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

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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 claims continue to account for a significant portion of all FHA

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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.


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).


⁶ See, e.g., Jeannine Bell, Restraining the Heartless: Racist Speech and Minority Rights, 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.").
claims. According to the U.S. Department of Housing and Urban Development ("HUD"), the agency primarily responsible for administering the FHA, well over a thousand § 3617 complaints were filed with HUD and state and local fair housing agencies in each of the past four years. A similar number of harassment claims are made each year to private fair housing groups. 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 its white neighbors, although the legal basis for this case was state law, not the FHA.

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.


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.

See NAT’L FAIR HOU. ALLIANCE, A STEP IN THE RIGHT DIRECTION: 2010 FAIR HOUSING TRENDS REPORT 24 (2010), available at http://www.nationalfairhousing.org/LinkClick.aspx?fileticket=APlout1nxwp%3d&tvid=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=dsT4nlHhkbQ%3d&tvid=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 DEAR M DENIED: FORTY YEARS OF FAILED FEDERAL ENFORCEMENT: 2008 FAIR HOUSING TRENDS REPORT 50 (2008), available at http://www.nationalfairhousing.org/LinkClick.aspx?fileticket=qPhxjtvGA%3d&tvid=3917&mid=5321 (reporting that 1,246 harassment complaints were made to private groups in 2007).

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 harassment, invidiously motivated.’”18 Courts throughout the country have expressed similar misgivings about applying the FHA to

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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*).
18 587 F.3d at 783 (quoting *Halprin*, 388 F.3d at 330).
neighbor harassment unless it involves systematic or highly abusive behavior.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 minimus defense on § 3617 cases, because they believe the FHA was not intended to impose a “civility code” on neighbors.\textsuperscript{22} But the text of § 3617—surely the best indicator of congressional intent—contains no such defense.\textsuperscript{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.\textsuperscript{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.\textsuperscript{25} Furthermore, there are good reasons to suppose that congressional concerns underlying the FHA might well be advanced by broadly interpreting § 3617 to outlaw all forms of invidious harassment among neighbors.\textsuperscript{26}

\textsuperscript{19} See cases cited infra notes 69, 102, 109, 210 and accompanying text.
\textsuperscript{20} 42 U.S.C. § 3617 (2006). For the full text of this provision, see infra text accompanying note 29.
\textsuperscript{21} 24 C.F.R. § 100.400(c)(2) (2010). For the full text of this regulation, see infra text accompanying note 156.
\textsuperscript{22} See, e.g., infra note 99 (discussing one district court’s reluctance to interpret § 3617 as imposing a code of civility on neighbors).
\textsuperscript{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”).
\textsuperscript{24} See infra note 215 (citing cases applying the “severe or pervasive” standard in Title VII cases).
\textsuperscript{25} See infra Part III.E (discussing First Amendment considerations).
\textsuperscript{26} For the relevant legislative history of § 3617, see infra Part III.B.
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 1968 and the Fair Housing Amendments Act of 1988 (“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 exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.\(^{29}\)


\(^{28}\) 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.

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, 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

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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.
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” 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.”

The rest of §§ 3603–3606 outlaws various other specified discriminatory housing practices.

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.” 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.

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 Bloch cases mentioned in the Introduction; the second deals with pre-Halprin cases, which are presented roughly in chronological order. The general conclusion of this Section is that § 3617’s

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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).

38 See supra notes 12–18 and accompanying text.
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 challenged the validity of this regulation.44 Still, the Halprin opinion

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 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.
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." 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."

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. Some courts went along, notably the Fifth Circuit, but many did not. HUD and the Justice Department continued to support § 3604 claims brought by current residents and

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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").


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.

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
to defend HUD’s regulation providing for § 3617’s application to postacquisition situations.\textsuperscript{51}

Eventually, as noted above, the en banc Seventh Circuit rejected the \textit{Halprin} theory in the \textit{Bloch} case.\textsuperscript{52} \textit{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.\textsuperscript{53} The Blochs also sued under the Civil Rights Act of 1866 and various state law theories.\textsuperscript{54} The district court, relying on \textit{Halprin}, granted summary judgment for the defendants, and a divided panel of the


\textsuperscript{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); \textit{Koch}, 352 F. Supp. 2d at 978–79 (rejecting \textit{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”).

