forth in *Burlington* should control future interference claims under § 3617.²³¹ *Burlington* regularly uses

²²⁷ *Id.* at 67.

²²⁸ *Id.* at 68 (citations omitted). Among the examples of nonactionable behavior that this passage in *Burlington* identified were “the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing,” *id.* (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (internal quotation marks omitted)), and “‘personality conflicts at work that generate antipathy’ and ‘snubbing by supervisors and co-workers,’” *id.* (internal quotation marks omitted) (quoting 1 B. LINDEMANN & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 669 (3d ed. 1996)).

²²⁹ *Id.* at 68. Thus, *Burlington* held, “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, ‘which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.’” *Id.* (internal quotation marks omitted) (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). According to *Burlington*: “An objective standard is judicially administrable[and . . .] avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff’s unusual subjective feelings.” *Id.* at 68–69.

²³⁰ *Id.* at 69 (quoting *Washington v. Ill. Dep’t of Revenue*, 420 F.3d 658, 661 (7th Cir. 2005)).

²³¹ In addition to the reasons given in the text, this proposition is supported by the courts’ general tendency to rely on Title VII precedents to interpret the FHA. See SCHWEMM, *supra* note 28, § 7:4 & nn.3–4 (stating that “[a] number of lower courts have followed this lead by relying on Title VII precedents to interpret [the FHA]” and citing numerous cases in support).

“interfering with” and “interference”—the key concept involved in most § 3617 claims—to describe the behavior being regulated.²³² Furthermore, *Burlington*, although recognizing that Title VII’s retaliation provision is distinct from its substantive provision, insisted that the former should reflect concerns derived from decisions interpreting the latter in avoiding turning the statute into “a general civility code.”²³³ The same must now presumably obtain in FHA cases. In summary, *Burlington* suggests that “interferes with” under § 3617 should be interpreted to require that “a reasonable person” in the context of the plaintiff’s particular situation would find the challenged behavior so “materially adverse” that he would be deterred from exercising or enjoying his FHA rights.²³⁴

Burlington’s key lesson, of course, is that § 3617 should be interpreted based on its own language and purpose apart from the FHA’s other substantive provisions. The problem, however, is that § 3617, unlike its Title VII counterpart, explicitly refers to the rights “granted or protected” by these other substantive provisions. Thus, a neighbor-on-neighbor harassment case must not only involve behavior that would be materially adverse to a reasonable plaintiff, but would dissuade that person from exercising or enjoying the rights granted or protected by §§ 3603–3606. The next subsection examines what, exactly, these rights are.

3. *The Relationship of § 3617 to the Rights Protected by §§ 3603–3606*

The problem here is to determine whether, if a neighbor’s conduct is sufficiently egregious to constitute interference for purposes of § 3617, that conduct affects the “exercise or enjoyment” of a “right granted or protected by” §§ 3603–3606. As noted above, courts have struggled throughout the FHA’s history to define the proper

²³² See *supra* text accompanying notes 219, 228 (quoting *Burlington*).

²³³ See *supra* text accompanying note 228 (quoting *Burlington*).

²³⁴ See *supra* note 229 (quoting *Burlington*); cf. *United States v. Hartbarger*, 148 F.3d 777, 782–83 (7th Cir. 1998) (determining, for purposes of § 3631 prosecution, that whether the defendants’ behavior constituted a threat involves an evaluation of the context and of how a reasonable person targeted by such behavior would feel); SCHWEMM, *supra* note 28, § 15:3 n.4, § 15:6 nn.19–22, § 15:8 & n.2 (citing cases holding that, for purposes of the FHA’s prohibition against discriminatory ads and statements in § 3604(c), the challenged ad or statement should be judged by an “ordinary reader” or “ordinary listener” standard); *id.* § 17:2 & n.1 (citing cases holding that, in order to violate the FHA’s prohibition against “blockbusting” in § 3604(e), a challenged statement must, “under the circumstances, . . . convey to a reasonable person” the illegal message).

relationship between a § 3617 claim and the rights recognized in the provisions it refers to.²³⁵

One of the few pre-*Halprin* appellate decisions to deal with this issue was produced by the Second Circuit in 1994 in *Frazier v. Rominger*.²³⁶ The *Frazier* opinion began its § 3617 analysis by noting that this provision “prohibits the interference with the exercise of Fair Housing rights only as enumerated in these referenced sections.”²³⁷ The main plaintiffs in this case were a mixed-race couple who were rejected for an apartment after they asked the landlord (Rominger) whether his hesitancy about renting to them was “a racial thing.”²³⁸ Rominger testified at trial that he decided not to rent to the couple because “being accused of race discrimination made him feel very uncomfortable, and . . . he considered it important to feel comfortable with his tenants.”²³⁹ The jury apparently believed this testimony and ruled against the plaintiffs on their refusal-to-rent claim under § 3604(a),²⁴⁰ a ruling that was upheld on appeal.²⁴¹

The Second Circuit also rejected the plaintiffs’ § 3617 claim.²⁴² It held they could not “claim that Mr. Frazier’s questioning of Mr.

²³⁵ See *supra* Part III.D.1.

²³⁶ 27 F.3d 828 (2d Cir. 1994).

²³⁷ *Id.* at 834.

²³⁸ *Id.* at 829–30. Besides the couple (a black man named Eddie Frazier and a white woman named Diane Treloar), the *Frazier* plaintiffs included a fair housing organization that had tested the case for them. *Id.* at 829, 831. After Rominger showed Frazier and Treloar the apartment, they said they would like to rent it, but Rominger told them they needed to submit an application and that he preferred to rent to a single tenant. *Id.* at 829–30. Frazier then questioned Rominger about his hesitancy to rent to the couple and asked Rominger, in what Rominger perceived as an angry tone, “Is this a racial thing?” *Id.* at 830. Rominger replied that it was not and that everyone had to fill out an application; he then provided an application form, which the plaintiffs completed before leaving. *Id.* By then, however, Rominger had apparently decided not to rent to the couple because of “being accused of race discrimination.” *Id.* at 831. Thereafter, Rominger rented the apartment to a white couple for a brief period and then to a single Hispanic woman. *Id.*

²³⁹ *Id.* at 831.

²⁴⁰ *Id.*

²⁴¹ On the § 3604(a) claim, the Second Circuit held that, although the plaintiffs had established a prima facie case of race discrimination, the defendant’s

proffered justification for denying the couple the apartment—Mr. Frazier’s question as to whether the perceived hesitancy was “a racial thing” and the discomfort this question engendered on Mr. Rominger’s part—was . . . a legally acceptable explanation for denying Mr. Frazier and Ms. Treloar the apartment which the jury was free to accept or reject.

Id. at 831–32.

²⁴² *Id.* at 833–34. The plaintiffs had not originally pled a § 3617 claim, but at trial they moved to have the jury instructed on § 3617 as well as § 3604(a), which the trial court refused to do. *Id.* at 831. In their appeal, the plaintiffs challenged both their § 3604(a) loss and their inability to proceed under § 3617. *Id.* at 831, 833.

Rominger's potential bias constituted the 'exercise or enjoyment of' one of his rights under the Fair Housing Act.²⁴³ In other words, *Frazier* held that a minority homeseeker's "right" to question a housing provider's motivation as racial is not a "right granted or protected" by §§ 3603–3606. Those sections, according to the Second Circuit, "provide that prospective tenants have a right not to be discriminated against on account of their race in a wide variety of housing transactions."²⁴⁴ However, "[n]owhere in these sections . . . can be found a right to question the potential racial motivations of landlords."²⁴⁵ Thus, *Frazier* concluded, the plaintiffs' § 3617 claim failed because it was "without a predicate."²⁴⁶

The *Frazier* court saw an additional problem with the plaintiffs' § 3617 claim, based on the fact that "the only 'interference' that plaintiffs can claim is the actual denial of rental housing," which they alleged violated § 3604(a).²⁴⁷ The Second Circuit concluded that a § 3617 "interference" claim could not be based solely on the same conduct that was concurrently being challenged under § 3604(a), believing that Congress never intended "such a statutory overlap" and thus "that the plaintiffs' sole remedy in this case existed in their § 3604(a) cause of action."²⁴⁸ Based on this analysis, *Frazier* held that

²⁴³ *Id.* at 833.

²⁴⁴ *Id.* at 834.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* Thus, as the Second Circuit saw it, the theory underlying the plaintiffs' § 3617 claim was that the defendants' refusal to rent to them "is at the same time a § 3604(a) discrimination and a § 3617 interference, thus giving rise to two separate causes of action." *Id.* at 833. The *Frazier* opinion described this theory as "somewhat peculiar," *id.*, because "under this theory, every allegedly discriminatory denial of housing under § 3604(a) would also constitute a violation of § 3617 in that the denial 'interfered' with the prospective tenant's Fair Housing Act rights," *id.* at 834.

²⁴⁸ *Id.* at 834. As noted above, the Seventh Circuit disagrees, having concluded in both *Bloch* and *Halprin* that the same conduct may well result in a § 3617 violation as well as a § 3604 violation. *Bloch v. Frischholz*, 587 F.3d 771, 782 (7th Cir. 2009) (en banc); *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 328–29 (7th Cir. 2004); see also *Krueger v. Cuomo*, 115 F.3d 487, 491–92 (7th Cir. 1997) (described *supra* note 113); *infra* note 249 (describing the Seventh Circuit's decision in the *Arlington Heights* case). Other appellate courts agree with the Seventh Circuit on this point. See, e.g., *Quigley v. Winter*, 598 F.3d 938, 946–48 (8th Cir. 2010) (described *supra* note 113); *Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1231, 1240 (D.C. Cir. 1997) (considering claims of §§ 3604 and 3617 violations); *HUD ex rel. Herron v. Blackwell*, 908 F.2d 864, 872 (11th Cir. 1990) (affirming ALJ's finding of a violation of §§ 3604 and 3617); appellate cases cited *supra* note 178; see also *United States v. Collier*, No. 08-0686, 2010 WL 3881381, at *9–11 (W.D. La. Sept. 28, 2010) (finding violations of § 3617 along with § 3604(a)–(c) at urging of the Justice Department). Indeed, as the *Bloch* opinion pointed out, there is nothing unusual in concluding that particular conduct may violate more than one FHA provision. See *Bloch*, 597 F.3d at 782; see also SCHWEMM, *supra* note 28, § 11C:2 n.36, § 13:15 n.4, § 14:2 n.18, § 14:3 & n.30 (citing cases holding that same conduct violates multiple sections of the FHA). See generally CBOCS

“the plaintiffs did not state a cause of action under § 3617 separate and distinct from their cause of action under § 3604(a).”²⁴⁹

This part of the *Frazier* analysis also implies, however, that a § 3617 interference claim may well be viable without a violation of §§ 3603–3606 in a different type of case. If, as *Frazier* contends, no such § 3617 claim is available when the conduct complained of is unsuccessfully challenged under § 3604(a),²⁵⁰ the reverse corollary is that § 3617 *may* apply in situations where the complained of conduct does *not* violate §§ 3603–3606.²⁵¹

Thus, as one district court within the Second Circuit later noted in a neighbor-on-neighbor harassment case, *Frazier* certainly does not bar this type of § 3617 claim.²⁵² Indeed, as we have seen, in most cases involving neighbor harassment, the plaintiff would not have a claim under §§ 3603–3606 to begin with.²⁵³

But the question remains what § 3617 means when it refers to exercising or enjoying “any right granted or protected by” §§ 3603–

W., Inc. v. Humphries, 128 S. Ct. 1951, 1960 (2008) (describing how civil rights statutes should be interpreted to overlap where “the ‘overlap’ reflects congressional design”).

In light of this overwhelming authority to the contrary, the Second Circuit’s statement quoted in the text must be considered misguided dicta. It is true that many courts, including the Seventh Circuit, have rejected a § 3617 claim after ruling against the plaintiff’s § 3604 claim based on the same conduct with only a brief analysis of the § 3617 claim. See *supra* note 178 and accompanying text (citing cases). The *Frazier* court could have followed this technique. The fact that it chose to articulate a different approach was unfortunate, but only to the extent that the statement quoted in the text might be mistaken as correct.

²⁴⁹ 27 F.3d at 834. *Frazier*’s conclusion here that the same conduct cannot produce a § 3617 interference claim separate from a claim under § 3604(a) is somewhat reminiscent of the Seventh Circuit’s determination in 1977 that, when the same conduct is alleged to have violated both § 3604(a) and § 3617, “the validity of the section 3617 claim depends on whether [that conduct] violated section 3604(a).” *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1288 n.5 (7th Cir. 1977) (cited *supra* notes 177 and 179). In these circumstances, the Seventh Circuit would apparently hold that a violation of § 3604(a) means that § 3617 is also violated, whereas *Frazier* held that no § 3617 claim can be asserted in such a situation, but the practical result is the same: that is, the § 3617 claim provides no additional value for potential plaintiffs. This is at least true for cases in the modern era after the 1988 FHAA made § 3617 claims subject to the same statutes of limitations and other enforcement procedures that govern § 3604 claims. See *supra* note 28 and accompanying text (discussing the FHAA); *supra* note 182 (citing pre-FHAA cases dealing with enforcement of § 3617).

²⁵⁰ But see *supra* notes 248–49 and accompanying text.

²⁵¹ This view is consistent with the many decisions, both before and after *Frazier*, holding that § 3617 can, in some circumstances, produce a viable claim without a violation of §§ 3603–3606. See cases cited *supra* notes 180 and 191.

²⁵² See *Ohana v. 180 Prospect Place Realty Corp.*, 996 F. Supp. 238, 241 (E.D.N.Y. 1998) (concluding, with respect to the proposition that § 3617 can “serve as a separate basis for an FHA claim where there is no predicate for liability under [§§ 3603–3606],” that “a careful reading of *Frazier* suggests that the Second Circuit agrees”). For further discussion of *Ohana*, see *supra* note 98; *infra* notes 260–66 and accompanying text.

²⁵³ See *supra* note 192 and accompanying text.

3606; that is, what are the “predicate” rights under these provisions that *Frazier* held are required for a § 3617 claim. On this point, *Frazier* tells us only what such rights do *not* include (i.e., they do not include questioning a landlord about his potential bias).²⁵⁴

Prior cases do suggest some affirmative answers. One example is Judge Posner’s hypothetical in *Halprin* of a neighbor burning down a minority’s house, which *Bloch* later agreed would constitute a violation of both §§ 3604(a) and 3617.²⁵⁵ Furthermore, even if the harassment is not so egregious as to constitute a § 3604 violation, the victim may still have a § 3617 claim, for, as *Bloch* pointed out, the fact that “§ 3604 prohibits discriminatory evictions[means] that attempted discriminatory evictions can violate § 3617’s prohibition against interference with § 3604 rights.”²⁵⁶

Beyond avoiding arson and attempted eviction, what other “rights” do minority residents have under § 3617? In addressing this question, it is worth remembering that § 3617 refers to rights that are “granted or protected” by §§ 3603–3606,²⁵⁷ and that the addition of the “or protected” phrase was one of the few changes made to § 3617’s substantive language during the FHA’s legislative history.²⁵⁸ Furthermore, some courts have focused on the fact that the language of § 3617 protects not only the “exercise” but also the “enjoyment” of §§ 3603–3606 rights.²⁵⁹ For example, in *Ohana v. 180 Prospect Place Realty Corp.*,²⁶⁰ the court upheld the plaintiffs’ § 3617 claim based on neighbor harassment, concluding that the plaintiffs, “having already exercised their rights to fair housing” by moving into their home, had “a cognizable claim under § 3617” to avoid interference with “the enjoyment of these rights because of [their] race, religion and national

²⁵⁴ See *supra* notes 243–46 and accompanying text. For another example of an appellate court’s determination of what §§ 3603–3606 rights do not include for purposes of § 3617, see *Dixon v. Hallmark Cos.*, 627 F.3d 849, 858 (11th Cir. 2010) (holding that, because the plaintiffs have no right under § 3604(b) “to hang religious artwork in Hallmark’s rental office, which is separate from their personal dwelling,” their § 3617 “claim for retaliatory housing discrimination” cannot be based on § 3604(b) and therefore “must fail”).

²⁵⁵ See *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, 388 F.3d 327, 329 (7th Cir. 2004) (posing hypothetical); *Bloch v. Frischholz*, 587 F.3d 771, 776–77, 781–82 (7th Cir. 2009) (en banc) (agreeing with *Halprin* that “§ 3604(a) may reach post-acquisition discriminatory conduct that makes a dwelling unavailable to the owner or tenant,” and implying that a physical deprivation of one’s dwelling violating § 3604(a) also violates § 3617); see also *Bloch*, 587 F.3d at 783 (holding that the plaintiffs there had a § 3617 claim if they were interfered with in “the . . . exercise or enjoyment of their right to inhabit their condo”).