\textsuperscript{52} \textit{Bloch} v. Frischholz, 587 F.3d 771 (7th Cir. 2009) (en banc).

\textsuperscript{53} \textit{Id}. at 772–75.

\textsuperscript{54} \textit{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. \textit{Id}. at 787.

Section 1982 has provided an independent basis for housing-discrimination claims ever since the Supreme Court’s decision in \textit{Jones} v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Sometimes § 1982 and the FHA overlap, as in \textit{Bloch}, and sometimes § 1982 alone provides coverage when gaps in the FHA preclude it from applying. See \textit{Schwemm}, supra note 28, § 27:2 (discussing the independence of § 1982 and the FHA); \textit{see also} \textit{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 \textit{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. \textit{See} \textit{CBOCS W.}, 128 S. Ct. at 1955 (describing \textit{Sullivan}’s holding); \textit{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. \textit{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 interpreted not to apply in such a case, a plaintiff might still be able to prevail under § 1982.
Seventh Circuit affirmed, but the en banc court took a decidedly different approach in a unanimous opinion. It held that some postacquisition situations are indeed covered by § 3604(a) and (b). The en banc decision also upheld the plaintiffs' § 3617 claim, 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. This part of the Bloch opinion began by noting that a § 3617 violation could occur even without a violation of § 3604. Thus:

...
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 Bloch opinion recognized that "this interpretation effectively

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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.

overrules Halprin as far as § 3617 is concerned. 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. The Bloch opinion endorsed this view and thus concluded that only a "pattern of harassment" could violate § 3617.

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 cases—albeit generally in dicta, as in Halprin and Bloch—and no case took the contrary position in the five years between Halprin and the en banc decision in Bloch.

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, in which a new black resident of a white Chicago suburb alleged that a neighbor firebombed his car to intimidate the plaintiff and his family and drive them out of the area. The defendant was convicted of arson in a separate state court.

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, 338 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.
73 Stackhouse, 620 F. Supp. at 209, 211.
proceeding.\textsuperscript{74} With respect to the plaintiff's civil action, Judge Aspen initially questioned \$ 3617's applicability,\textsuperscript{75} but then held two years later that the defendant's behavior was "squarely within the range of actions prohibited by \$ 3617."\textsuperscript{76}

Claims like the one in \textit{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.\textsuperscript{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,\textsuperscript{78} which was passed in 1968 as a companion title to the FHA.\textsuperscript{79} Victims of such behavior are presumably entitled to bring civil claims under \$ 3617,\textsuperscript{80} but only a handful actually did so in the first two decades of the FHA.\textsuperscript{81}

\begin{itemize}
\item \textsuperscript{74} Id. at 211.
\item \textsuperscript{75} \textit{Stackhouse}, 566 F. Supp. at 859.
\item \textsuperscript{76} \textit{Stackhouse}, 620 F. Supp. at 211.
\item \textsuperscript{77} 42 U.S.C. \$ 3617 (2006). For the full text of this section, see supra text accompanying note 29.
\item \textsuperscript{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).
\item \textsuperscript{79} See supra note 36 and accompanying text.
\item \textsuperscript{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").
\item \textsuperscript{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 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, 1998 WL 9092, at *4 (N.D. Ill. Feb. 2, 1998) (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 \textit{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").
\end{itemize}
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.\(^{84}\)

In the 1990s and early 2000s before Halprin, many more cases involving § 3617 claims of race- or sex-based harassment were

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\(^{82}\) 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.

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.\(^5\) 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.\(^6\) 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,\(^7\) the FHAA strengthened both the private and governmental enforcement mechanisms of the FHA.\(^8\) 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.\(^9\) Finally, the FHAA directed HUD to promptly issue rules interpreting the new FHA.\(^9\) HUD complied in early 1989, and the resulting regulations included one on the meaning of § 3617.\(^9\) As noted above, HUD’s

\(^5\) See supra notes 29–31 and accompanying text.

\(^6\) 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.

\(^7\) 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.

\(^8\) 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 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).

\(^9\) 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).

\(^9\) 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.