²⁵⁶ *Bloch*, 587 F.3d at 782.

²⁵⁷ 42 U.S.C. § 3617 (2006) (emphasis added).

²⁵⁸ See *supra* notes 120, 123 (summarizing the substantive changes made to § 3617).

²⁵⁹ 42 U.S.C. § 3617.

²⁶⁰ 996 F. Supp. 238 (E.D.N.Y. 1998).

origin.”²⁶¹ In addition, a number of sex harassment cases have upheld § 3617 claims based on the determination that the defendant’s behavior interfered with the complainant’s enjoyment of her home.²⁶²

In upholding these interference-with-enjoyment claims, *Ohana* and some other opinions relied on—and gave *Chevron* deference to—

²⁶¹ *Id.* at 243; see also *Antonio v. Sec. Servs. of Am., LLC*, 701 F. Supp. 2d 749, 772 (D. Md. 2010) (citing § 3617 in support of the conclusion that the Fair Housing Act guarantees “persons basic rights to be free from discrimination in connection with their enjoyment of property”); *United States v. Pospisil*, 127 F. Supp. 2d 1059, 1064 (W.D. Mo. 2000) (“Several cases have affirmed the existence of a cause of action under § 3617, for discriminatory interference with enjoyment of occupancy”); *Schroeder v. De Bertolo*, 879 F. Supp. 173, 177–78 (D.P.R. 1995) (noting, in the course of upholding various FHA claims, that the plaintiff-resident had “the continuing right to quiet enjoyment and use of her condominium unit and common areas of the building” and that § 3617 bars interference with an “individual’s free exercise of [such] housing rights”); *HUD v. Courthouse Square Co.*, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,155, at 26,247 (HUD ALJ 2001), available at 2001 WL 953792 (holding, for purposes of § 3617, that it follows from the fact that an individual has “exercised her rights under the [FHA] by taking up residence in” respondents’ housing that “her continued enjoyment of her tenancy would be deemed an exercise of her rights under the [FHA]”); *HUD v. Gutleben*, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,078, at 25,726–27 (HUD ALJ 1994), available at 1994 WL 441981 (holding that respondent-neighbor’s racial slurs directed at black family violated § 3617 because they “interfered with Complainants’ exercise of that right, i.e., a quiet enjoyment of their apartment, because of Complainants’ race” and “interfered with their ability to reside there free from such menace. . . . [and the] right to enjoy [their] home free from such slurs”), modified, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,103 (HUD ALJ 1994).

²⁶² *E.g.*, *Quigley v. Winter*, 598 F.3d 938, 947–48 (8th Cir. 2010) (holding that landlord’s “numerous unwanted interactions of a sexual nature . . . interfered with [the plaintiff’s] use and enjoyment of her home” and violated § 3617 because they interfered with the plaintiff’s “enjoyment of her housing rights”); *United States v. Koch*, 352 F. Supp. 2d 970, 978–80 (D. Neb. 2004) (holding that § 3617 is violated by landlord’s unwelcome sexual advances to female tenants that interfered with their “enjoyment of a dwelling because of [their] sex”); *HUD v. Krueger*, Fair Housing–Fair Lending Rptr. ¶ 25,119, at 26,026 (HUD ALJ 1996), available at 1996 WL 418886 (holding that landlord’s sexual harassment of female tenant violated § 3617 because it interfered with “her exercise of the right she was attempting to enjoy,” i.e., “she was attempting to enjoy a right protected under the Act—quiet enjoyment of her apartment without interference from sexual harassment”), *aff’d sub nom.* *Krueger v. Cuomo*, 115 F.3d 487 (7th Cir. 1997); *HUD v. Kogut*, Fair Housing–Fair Lending Rptr. ¶ 25,100, at 25,904 (HUD ALJ 1995), available at 1995 WL 225277 (holding that landlord’s eviction of tenant who refused his sexual advances violated § 3617 because “she was attempting to enjoy housing free from interference because of discrimination; that is, she was exercising her right to quiet enjoyment of her apartment”). In the *Koch* case, the court opined:

[I]f a woman rents an apartment—ostensibly pursuant to the same lease terms that are provided to all other tenants—it seems to me that she has exercised her rights to obtain a dwelling without discrimination on account of her sex. This right is protected by section 3604, although there has been no violation of this right. If, however, after she has taken possession of the property, she is then subjected to discriminatory acts based upon her sex, it seems to me that she should be allowed to prove that she experienced [a § 3617 violation through] interference—if not threats, intimidation, or coercion—on account of her having exercised or enjoyed her right of access to housing protected by section 3604.

352 F. Supp. 2d at 978–79 n.8.

HUD's § 3617 regulation,²⁶³ which outlaws "interfering with persons in their enjoyment of a dwelling" because of such persons' race or other factor prohibited by the FHA.²⁶⁴ The *Ohana* opinion, in particular, emphasized that this made it appropriate to interpret § 3617 to cover "actions that would interfere with the enjoyment of a person's property" or that interfere with the "peaceful enjoyment of one's home."²⁶⁵ The latter concept, according to *Ohana*,

is obviously sufficiently pervasive to embrace the expectation that one should be able to live in racial and ethnic harmony with one's neighbors. This case is not about providing a federal judicial forum for the resolution of disputes amongst neighbors. It is simply about holding one accountable for intentionally intruding upon the quietude of another's home because of that person's race, color, religion, sex, familial status or national origin. The Fair Housing Act . . . is an appropriate means for accomplishing this salutary end²⁶⁶

Thus, the conclusion suggested by *Ohana* and the HUD regulations is that § 3617 may be invoked in any case where the challenged conduct interferes with the plaintiff's "right" to enjoy his or her home free from invidiously motivated harassment, i.e., that such a right is "granted or protected by" §§ 3603–3606.²⁶⁷ This would

²⁶³ *E.g.*, *Koch*, 352 F. Supp. 2d at 979–80; *Ohana*, 996 F. Supp. at 242. For more on the meaning of *Chevron* deference, see *supra* notes 152–54 and accompanying text.

In *Bloch*, the Seventh Circuit gave HUD's interpretation in this regulation "great weight," *Bloch v. Frischholz*, 587 F.3d 771, 782 (7th Cir. 2009) (en banc) (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972)), but not full *Chevron* deference, *id.* (citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649–50 (1990)). In *Adams Fruit*, the Supreme Court refused to defer to a Department of Labor regulation, holding that a precondition for *Chevron* deference, i.e., that the statute contain a delegation of administrative authority to the agency, did not exist here, because the Department of Labor was given authority only to promulgate substantive standards and not also to define the extent of private rights of action, which remained the province of the judiciary. 494 U.S. at 649–50. Unlike *Adams Fruit*, however, the issue here is how the FHA's substantive provisions should be interpreted. As to this, the FHA *does* delegate administrative authority to HUD. See *supra* note 90 and accompanying text (describing the FHA grant of authority to HUD); see also *Meyer v. Holley*, 537 U.S. 280, 287–88 (2003) (citing *Chevron* in support of deferring to a HUD regulation interpreting the FHA). Thus, *Bloch* should have given full *Chevron* deference to HUD's § 3617 regulation, as *Ohana* and other courts have done.

²⁶⁴ 24 C.F.R. § 100.400(c)(2) (2010).

²⁶⁵ 996 F. Supp. at 241, 243.

²⁶⁶ *Id.* at 243 (citing *United States v. Weisz*, 914 F. Supp. 1050, 1054–55 (S.D.N.Y. 1996)).