\(^9\) 24 C.F.R. § 100.400 (2010). For the text of this regulation, see infra note 156 and accompanying text.
§ 3617 regulation played a key role in both *Halprin* and *Bloch,* and it was also available for guidance—indeed, was required to be given *Chevron* deference—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. The behavior in three of these cases involved only verbal attacks on the complainants; two of the three involved a series of such attacks, but in the third, liability was based only on a single conversation.

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 rulings. The allegations in virtually all of these cases set forth a series of verbal and sometimes even physical attacks by the

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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.


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.
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 2000 case that dismissed a § 3617 claim by a California minority

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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 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 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).
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. 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." Instead, the court held that only those acts that are "designed to drive the victim out of his or her home" should be actionable.

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. 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." 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. The court conceded that some of the alleged incidents "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." As a result, Weisz held that the conduct alleged "does not fall within § 3617," opining that a § 3617 complaint

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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.
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.
107 Id. at 1054–55.
108 Id. at 1055.
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.  

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, which involved a white homeowner who allegedly was harassed by the defendant-neighbors because they feared he would rent to blacks. 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. 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 plaintiffs’ § 3617 claims separate from their § 3604 claims—both of which were thought to be governed by a “severe or pervasive” standard.

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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.
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
NEIGHBOR-ON-NEIGHBOR HARASSMENT

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. Furthermore, imposing a "severe or pervasive" standard on § 3617 ignores a key goal of the FHA: to encourage integration and therefore presumably to protect minority families who make integrative moves.

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. These are the three

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.

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.
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.\footnote{See supra note 65 (quoting the test from *Bloch*).} 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.\footnote{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 FHA's substantive provisions evolved, see *id.* at 200–06.} The FHA's legislative process began in 1966 when President Johnson proposed a fair housing bill,\footnote{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).} which included a provision almost identical to § 3617.\footnote{The bill's version of § 3617 provided:} Later in 1966, the House passed an amended
version of the Johnson bill with no changes to this provision, but that bill failed in the Senate.

In 1967, Senator Mondale introduced a new fair housing bill that included some slight changes to § 3617's predecessor. 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. In early 1968, the Mondale bill was proposed as an amendment to another civil rights bill then pending on the Senate floor. This amendment was later withdrawn in favor of a substitute fair housing proposal offered by Senator Dirksen, which, with minor amendments not relevant here, was eventually enacted.

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.*


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.
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 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

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118 Conferences 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.

proceeding under this title" and that "Congress on other occasions has expressly provided [such] a safeguard."

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." 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. Under well-established principles of statutory construction, Congress's decision to make these additions, once enacted, must be seen an intentional effort to add substantive coverage to the FHA's provision.

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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.

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

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


134 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 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.

135 42 U.S.C. § 1973(b); see also id. § 1973(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 § 1973(b)).

be considered important additions to a proper interpretation of § 3617.\textsuperscript{139} As we have seen, § 3617's addition of "interfere with" is particularly crucial to resolving the issue at the heart of this Article.\textsuperscript{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,\textsuperscript{141} and indeed it does protect those who are later discriminated against for asserting their FHA rights.\textsuperscript{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.\textsuperscript{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."\textsuperscript{144} The Bloch court here was quoting the Supreme Court's first FHA decision, Trafficante\textsuperscript{v. Metropolitan Life Insurance Co.},\textsuperscript{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."\textsuperscript{146} Clearly,
the goal of racial integration was important to the Congress that passed the 1968 FHA. 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. This lesson will be further explored later.

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. Each of the FHA's substantive provisions, including § 3617, was the subject of one or more of these regulations. Pursuant to the Supreme Court's directive in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., these regulations must be given substantial deference in interpreting the

stating that the FHA reflects Congress's commitment "to the principle of living together" and to promoting integrated neighborhoods where residents of different races would live together in "harmony").

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," 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.


See infra notes 275-81 and accompanying text.


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.

FHA—i.e., courts must follow these regulations so long as they are a “permissible” or “reasonable” construction of the FHA.

The regulation interpreting § 3617 first tracks the statutory language of this provision and then identifies five types of conduct outlawed by § 3617. 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.”

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.

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”).

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).