²⁶⁷ For a further description of these provisions, see *supra* notes 31–33 and accompanying text. In neighbor harassment cases, it would seem particularly appropriate to attribute this right as being protected by § 3604(b), which outlaws discrimination in the privileges, terms, and conditions of the sale or rental of a dwelling.

mean, as least in theory, that *any* race-based abusive remark by a neighbor might suffice to trigger a § 3617 claim. If, as suggested in the previous Section, however, the Title VII standards from *Burlington* apply, then the neighbor's behavior would have to be sufficiently egregious that a reasonable person in the plaintiff's position would consider the behavior to have a materially adverse effect on the enjoyment of one's home.²⁶⁸ But this is a far more generous standard than that advocated in some earlier neighbor harassment cases (e.g., that such harassment would be actionable only if it were designed to oust the plaintiffs from their home).²⁶⁹ And it is a significantly different standard than *Bloch*'s "pattern of harassment" requirement.²⁷⁰ Instead, the key would be how a reasonable minority homeowner or tenant would respond to the defendant's behavior; thus liability could result, in a given context and contrary to *Bloch*, from an "isolated act of discrimination."²⁷¹

The incident(s) must, however, be "invidiously motivated." The right being recognized for purposes of § 3617 is not peaceful enjoyment generally, but a particular kind of peaceful enjoyment, i.e., that undisturbed by racial or other FHA-condemned types of harassment. Thus, *Bloch* and other courts have been correct in identifying the necessary elements for such a § 3617 claim as including the defendant's being "motivated by an intent to discriminate,"²⁷² even though this element is not required in certain other types of § 3617 claims.²⁷³ This means, for example, that the *Weisz* court's rejection of a neighbor harassment claim was sound, at least to the extent the court there accurately attributed the defendant's

²⁶⁸ See *supra* notes 226–30 and accompanying text (discussing the *Burlington* "materially adverse to a reasonable employee" standard).

²⁶⁹ See *supra* note 103 and accompanying text (discussing *Egan v. Schmock*).

²⁷⁰ *Bloch v. Frischholz*, 587 F.3d 771, 783 (7th Cir. 2009) (en banc) (quoting *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 330 (7th Cir. 2004)) (internal quotation marks omitted).

²⁷¹ *Id.* (quoting *Halprin*, 388 F.3d at 330) (internal quotation marks omitted).

²⁷² *Id.* (citing *East-Miller v. Lake Cnty. Highway Dep't*, 421 F.2d 558, 563 (7th Cir. 2005)); see also *Simoës v. Wintermere Pointe Homeowners Ass'n, Inc.*, No. 6:08-CV-01384-LSC, 2009 WL 2216781, at *6 (M.D. Fla. July 22, 2009) (awarding summary judgment against Brazilian resident's § 3617 claim on the ground that he failed to show that the defendant's actions were prompted by "Latin American animus" or "animus toward Brazilians"), *aff'd*, 375 Fed. App'x 927 (11th Cir. 2010).

²⁷³ For example, in retaliation claims under § 3617, the required elements are that: (1) the plaintiff was engaged in an activity protected by §§ 3603–3606; (2) the defendant took some adverse action against the plaintiff; and (3) a causal connection existed between the protected activity and the adverse action. See SCHWEMM, *supra* note 28, § 20:5, at 20-27 n.3 (citing cases). *But see* *Campbell v. Robb*, 162 Fed. App'x 460, 472–74 (6th Cir. 2006) (requiring, based on prior circuit precedent, a showing of discriminatory animus in § 3617 retaliation claim).

behavior solely to hostility to her neighbors that was *not* based on their religion.²⁷⁴

Given the FHA's goal of fostering integration,²⁷⁵ it seems obvious that § 3617 should cover invidiously motivated harassment that discourages minorities from moving into white areas²⁷⁶ or, once there, makes them feel so unwelcome that they decide to move away.²⁷⁷ But § 3617 goes beyond those situations where a change of residence occurs.²⁷⁸ Interference under § 3617 should be interpreted to include any neighbor harassment that would reduce a reasonable person's enjoyment of his home sufficiently to raise the prospect of having to move.

²⁷⁴ See *supra* notes 104–09 and accompanying text (summarizing the *Weisz* holding and rationale).

²⁷⁵ See *supra* notes 144–48 and accompanying text.

²⁷⁶ See, e.g., *HUD v. Weber*, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,041, at 25,424 (HUD ALJ 1993), available at 1993 WL 246392 (noting that minority who was inspecting a rental unit when local resident verbally harassed him did not rent this unit, but is protected by § 3617 because he had “a right to attempt to rent a home without being subjected to discrimination”); cf. *United States v. Craft*, 484 F.3d 922, 926 (7th Cir. 2007) (noting that convictions under § 3631 may be based on behavior directed at minorities before they “physically reside in the property” (citing *United States v. White*, 788 F.2d 390, 392 (6th Cir. 1986); *United States v. Anzalone*, 555 F.2d 317, 318 (2d Cir. 1977))).

²⁷⁷ See, e.g., *HUD v. Lashley*, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,039, at 25,405 (HUD ALJ 1992), available at 1992 WL 406539 (noting that victims moved as a result of neighbor harassment that was held to violate § 3617); *HUD v. Johnson*, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,076, at 25,705 (HUD ALJ 1994), available at 1994 WL 391135 (same).

²⁷⁸ See *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 610–611, 613–14 (D.N.J. 2000) (upholding § 3617 claim where the defendants' alleged harassment was unsuccessful in driving the plaintiffs from their home); *Schroeder v. De Bertolo*, 879 F. Supp. 173, 178 (D.P.R. 1995) (same); *supra* notes 63, 259–68 and accompanying text (discussing courts' understanding that the reach of § 3617 extends beyond circumstances in which physical vacation of the property results); cf. *United States v. Vartanian*, 245 F.3d 609, 612 (6th Cir. 2001) (noting, in upholding the defendant's § 3631 conviction for making racist threats regarding a black family about to move into the defendant's neighborhood, that the family “nevertheless decided to go through with the purchase of the home, but they kept strict watch over their children so as to protect them from possible attacks or mischief from their neighbors”); *United States v. Hayward*, 6 F.3d 1241, 1252–53 (7th Cir. 1993) (holding that § 3631 conviction does not require that the target of the defendant's behavior leave their home); *United States v. Wood*, 780 F.2d 955, 961 (11th Cir. 1986) (same). In the *Wood* case, the Eleventh Circuit wrote, in the course of upholding a § 3631 conviction:

Section 3631 was clearly designed to protect an individual's right to occupy a dwelling of one's choice free from racial pressure. . . . The statute prohibits acts of willful intimidation of or interference with a victim “because of his race . . . and because he is . . . occupying . . . any dwelling.” Section 3631 nowhere mentions that the acts be designed to force an individual to move; it merely requires that the acts be precipitated by the individual's occupation of a particular house. “Occupation” includes more than mere physical presence within four walls; the term clearly incorporates the right to associate in one's home with members of another race.

Id. (second, third, and fourth omissions in original).

While predicting how a reasonable person would react to a particular incident or type of housing harassment may be difficult,²⁷⁹ it seems likely that most Americans would find a challenge to their right to live in their chosen home an extremely stressful situation.²⁸⁰

Furthermore, because many of these cases involve minority families who have recently moved into predominantly white areas, it would be reasonable for them to be somewhat on their guard and to react negatively to race-based abuse that interferes with the peaceful enjoyment of their home.²⁸¹

In summary, the conclusion seems inescapable that even one invidiously motivated incident or abusive remark by a hostile neighbor might well result in liability under § 3617. This was, in fact, the holding in an early HUD administrative decision rendered shortly after the 1988 FHAA reenacted § 3617,²⁸² and it is a conclusion that

²⁷⁹ But certainly not outside the range of judicial competence. See *supra* note 229 and accompanying text (discussing the *Burlington* court's use of a reasonable-person analysis in the employment-discrimination context); see also Short, *supra* note 47, at 211 n.53 (arguing that the "concern over potentially federalizing common, ordinary neighbor-to-neighbor disputes . . . ignores the ability of judges to draw appropriate lines in hard cases").

²⁸⁰ See, e.g., Regina Cohen, Comment, *Home Is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 Wis. L. REV. 1061, 1073–74 (1987) (describing typical reactions of housing-harassment victims to include feelings of nervousness, frustration, fear, and anger, which can manifest themselves in physical illness, decreased work productivity, and depression); Florence Wagman Roisman, *The Right to Remain: Common Law Protections for Security of Tenure: An Essay in Honor of John Otis Calmore*, 86 N.C. L. REV. 817, 820–29 (2008) (discussing the importance of security of tenure as an element of the human right to housing); Robert G. Schwemm & Rigel C. Oliveri, *A New Look at Sexual Harassment Under the Fair Housing Act: The Forgotten Role of § 3604(c)*, 2002 Wis. L. REV. 771, 786–88 (2002) (citing sources dealing with the negative effects of sex harassment in housing); cf. *Homesavers Council of Greenfield Gardens, Inc. v. Sanchez*, 874 N.E.2d 497, 502 (Mass. App. Ct. 2007) (finding it foreseeable that tenant would suffer emotional distress as a result of landlord's interference with her quiet enjoyment).

²⁸¹ See, e.g., *HUD v. Gutleben*, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,078, at 25,726–27 (HUD ALJ 1994), available at 1994 WL 441981 (describing, in holding that respondent-neighbor's racial slurs violated § 3617, how various members of the target family were negatively affected by these comments, including the children suffering fear and nightmares), modified, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,103 (HUD ALJ 1994); cf. *United States v. Vartanian*, 245 F.3d 609, 616 & n.2 (6th Cir. 2001) (noting, in upholding the defendant's § 3631 conviction for making racist threats regarding a black family about to move into the defendant's neighborhood, that the target of these threats "justifiably felt compelled to take special precautions to ensure the well-being of their family members," which included altering their lifestyles, limiting their children's activities, and rearranging the furniture "so it wasn't in front of the window. . . . to be sure if a brick or gunshots or something that came into the window, it wouldn't hit anybody," and that the defendant "was, or should have been, aware that such defensive actions were but natural reactions flowing from [his threatening] comments"); *United States v. Magleby*, 241 F.3d 1306, 1314–16 (10th Cir. 2001) (noting, in upholding the defendant's § 3631 conviction for burning a cross in the yard of an interracial family, that the family thereafter took extensive security measures that included having their eleven-year-old son carry and sleep with a baseball bat for protection).

²⁸² See *supra* note 96 and accompanying text.

seems justified by the statute's text, purpose, and legislative history. The next Section examines whether this interpretation is foreclosed by First Amendment considerations.

E. First Amendment Considerations

1. Overview

Defendants accused of violating § 3617 based on their speech or other expressive activities have often argued that they are protected from liability by the First Amendment.²⁸³ Actually, First Amendment arguments have been made in two distinct types of § 3617 cases: (1) those where the defendants have opposed a housing project through litigation and/or comments to a local zoning board or similar governmental entity; and (2) those where the defendant-neighbors' harassment has taken the form of verbal abuse or other type of communication directed at minority residents.²⁸⁴ Defendants in the former type of case clearly do have some First Amendment protection, at least so long as their litigation or petitioning behavior has a good-faith basis and is not solely motivated by a discriminatory factor condemned by the FHA.²⁸⁵

²⁸³ See, e.g., cases cited *infra* notes 285–87.

²⁸⁴ On occasion, both situations may be present in the same case. See, e.g., *Simoes v. Wintermere Pointe Homeowners Ass'n*, No. 6:08-CV-01384-LSC, 2009 WL 2216781, at *6–8 (M.D. Fla. July 22, 2009) (rejecting, for lack of proof of discriminatory animus, Brazilian resident's § 3617 claim based on a variety of hostile actions by homeowners' association that included state court litigation), *aff'd*, 375 Fed. App'x 927 (11th Cir. 2010); *Scialabba v. Sierra Blanca Condo. No. One Ass'n*, No. 00 C 5344, 2000 WL 1889664, at *3–4 (N.D. Ill. Dec. 27, 2000) (upholding § 3617 claim on behalf of mentally disabled condominium resident based on the defendants' allegedly having "imposed discriminatory conditions upon [his] use of condominium facilities" and filed "a lawsuit to enforce liens imposed for discriminatory purposes"); *Schroeder v. De Bertolo*, 879 F. Supp. 173, 178 (D.P.R. 1995) (upholding § 3617 claim by mentally disabled condominium resident who alleged that she had been the target of a series of intimidating actions by the condominium's management and some of her neighbors, including groundless civil lawsuits, threats of criminal complaints, and unauthorized searches of her unit).

²⁸⁵ For examples of cases that have upheld First Amendment claims in this situation, see *White v. Lee*, 227 F.3d 1214, 1230–37 (9th Cir. 2000); *United States v. Robinson*, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 15,979 (D. Conn. 1995); *HUD v. Grappone*, Fair Housing–Fair Lending Rep. ¶ 25,059, at 25,574–79 (HUD ALJ 1993), available at 1993 WL 388605; see also *New W., L.P. v. City of Joliet*, 491 F.3d 717, 722 (7th Cir. 2007) (suggesting that the defendant's First Amendment rights to speak and petition might shield it from FHA liability for its having filed a state court condemnation proceeding against the plaintiff's apartment complex and its lobbying HUD not to renew the complex's funding); *Affordable Hous. Dev. Corp. v. City of Fresno*, 433 F.3d 1182, 1193, 1197–98 (9th Cir. 2006) (awarding attorney's fees to the defendants who prevailed in a suit accusing them of unlawfully interfering with a housing developer by opposing its proposal before the city council, after noting that an individual's First Amendment right to publically oppose a proposed housing development had been established since the early 1990s); *Hous. Investors, Inc. v. City of*

As for neighbor harassment cases, no court has yet held that an otherwise unlawful communication under § 3617 is protected by the First Amendment.²⁸⁶ Some opinions, however, have recognized First Amendment concerns and have accordingly interpreted § 3617 narrowly to steer clear of barring protected expression,²⁸⁷ an approach that has also been followed in other types of FHA cases.²⁸⁸ This

Clanton, Ala., 68 F. Supp. 2d 1287, 1301 (M.D. Ala. 1999) (described *infra* note 287).

Other cases have rejected First Amendment claims in this situation. *See, e.g.*, United States v. Wagner, 940 F. Supp. 972, 980–83 (N.D. Tex. 1996) (explaining that First Amendment protection did not apply because the defendant filed suit with an objectively baseless claim and with improper motive); Tizes v. Curcio, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 16,021, at 16,021.2–3 (N.D. Ill. 1995) (finding that the defendants’ lawsuit against the plaintiffs was not protected by the First Amendment because there is no protection when one uses administrative or judicial proceedings for fraudulent or unlawful purposes); *see also* United States v. Scott, 788 F. Supp. 1555, 1562–63 (D. Kan. 1992) (finding § 3617 violation based on the defendants’ efforts to block housing for disabled persons, which included filing a lawsuit, without discussing First Amendment issues). *See generally* Bill Johnson’s Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983) (holding that baseless litigation is not protected by the First Amendment’s right to petition).

²⁸⁶ *See, e.g.*, LeBlanc–Sternberg v. Fletcher, 781 F. Supp. 261, 265–67 (S.D.N.Y. 1991) (holding that the First Amendment does not protect defendants against § 3617 claim based on their efforts to harass and discourage Orthodox Jews from living in the defendants’ town); HUD v. Simpson, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,082, at 25,761 (HUD ALJ 1994), available at 1994 WL 497538 (holding that respondent-neighbors’ campaign of harassment against Hispanic family in violation of § 3617 was not protected by the First Amendment), *petition for review dismissed without opinion*, 110 F.3d 64, 1997 WL 103364 (6th Cir. 1997); HUD v. Gutleben, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,078, at 25,727–28 (HUD ALJ 1994), available at 1994 WL 441981 (holding that respondent-neighbors’ racial epithets and other remarks in violation of black tenants’ rights under § 3617 were not protected by the First Amendment), *modified*, Fair Housing–Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,103 (HUD ALJ 1994).

²⁸⁷ *See* Gourlay v. Forest Lake Estates Civic Ass’n, Inc., 276 F. Supp. 2d 1222, 1236 (M.D. Fla. 2003) (ruling against § 3617 claim after expressing “serious constitutional concerns” about a case like this “where, arguably, Plaintiffs are trying to regulate speech because of its emotive impact on the Plaintiffs”), *vacated pursuant to settlement*, No. 8:02CV1955T30TGW, 2003 WL 22149660 (M.D. Fla. Sept. 16, 2003); Salisbury House, Inc. v. McDermott, No. CIV.A. 96-CV-6468, 1998 WL 195693, at *13 (E.D. Pa. Mar. 24, 1998) (ruling against § 3617 claim after expressing concern “about potential First Amendment conflicts which may arise were we to interpret ‘interfere’ [in § 3617] in its broadest sense”); *cf. Hous. Investors, Inc.*, 68 F. Supp. 2d at 1301 (avoiding issue of whether the First Amendment protects § 3617 defendants from liability based on their opposition to an affordable-housing project in public hearings before local government commission by construing § 3617 not to cover such behavior). *See generally* United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994) (noting that statutes should be read to eliminate constitutional doubts “so long as such a reading is not plainly contrary to the intent of Congress” (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988))); *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (recognizing “the well-established principle that statutes will be interpreted to avoid constitutional difficulties” (citing *Erznoznik v. Cty of Jacksonville*, 422 U.S. 205, 216 (1975)); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)); *United States v. Clark*, 445 U.S. 23, 27 (1980) (“[T]his Court will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided.”).