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.
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],”\textsuperscript{157} and that the regulation’s illustrations of prohibited conduct “indicate that a broad range of activities can constitute a discriminatory housing practice.”\textsuperscript{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.”\textsuperscript{159}

This last comment reflects § 3617’s legislative history and confirms prior case law holding that neighbors’ conduct may be subject to § 3617.\textsuperscript{160} Also, in outlawing invidiously motivated interference with “persons in their enjoyment of a dwelling,”\textsuperscript{161} HUD’s regulation provided important support for the proposition that current residents may invoke § 3617’s protections. Again, this proposition simply reflected § 3617’s prior case law and general legislative history,\textsuperscript{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


\textsuperscript{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.”

\textsuperscript{159} Id.

\textsuperscript{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).

\textsuperscript{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”).

\textsuperscript{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).
neighbor-on-neighbor or any other form of postacquisition harassment.\footnote{163 See supra notes 44–45, 48 and accompanying text (discussing case law that interprets § 3617 as not extending to postacquisition disputes).}

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.\footnote{164 24 C.F.R. § 100.400(c)(2).} 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.\footnote{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).} 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.\footnote{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).} 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 of persons who have “aided or encouraged” others in the exercise or enjoyment of their FHA rights.\footnote{167 For more on this type of § 3617 claim, see infra notes 177, 183–86 and accompanying text.} Another type of § 3617 claim is analogous to retaliation claims under Title VII,\footnote{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.} 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 with” the developer and its prospective tenants in violation of § 3617.176 In such cases where the plaintiffs prevailed, courts

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


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 Alhambra, 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 Cnty. 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).

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.”).
provisions. The most important of these was the Ninth Circuit’s 1975 decision in *Smith v. Stechel*, 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.

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,” and thus the plaintiffs come within that part of § 3617 that protects persons who are harmed “on account of . . . having aided or encouraged” others in exercising their FHA rights. 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. These holdings were confirmed 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. These holdings were confirmed.

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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, financer 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 Id. at 1164.


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.
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). In the most violent types of neighbor abuse, as illustrated by Judge Posner’s arson hypothetical in *Halprin*, 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. Short of such an extreme 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.

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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., when the adverse employment action is only threatened, but not actually carried out).
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 person’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. 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, 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. 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. 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. The rationale for this conclusion included three points: (1) that the Supreme Court has directed that the FHA’s language should be broadly construed; (2) that the language used in § 3617, in contrast to the related criminal provision in § 3631, does

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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.
not require "a showing of force or violence for coercion, interference, intimidation, or threats to give rise to liability;" 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. 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."

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


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. 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.
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

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. (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 Bachelder 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 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 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.
In contrast to Walker, a district court provided a narrow interpretation of “interferes with” in Sporn v. Ocean Colony Condominium Ass’n. 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. According to the court, such behavior was simply not egregious enough to come within the concept of interference under § 3617. 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) and on its own view that such serious behavior was the only legitimate concern of § 3617.

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

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).

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).

other district courts to ascribe a narrow meaning to § 3617's "interferes with." Other district courts have agreed that § 3617 should be limited to severe behavior, with some concluding that the


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 Gourlay, 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 Gourlay 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, Gourlay'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 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)).
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. White216 that that statute's antiretaliation provision should be interpreted differently from its key substantive provision.217 The Burlington Court noted:

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. ofDirs., 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., Gourley, 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) (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); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (applying the "severe or pervasive" standard to Title VII claim); EEOC v. Summerlin, 525 F. Supp. 1050, 1058 (D. Minn. 1981) (holding that party must show severe or pervasive harassment). The "severe or pervasive" standard applies in race-based hostile-environment claims; 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).


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

. . . The 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.

. . . Differences in the purpose of the two provisions . . . justify this difference in interpretation.\footnote{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 does),\footnote{220} and § 3617's purposes go well beyond merely outlawing retaliation for participating in FHA proceedings.\footnote{221} Furthermore, the

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

\footnote{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)).

\footnote{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)).

\footnote{221} See, e.g., cases cited supra notes 176, 182–85 and accompanying text.
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, a much broader concept than HUD’s interpretation of harassing behavior that runs afoul of § 3604(b).

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) 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.” 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.” Thus, according to the Burlington opinion, this provision in Title VII “protects an individual not from all retaliation, but from retaliation that produces an injury or harm.” 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

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)).
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 "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

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 I 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 quotations 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.