²⁸⁸ *See, e.g.*, *Hous. Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d

approach also reflects the FHA's own first section, which states: "It is the policy of the United States to provide, *within constitutional limitations*, for fair housing throughout the United States."²⁸⁹ All of this makes clear that the basic theme of this Article—that § 3617 should be more generously interpreted to ban most forms of neighbor-on-neighbor harassment—must take into account First Amendment concerns.

2. Cross-Burning Cases

The Supreme Court has made clear in two cross-burning cases that racist expressions directed at minority homeowners may be regulated consistent with the First Amendment. In the first, *R.A.V. v. City of St. Paul, Minnesota*,²⁹⁰ a 1992 case, the Court struck down a city ordinance banning certain hate-inspired symbols because it too broadly restricted freedom of speech,²⁹¹ but noted that the defendant's act of burning a cross in a black family's yard could have been prosecuted under a properly drawn statute.²⁹² Indeed, the *R.A.V.*

644, 650–53 (6th Cir. 1991) (rejecting FHA-based challenge to newspaper's housing ads that featured only white models on the ground that the plaintiff's theory hinged on a construction of the FHA that raised serious First Amendment concerns); *Stewart v. Furton*, 774 F.2d 706, 710 n.2 (6th Cir. 1985) (implying in FHA case against landlord that basing liability on his biased statement unrelated to a specific discriminatory transaction would raise difficult First Amendment issues); *see also* *United States v. Northside Realty Assocs., Inc.*, 474 F.2d 1164, 1169–71 (5th Cir. 1973) (reversing liability finding because of the possibility that it may have rested in part on the fact that the defendant had stated his belief that the FHA was unconstitutional); *cf.* *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 529–36 (2002) (adopting a limited construction of the National Labor Relations Act's anti-interference provision in part to avoid difficult First Amendment issues that might result from a broader interpretation).

²⁸⁹ 42 U.S.C. § 3601 (2006) (emphasis added).

²⁹⁰ 505 U.S. 377 (1992).

²⁹¹ *Id.* at 391–96.

²⁹² *See id.* at 380 n.1 (listing a number of state criminal laws under which the defendant's conduct could have been punished). Indeed, the *R.A.V.* defendant himself was later convicted of violating § 3631, the criminal provision that was passed as a companion to the FHA. *See* *United States v. J.H.H.*, 22 F.3d 821, 824–28 (8th Cir. 1994) (rejecting the argument of *R.A.V.* and his coconspirators that their § 3631 convictions violated the First Amendment because § 3631 is "not directed toward protected speech, but [is] directed only at intentional threats, intimidation, and interference with federally guaranteed rights"). Other post-*R.A.V.* decisions also rejected First Amendment challenges to § 3631 prosecutions for cross burning or similar behavior. *See, e.g.,* *United States v. Stewart*, 65 F.3d 918, 930 (11th Cir. 1995) (holding that the defendants' prosecution for cross burning was based on their "act and not the opinion or belief which motivated it" and that their intentionally threatening and intimidating action was thus "not protected by the First Amendment"); *United States v. Gilbert*, 813 F.2d 1523, 1529 (9th Cir. 1987) (holding that threats, which constitute conduct carried out through speech, are not protected by the First Amendment); *United States v. Hayward*, 6 F.3d 1241, 1249–52 (7th Cir. 1993) (holding that a cross burning is equivalent to fighting words, and therefore, prohibition is constitutional); *see also* *United States v. Magleby*, 420 F.3d 1136, 1138 (10th Cir. 2005)

opinion cited Title VII as an example of a constitutionally appropriate restriction on conduct that may have the permissible secondary effect of limiting expression.²⁹³ Eleven years later, in *Virginia v. Black*,²⁹⁴ the Court again found the particular statute at issue constitutionally suspect, but held that “a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate.”²⁹⁵

Thus, constitutional concerns do not prevent laws from banning cross burning done with “the intent to intimidate.” This would presumably also be true for other kinds of threatening speech designed to intimidate a targeted person or group.²⁹⁶ As a result, holding that § 3617 outlaws neighbor harassment that takes the form of expression designed to intimidate a minority homeowner or tenant would not violate the First Amendment.²⁹⁷

(rejecting habeas petition raising First Amendment challenge to § 3631 conviction for cross burning at interracial couple’s home).

²⁹³ Thus, according to *R.A.V.*:

[S]exually derogatory “fighting words,” among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

505 U.S. at 389–90 (citing 42 U.S.C. § 2000e-2 (1988); 29 C.F.R. § 1604.11 (1991)); *see also* *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (rejecting First Amendment challenge to Title VII’s prohibition of invidiously motivated employment discrimination).

²⁹⁴ 538 U.S. 343 (2003).

²⁹⁵ *Id.* at 347; *see also id.* at 363 (“A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R.A.V.* and is proscribable under the First Amendment.”).

Two of the defendants in *Black* had been convicted under a Virginia criminal statute of attempting to burn a cross on the yard of a black neighbor, *id.* at 351, and the Court, though finding reversible error in their convictions, held that they could be retried for this act under a narrowed interpretation of this statute that would avoid violating the First Amendment, *id.* at 367–68.

²⁹⁶ *See id.* at 362 (noting generally that “it would be constitutional to ban only a particular type of threat” and quoting *R.A.V.* to the effect that “threats of violence are outside the First Amendment” (quoting *R.A.V.*, 505 U.S. at 388)).

The text uses “presumably” only because the Court in *Black* was at pains to stress the particularly noxious history of cross burning in the United States as a “symbol of hate.” *See id.* at 353–57; *see also id.* at 389–91 (Thomas, J., dissenting in part) (recounting the history of cross burning and concluding that “[i]n our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence”).

²⁹⁷ This statement assumes that § 3617 is directed primarily at conduct and only secondarily affects speech, an assumption that is supported by its textual focus on acts that “coerce, intimidate, threaten, or interfere with” and by numerous decisions upholding the constitutionality of convictions under its companion provision, § 3631. *See, e.g., J.H.H.*, 22 F.3d at 824–28 (quoted *supra* note 292); *Hayward*, 6 F.3d at 1250 (holding that § 3631 “is aimed at curtailing wrongful conduct . . . [and] because [it] is content-neutral, it does not directly regulate speech”).

But what of less egregious remarks, such as “Go back where you belong”?²⁹⁸ At the very least, legitimate First Amendment concerns in this type of situation reinforce the notion that § 3617 claims should be subject to the Title VII standards adopted in *Burlington*, which means that a reasonable person in the plaintiff’s position would have to be materially affected by the defendant’s comments.²⁹⁹ As *Burlington* instructed, this would require an examination of the particular circumstances to determine whether such a person in this context would have the enjoyment of his or her home materially harmed.³⁰⁰ Assuming a positive answer—and therefore potential § 3617 liability—then the First Amendment would allow such liability, at least in those cases where the defendant’s comments were made with the intent of intimidating the plaintiff. The difficult case would be where a reasonable plaintiff felt materially harmed, but the defendant did not intend to intimidate.

This is certainly possible, as a recent sex harassment case illustrates. In *Quigley v. Winter*³⁰¹ the Eighth Circuit affirmed a landlord’s liability under the FHA for subjecting a female tenant to

Concluding that such a statute is aimed at conduct is crucial to its passing constitutional muster, as *R.A.V.* and its progeny make clear. See *supra* note 293 (quoting *R.A.V.*); *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (noting the importance of this distinction in upholding a state statute providing for enhanced sentences for crimes motivated by race or other prohibited factor by observing that “whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression . . . , the statute in this case is aimed at conduct unprotected by the First Amendment”).