232 See supra text accompanying notes 219, 228 (quoting Burlington).
interpreting the latter in avoiding turning the statute into “a general civility code.” 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.

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

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. The Frazier opinion began its § 3617 analysis by noting that this provision “prohibits the interference with the exercise of Fair

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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(c), a challenged statement must, “under the circumstances, . . . convey to a reasonable person” the illegal message).

235 See supra Part III.D.1.

236 27 F.3d 828 (2d Cir. 1994).
Housing rights only as enumerated in these referenced sections." 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." 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." The jury apparently believed this testimony and ruled against the plaintiffs on their refusal-to-rent claim under § 3604(a), a ruling that was upheld on appeal.

The Second Circuit also rejected the plaintiffs' § 3617 claim. It held they could not "claim that Mr. Frazier's questioning of Mr. Rominger's potential bias constituted the 'exercise or enjoyment of' one of his rights under the Fair Housing Act." 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

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 the 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.
243 Id. at 833.
housing transactions.” However, “[n]owhere in these sections... can be found a right to question the potential racial motivations of landlords.” Thus, Frazier concluded, the plaintiffs’ § 3617 claim failed because it was “without a predicate.”

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). 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.” Based on this analysis, Frazier held that

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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 Kueger v. Cuono, 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 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.
"the plaintiffs did not state a cause of action under § 3617 separate and distinct from their cause of action under § 3604(a)."

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), the reverse corollary is that § 3617 may apply in situations where the complained of conduct does not violate §§ 3603–3606.

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. Indeed, as we have seen, in most cases involving neighbor harassment, the plaintiff would not have a claim under §§ 3603–3606 to begin with.

But the question remains what § 3617 means when it refers to exercising or enjoying "any right granted or protected by" §§ 3603–3606; 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).

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.

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
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 origin.”261 In addition, a number of sex harassment cases have upheld 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.
258 See supra notes 120, 123 (summarizing the substantive changes made to § 3617).
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
§ 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—HUD’s § 3617 regulation,263 which outlaws “interfering with persons

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 their 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:

[If 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.

263 E.g., Koch, 352 F. Supp. 2d at 978–80; 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,
in their enjoyment of a dwelling” because of such persons’ race or other factor prohibited by the FHA. 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.” 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 end . . . .

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. This would 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

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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.
position would consider the behavior to have a materially adverse effect on the enjoyment of one’s home. 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). And it is a significantly different standard than Bloch’s “pattern of harassment” requirement. 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.”

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,” even though this element is not required in certain other types of § 3617 claims. 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 behavior solely to hostility to her neighbors that was not based on their religion.

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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 Simoes v. Wintemere 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).

274 See supra notes 104–09 and accompanying text (summarizing the Weisz holding and rationale).
Given the FHA’s goal of fostering integration, it seems obvious that § 3617 should cover invidiously motivated harassment that discourages minorities from moving into white areas or, once there, makes them feel so unwelcome that they decide to move away. But § 3617 goes beyond those situations where a change of residence occurs. 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.

While predicting how a reasonable person would react to a particular incident or type of housing harassment may be difficult,

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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))).
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, 243 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).
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
it seems likely that most Americans would find a challenge to their right to live in their chosen home an extremely stressful situation.\textsuperscript{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.\textsuperscript{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,\textsuperscript{282} and it is a conclusion that seems justified by the statute’s text, purpose, and legislative history. The next Section examines whether this interpretation is foreclosed by First Amendment considerations.

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”).


\textsuperscript{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), \textit{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).

\textsuperscript{282}See supra note 96 and accompanying text.
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. 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. 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.

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

¶ 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).


See, e.g., Hous. Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 943 F.2d 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. Burton, 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
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.” 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, a 1992 case, the Court struck down a city ordinance banning certain hate-inspired symbols because it too broadly restricted freedom of speech, 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. Indeed, the R.A.V. opinion cited Title VII as an example of a constitutionally appropriate restriction on conduct that may have the permissible secondary effect

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).