²⁹⁸ See, e.g., *United States v. Collier*, No. 08-0686, 2010 WL 3881381, at *10–11 (W.D. La. Sept. 28, 2010) (holding that landlord violated § 3617 by, inter alia, repeatedly making statements that he would not allow “those kind of people” to live at his residential community, which statement the court found to reflect his intent “to prevent African Americans from buying property or living at” this community); cf. *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1935 (2008) (citing comments made to the plaintiff that she should “go back to where she belong[ed]” as one example of the harassment that justified her retaliation claim under the Age Discrimination in Employment Act (alteration in original) (internal quotation marks omitted)); *United States v. May*, 359 F.3d 683, 685 (4th Cir. 2004) (quoting defendant convicted for violating § 3631 who said that his burning of a cross near a black family’s home was to “let the nigger know he wasn’t welcomed [sic] here” (internal quotation marks omitted)); *United States v. McInnis*, 976 F.2d 1226, 1230 (9th Cir. 1992) (holding that under § 3631, the defendant’s sign stating “Niggers Get Out! Go Back To Your Slums” supported jury’s finding that the defendant “intended to interfere with [the neighboring black family’s] occupancy of their home” (citing *United States v. Skillman*, 922 F.2d 1370, 1374 (9th Cir. 1990)) (internal quotation marks omitted)); *Ky. Comm’n on Human Rights v. Foster*, No. 04-CI-03103, slip op. at 1 (Ky. Cir. Ct. Feb. 1, 2008) (holding that state’s equivalent of § 3631 was violated by, inter alia, the defendants’ “yelling racial epithets such as ‘f---- niggers’ and ‘get out of town’”).

²⁹⁹ See *supra* notes 227–29 and accompanying text (discussing *Burlington*).

³⁰⁰ See *supra* notes 229–30 and accompanying text (discussing *Burlington*).

³⁰¹ 598 F.3d 938 (8th Cir. 2010).

“unwanted interactions of a sexual nature” in her home,³⁰² noting that this was “a place where Quigley was entitled to feel safe and secure and need not flee, which makes Winter’s conduct even more egregious.”³⁰³ Obviously, the Eighth Circuit believed that the plaintiff felt materially harmed by the defendant’s conduct,³⁰⁴ but, significantly for our discussion here, it never described that conduct as being undertaken with an intent to intimidate.³⁰⁵

3. Speech Directed at People in Their Homes

In *Quigley*, the defendant’s offensive behavior included instances of purely verbal communication, but he raised no First Amendment defense.³⁰⁶ This seems appropriate, in light of the fact that only limited constitutional protection exists for speech that is directed at people in their homes. The Supreme Court has recognized that there is a “significant difference between state restrictions on a speaker’s right to address a willing audience and those that protect listeners from unwanted communication,”³⁰⁷ and the Court has applied this “unwilling audience” doctrine with particular diligence in cases involving communicative intrusions into a listener’s home.³⁰⁸ The

³⁰² *Id.* at 947.

³⁰³ *Id.* Elsewhere in *Quigley*, the Eighth Circuit commented that the defendant’s conduct was especially reprehensible because it “intruded upon Quigley’s sense of security in her own home.” *Id.* at 954.

³⁰⁴ As a result of the defendant’s unwelcome sexual advances, the plaintiff considered moving and felt “uncomfortable,” “scared,” and “worried about protecting her children and younger sister,” *id.* at 944, for which the jury awarded her \$13,685 in compensatory damages on her FHA claims, *id.* at 945. This award was not challenged on appeal, but the Eighth Circuit did reduce the jury’s punitive award of \$250,000 to \$54,750. *Id.* at 952–56.

³⁰⁵ See *id.* at 944–48. The Eighth Circuit described the defendant’s conduct as “reprehensible” and “unquestionably intentional and more than churlish,” *id.* at 954, but it never focused on or determined whether this conduct was intended to intimidate the plaintiff.

Similar holdings occur regularly in the employment context. See, e.g., *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 912 (7th Cir. 2010) (holding in a Title VII case “that a reasonable person would find [the defendant’s] work environment hostile or abusive” based in part on coworkers’ racial epithets directed at the black plaintiff, without considering whether these remarks were intended to intimidate her).

³⁰⁶ See *Quigley*, 598 F.3d at 944–48. The purely verbal examples of the defendant’s unwelcome interactions with the plaintiff included “sexually suggestive comments” and “several middle of the night phone calls to her home.” *Id.* at 947. There was also evidence of unwelcome physical interactions, e.g., “unwanted touching on two occasions.” *Id.*

³⁰⁷ *Hill v. Colorado*, 530 U.S. 703, 715–16 (2000).

³⁰⁸ See, e.g., *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995) (recognizing government’s overriding “interest in protecting the well-being, tranquility, and privacy of the home” and the home’s special role as a place to “avoid intrusions” and one “which the State may legislate to protect” (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980); *Frisby v. Schultz*, 487 U.S. 474, 484–85 (1988)) (internal quotation marks omitted)); *Cohen v. California*, 403 U.S. 15, 21–22 (1971) (“[T]his Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas

rationale is that, while people assume the risk of being confronted with unwanted speech when they venture out into the world, their home is the one place to which they are entitled to retreat to enjoy privacy, repose, and peace of mind;³⁰⁹ as a result, the government's interest in protecting people from unwelcome speech in their homes is "of the highest order."³¹⁰

A leading case involving this doctrine is *Frisby v. Schultz*,³¹¹ where the Court in 1988—the same year that the FHAA reenacted § 3617's substantive prohibitions³¹²—rejected a First Amendment challenge to an ordinance that banned picketing targeted at an individual residence.³¹³ Speaking for the Court in *Frisby*, Justice O'Connor wrote:

which cannot be totally banned from the public dialogue [In terms of one's] claim to a recognizable privacy interest . . . , surely there is nothing like the interest in being free from unwanted expression in the confines of one's own home."); *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 737 (1970) ("The ancient concept that a 'man's home is his castle' into which 'not even the king may enter' has lost none of it vitality, and none of the recognized exceptions includes any right to communicate offensively with another." (citing *Camara v. Mun. Court*, 387 U.S. 523 (1967))); *infra* notes 310 and 314 and accompanying texts (discussing *Frisby v. Schultz*, 487 U.S. 474 (1988), and *Carey v. Brown*, 447 U.S. 455 (1980)); *see also* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 165 (2002) (noting that "the protection of residents' privacy" is among the "important interests that the [government] may seek to safeguard through some form of regulation of solicitation activity"); *Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 542 & n.11 (1980) (recognizing "the special privacy interests that attach to persons who seek seclusion within their own homes" (citing *Rowan*, 397 U.S. at 737)); *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 209 (1975) ("[S]elective [speech] restrictions have been upheld only when the speaker intrudes on the privacy of the home" (citing *Rowan*, 397 U.S. 728)).

³⁰⁹ *See, e.g., Frisby*, 487 U.S. at 484–85; *supra* note 308; *infra* notes 310 and 314 and accompanying text (discussing *Frisby* and *Carey*).

³¹⁰ *Frisby*, 487 U.S. at 484 (quoting *Carey*, 447 U.S. at 471). According to the *Carey* opinion:

Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual "to be let alone" in the privacy of the home, "sometimes the last citadel of the tired, the weary, and the sick." The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.

447 U.S. at 471 (citations omitted) (quoting *Gregory v. City of Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring)).

³¹¹ 487 U.S. 474 (1988).

³¹² *See supra* notes 29–31 and accompanying text.

³¹³ The stated purpose of the ordinance in *Frisby* was "the protection and preservation of the home" through assurance "that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy." 487 U.S. at 477. The Supreme Court recently cited *Frisby* with approval as having "upheld a ban on such [targeted] picketing 'before or about' a particular residence, [*Frisby*], 487 U.S., at 477." *Snyder v. Phelps*, 131 S.Ct.

[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

. . . There simply is no right to force speech into the home of an unwilling listener.³¹⁴

Moreover, *Frisby* made clear that where the intruding speech is directed solely at an individual rather than to the general public, even “core” First Amendment speech like picketing is less worthy of protection, and the government’s ability to restrict it is correspondingly greater.³¹⁵

Frisby’s recognition that some types of hostile, targeted speech may be barred from intruding into the homes of unwilling listeners provides a strong basis for allowing § 3617 to ban housing harassment without fear of constitutional problems.³¹⁶ Housing harassment is particularly damaging precisely because it affects its targets’ sense of security in their home,³¹⁷ a place where, according to *Frisby*, people have a right to be protected from unwanted intrusions.³¹⁸ Surely, race-based and other invidiously motivated neighbor-on-neighbor harassment would be expected to have at least as dire consequences for its targets as those that moved the Court in *Frisby* to uphold governmental protection for the targets of residential picketing.³¹⁹ Furthermore, because *Frisby* and other “unwilling

1207, 1218 (2011).

³¹⁴ *Frisby*, 487 U.S. 484–85 (citations omitted). The Court commented on the nature of targeted residential picketing in *Frisby*. See *id.* at 486 (noting that this type of speech has a “devastating effect . . . on the quiet enjoyment of the home” “To those inside . . . the home becomes something less than a home when and while the picketing . . . continue[s]. . . . [The] tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility.” (alterations and third, fourth, and fifth omissions in original) (quoting *Carey v. Brown*, 447 U.S. 455, 478 (1980) (Rehnquist, J., dissenting)) (internal quotation marks omitted)).