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) (rejecting habeas petition raising First Amendment challenge to § 3631 conviction for cross burning at interracial couple’s home).
of limiting expression.\textsuperscript{293} Eleven years later, in \textit{Virginia v. Black},\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{297}

\textsuperscript{293} Thus, according to \textit{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.


\textsuperscript{295} 538 U.S. 343 (2003).

\textsuperscript{296} 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 \textit{R.A. V.} and is proscribable under the First Amendment.").

Two of the defendants in \textit{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.

\textsuperscript{297} See id. at 362 (noting generally that "it would be constitutional to ban only a particular type of threat" and quoting \textit{R.A. V.} to the effect that "threats of violence are outside the First Amendment" (quoting \textit{R.A. V.}, 505 U.S. at 388)).

The text uses "presumably" only because the Court in \textit{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").

\textsuperscript{298} 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., \textit{J.H.H}, 22 F.3d at 824-28 (quoted \textit{supra} note 292); \textit{Hayward}, 6 F.3d at 1250 (holding that § 3631 "is aimed at curtail[ing] wrongful conduct . . . . [a]nd because [it] is content-neutral, it does not directly regulate speech").

Concluding that such a statute is aimed at conduct is crucial to its passing constitutional muster, as \textit{R.A. V.} and its progeny make clear. See \textit{supra} note 293 (quoting \textit{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 \textit{R.A. V.} was explicitly directed at expression . . . ., the statute in this case is aimed at conduct unprotected by the First
But what of less egregious remarks, such as "Go back where you belong"?\textsuperscript{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 \textit{Burlington}, which means that a reasonable person in the plaintiff's position would have to be materially affected by the defendant's comments.\textsuperscript{299} As \textit{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.\textsuperscript{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 \textit{Quigley v. Winter}\textsuperscript{301} the Eighth Circuit affirmed a landlord's liability under the FHA for subjecting a female tenant to "unwanted interactions of a sexual nature" in her home,\textsuperscript{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."\textsuperscript{303} Obviously, the Eighth Circuit believed that the plaintiff

\textsuperscript{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); \textit{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'").

\textsuperscript{299} See supra notes 227–29 and accompanying text (discussing \textit{Burlington}).

\textsuperscript{300} See supra notes 229–30 and accompanying text (discussing \textit{Burlington}).

\textsuperscript{301} 598 F.3d 938 (8th Cir. 2010).

\textsuperscript{302} Id. at 947.

\textsuperscript{303} Id. Elsewhere in \textit{Quigley}, the Eighth Circuit commented that the defendant's conduct
felt materially harmed by the defendant's conduct, but, significantly for our discussion here, it never described that conduct as being undertaken with an intent to intimidate.

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. 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," and the Court has applied this "unwilling audience" doctrine with particular diligence in cases involving communicative intrusions into a listener's home. The

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 Heathcare 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 the plaintiff).

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.


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 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
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; as a result, the government’s interest in protecting people from unwelcome speech in their homes is “of the highest order.”

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

[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


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).

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.


See supra notes 29–31 and accompanying text.

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. 1207, 1218 (2011).
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{316} Housing harassment is particularly damaging precisely because it affects its targets' sense of security in their home,\textsuperscript{317} a place where, according to Frisby, people have a right to be protected from unwanted intrusions.\textsuperscript{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.\textsuperscript{319} Furthermore, because Frisby and other "unwilling listener" cases have upheld restrictions on even core First Amendment speech where the speaker "has legitimate and important [constitutional] concerns,"\textsuperscript{320} and have done so by concluding that the

\textsuperscript{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)).

\textsuperscript{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").

\textsuperscript{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.

\textsuperscript{317} See supra notes 280–82 and accompanying text.

\textsuperscript{318} See supra note 314 and accompanying text; see also supra note 310.

\textsuperscript{319} See supra note 314.

\textsuperscript{320} Hill v. Colorado, 530 U.S. 703, 714 (2000); see also Frisby, 487 U.S. at 479, 486 (described supra note 315).
challenged law "reflects an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners," they would provide an even stronger basis for supporting § 3617's ban of such low-value speech as housing-related harassing statements.

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." 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. 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. 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. 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.

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. This standard might well

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

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.
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

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.

332 See supra text accompanying notes 326–27.
333 See supra notes 228–30 and accompanying text (discussing Burlington).
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.