³¹⁵ See *id.* at 479, 486 (noting that, while the antipicketing ordinance “operates at the core of the First Amendment,” the picketers whose speech was restricted “do not seek to disseminate a message to the general public, but to intrude upon the targeted resident . . . in an especially offensive way”).

³¹⁶ For a detailed description of how this “unwilling listener” doctrine applies to FHA cases involving sex-based harassing statements challenged under the FHA’s § 3604(c), see Schwemm & Oliveri, *supra* note 280, at 844–53.

³¹⁷ See *supra* notes 280–82 and accompanying text.

³¹⁸ See *supra* note 314 and accompanying text; see also *supra* note 310.

³¹⁹ See *supra* note 314.

listener” cases have upheld restrictions on even core First Amendment speech where the speaker “has legitimate and important [constitutional] concerns,”³²⁰ and have done so by concluding that the challenged law “reflects an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners,”³²¹ they would provide an even stronger basis for supporting § 3617’s ban of such low-value speech as housing-related harassing statements.³²²

F. Summary

The interpretive sources examined in Part III have established that the proper standard for neighbor harassment cases under § 3617 is different from the *Halprin-Bloch* requirement of a “pattern of harassment.”³²³ Indeed, single-incident behavior, as illustrated by the cross burnings in *Black* and *R.A.V.*, would often violate § 3617. Some of these single incidents, of course, are egregious enough to satisfy the first part of the “severe or pervasive” standard that governs harassment cases under § 3604(b) and Title VII.³²⁴ The problem with using this standard in neighbor harassment cases, however, is that it does not reflect the language of § 3617.

That language makes it unlawful to “interfere with” anyone “in the exercise or enjoyment of . . . any right granted or protected by” §§ 3603–3606.³²⁵ If the phrase “interferes with” is given its common meaning—as set forth in dictionaries at the time of § 3617’s enactment—then, as the Ninth Circuit held in *Walker*, this requires no more than the act of “meddling in or hampering” an FHA-protected right.³²⁶ And, according to HUD’s regulation interpreting § 3617, rights “granted or protected by” §§ 3603–3606 include the peaceful enjoyment of one’s home free from such invidiously motivated meddling.³²⁷

³²⁰ *Hill v. Colorado*, 530 U.S. 703, 714 (2000); see also *Frisby*, 487 U.S. at 479, 486 (described *supra* note 315).

³²¹ *Hill*, 530 U.S. at 714.

³²² To the extent that any First Amendment protection might exist for harassing speech otherwise outlawed by § 3617, the exact parameters of this protection should be left for the courts to develop over time based on the particular facts of individual situations and the doctrines discussed here. As *Frisby* noted after rejecting a facial challenge to the ordinance there based on the First Amendment, “the constitutionality of applying the ordinance to [specific] hypotheticals remains open to question.” 487 U.S. at 488.

³²³ See *supra* note 18 and accompanying text (quoting *Bloch*, which quotes *Halprin*).

³²⁴ See *supra* note 215 and accompanying text (citing cases).

³²⁵ 42 U.S.C. § 3617 (2006).

³²⁶ See *supra* note 203 and accompanying text (quoting *Walker*).

³²⁷ See *supra* text accompanying note 156 (quoting 24 C.F.R. § 100.400(c)(2) (2010)).

Assuming that *Burlington*'s Title VII standards are adopted in § 3617-based neighbor harassment cases, this would simply require that a reasonable person in the plaintiff's position be materially affected by the defendant's behavior.³²⁸ This standard might well include racist or other invidiously motivated abusive comments by a hostile neighbor, even if such comments did not involve a "pattern of harassment." Certainly, such an interpretation of § 3617 would be supported by that part of the 1968 FHA's legislative history showing Congress's desire that this law foster integrated living patterns, as well as by the 1988 FHAA's effort to provide more vigorous enforcement in response to Congress's perception that the original statute had failed to achieve its promise. Finally, the First Amendment would certainly permit § 3617 to be interpreted to prevent neighbor harassment undertaken with an intent to intimidate and, based on *Frisby* and similar home-protection decisions, even harassment that lacks this intent but is targeted at minority homeowners or tenants and simply reflects an intent to disrupt the peaceful enjoyment of their homes.³²⁹ Furthermore, such an improper intent may be gleaned from a § 3617 defendant's remarks without incurring any First Amendment problems.³³⁰

IV. CONCLUSION

More than four decades after enactment of the Fair Housing Act, thousands of minority families every year are still subjected to harassment motivated by race or other FHA-condemned factor. Apart from the devastating personal cost to the targets of such harassment, this phenomenon frustrates the FHA's basic goal of breaking down residential segregation and encouraging integrated living patterns in the United States. Passage of the Fair Housing Amendments Act of 1988, which reenacted the FHA's key antiharassment provision

³²⁸ See *supra* notes 226–30 and accompanying text (discussing *Burlington*).

³²⁹ See *supra* Part III.E.3 (discussing First Amendment implications of speech directed at people in their homes).

³³⁰ See, e.g., *Hill v. Colorado*, 530 U.S. 703, 721 (2000). The *Hill* Court noted:

It is common in the law to examine the content of a communication to determine the speaker's purpose. Whether a particular statement constitutes a threat, blackmail, an agreement to fix prices, a copyright violation, a public offering of securities, or an offer to sell goods often depends on the precise content of the statement. We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct.

Id.

(§ 3617) and beefed up the FHA's enforcement procedures, has yet to turn this situation around.

One problem is that the courts have never been clear about the basic thrust of § 3617 or its relationship to the FHA's other substantive provisions in §§ 3603–3606, to which § 3617 refers. This problem was greatly exacerbated by Judge Posner's 2004 opinion in the *Halprin* case, which suggested that neither § 3617 nor any other FHA provision should be interpreted to outlaw discrimination directed at current residents. Before the Seventh Circuit corrected this mistake in its 2009 en banc decision in *Bloch*, the Fifth Circuit and a number of district courts around the country decided to follow *Halprin*, leaving the law relating to § 3617's coverage of neighbor harassment badly confused.

Whether the courts that followed *Halprin* will now abandon that position in favor of *Bloch*'s new approach remains to be seen. But even if they do, one of *Bloch*'s key directives about neighbor-on-neighbor harassment cases is troubling, because it chose to adopt *Halprin*'s view that only a “pattern of harassment” could violate § 3617. This view is not supported by § 3617's text, purpose, or legislative history, but it may resonate with those courts that fear a broader interpretation of § 3617 would turn the FHA into a “civility code” by providing a federal forum for simple “quarrels among neighbors.”

This Article is designed to counteract that fear and to provide a solid basis for correctly interpreting § 3617 in neighbor harassment cases. By its terms, § 3617 makes it unlawful to “interfere with” anyone “in the exercise or enjoyment of . . . any right granted or protected by” §§ 3603–3606.³³¹ A proper interpretation of the quoted phrases—based on their words' common meanings as set forth in popular dictionaries from the time of the FHA's enactment and on HUD's current authoritative regulation—would mean that a § 3617 violation requires no more than that a neighbor's invidiously motivated harassment hamper the target family's peaceful enjoyment of their home.³³² The Supreme Court's interpretation of Title VII's analogous provision suggests that neighbor harassment cases under § 3617 should also require that a reasonable person in the plaintiff's position be materially affected by the defendant's behavior.³³³

³³¹ 42 U.S.C. § 3617 (2006).

³³² See *supra* text accompanying notes 326–27.

³³³ See *supra* notes 228–30 and accompanying text (discussing *Burlington*).

This standard should govern § 3617 cases, which means that it could well be violated by a single incident, as well as a pattern of harassment. Such an interpretation is also supported by the FHA's purpose and legislative history and would not run afoul of First Amendment protection for the defendant-neighbor's speech.

A few courts have adopted this view of § 3617 in neighbor-on-neighbor harassment cases. This Article is intended to provide courts in future cases with the resources to accept this position and resist the unduly narrow perception of § 3617 suggested by *Halprin*, *Bloch*, and their progeny. Without a proper judicial understanding of § 3617's role in neighbor harassment cases, the problems posed by such cases will not be solved and the FHA's ultimate goal of replacing race-based residential enclaves with truly integrated living patterns cannot be achieved.