

SUPREME COURT OF NORTH CAROLINA

WINSTON AFFORDABLE)	
HOUSING, LLC, d/b/a/)	
WINSTON SUMMIT)	
APARTMENTS,)	
Plaintiff,)	<u>From Forsyth County</u>
)	
v.)	
)	
DEBORAH ROBERTS,)	
Defendant.)	

AMICI CURIAE BRIEF

(NORTH CAROLINA JUSTICE CENTER, YALE LAW SCHOOL HOUSING CLINIC, DISABILITY RIGHTS NORTH CAROLINA)

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No. 267P19

TWENTY-FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

WINSTON AFFORDABLE)	
HOUSING, LLC, d/b/a/)	
WINSTON SUMMIT)	
APARTMENTS,)	
Plaintiff,)	<u>From Forsyth County</u>
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AMICI CURIAE BRIEF

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Pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, the North Carolina Justice Center, Disability Rights North Carolina, and the Yale Law School Housing Clinic submit this brief as *amici curiae* in support of Petitioner.¹ The decision of the Court of Appeals—that landlords may evict tenants for non-payment after illegally removing their housing subsidies—contravenes federal regulation and denies tenants their constitutional right to due process of law. It will do untold harm to the thousands of low-income families in North Carolina who rely on federal housing assistance and who, after this decision, are vulnerable to eviction on mere pretext. To preserve those tenants’ constitutional

¹ No one other than the amici and their members either directly or indirectly wrote this brief or contributed money to its preparation.

rights, and to align North Carolina with every other state that has addressed whether landlords may evict tenants for non-payment after wrongfully terminating their rental subsidies, this Court should reverse the decision below.

STATEMENT OF THE CASE

Ms. Roberts rents a subsidized apartment from Plaintiff and has done so for 20 years. (R pp 5, 17). On October 3, 2016, Plaintiff sent Ms. Roberts a Notice of Lease Termination [App. 24], alleging that she had violated her lease and informing her that the lease would be terminated on December 31, 2016. On January 4, 2017, Ms. Roberts was forced with no prior notice to sign a “lease amendment” which purported to modify her earlier lease and to terminate her federal housing subsidy, thus raising her share of the rent from \$139 per month to the market rate of \$532 per month. [App. 27]. On January 5, 2017, Plaintiff filed a summary ejectment complaint, alleging that Ms. Roberts had held over after her lease had ended. (R p 4). After a magistrate ruling in favor of Plaintiff on February 7, 2017, Plaintiff amended its complaint on April 6, 2017, to include allegations that Ms. Roberts did not pay \$665 in rent for January and part of February. (R pp 31-2). The District Court found that Plaintiff had waived its claims for breach of lease because it had accepted November and December rent, but found in favor of Plaintiff on the basis of the later non-payment claims. (R pp 69-70). The court rejected the claim that Ms. Roberts’s subsidy had been improperly terminated.

ARGUMENT

I. PLAINTIFF'S TERMINATION OF MS. ROBERTS'S SUBSIDY VIOLATED FEDERAL DUE PROCESS PROTECTIONS, WHICH STATE COURTS HAVE A DUTY TO UPHOLD.

Federal courts have long held that federal housing subsidies and the tenancies they permit are property interests under *Goldberg v. Kelly*, 397 U.S. 254 (1970), bearing a clear and specific set of protections. *See Caulder v. Durham Hous. Auth.*, 433 F.2d 998, 1003 (4th Cir. 1970), *cert. denied* 401 U.S. 1003 (1971) (“The ‘privilege’ or the ‘right’ to occupy publicly subsidized low-rent housing seems to us to be no less entitled to due process protection than entitlement to welfare benefits which were the subject of decision in *Goldberg* or the other rights and privileges referred to in *Goldberg*”); *Joy v. Daniels*, 479 F.2d 1236, 1242 (4th Cir. 1973) (“the entitlement of plaintiff to continue occupancy of public housing ... is, we think, of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause”) (internal quotations omitted). These protections are critical because a housing subsidy is among the most valuable assets a tenant possesses, and a tenant who loses her subsidy and cannot afford acceptable housing is “condemned to suffer grievous loss.” *Caulder*, 433 F.2d at 1003.

These protections extend to cover the activity of private parties when, as here, the state authorizes those parties to receive federal subsidies—and especially when those parties attempt to use state eviction procedures. *Id.* North Carolina’s courts have recognized and robustly enforced tenants’ due process protections. *See, e.g., Goler Metropolitan Apartments, Inc. v. Williams*, 43 N.C.App. 648, 260 S.E.2d 146

(1979); *Lincoln Terrace Assocs., Ltd. v. Kelly*, 179 N.C.App. 621, 635 S.E.2d 434 (2006); *Timber Ridge v. Caldwell*, 195 N.C.App. 452, 672 S.E.2d 735 (2009). *See also E. Carolina Reg'l Hous. Auth. v. Lofton*, 369 N.C. 8, 12, 789 S.E.2d 449, 452 (2016) (“In its role as the final forum for review of government housing decisions, the Court is not to second-guess or replace plaintiff’s discretionary decisions but to ensure procedural and substantive compliance with the federal statutory framework”). This Court, in which Respondent seeks to sustain its termination of Ms. Roberts’s federal housing subsidy, and to end her occupancy of an apartment in a subsidized complex, must determine whether Ms. Roberts’s due process rights were infringed.

Beyond having their own legal force, federal housing statutes and regulations demarcate the constitutional due process guarantee in housing matters. *Clark v. Alexander*, 85 F.3d 146, 150 (4th Cir. 1996) (noting that “[f]ederal regulations set out the basic procedural requirements of informal hearings in almost literal compliance with *Goldberg*”). Federal courts have held that violations of federal regulations create due process claims where those regulations arise out of portions of statute designed to safeguard due process rights. *See, e.g., Baldwin v. Hous. Auth. of City of Camden, NJ*, 278 F. Supp. 2d 365 (D.N.J. 2003). For this reason, federal courts have found due process violations where a landlord violates regulations that extend *Goldberg* requirements to federal housing subsidies. *See, e.g., McCall v. Montgomery Hous. Auth.*, 809 F. Supp. 2d 1314, 1325 (M.D. Ala. 2011); *see also Clark v. Alexander*, 85 F.3d at 153, *Holly v. Housing Auth. of New Orleans*, 684 F. Supp. 1363, 1366 (E.D.La.1988). Indeed, a tenant’s reliance on

federal regulation in interactions with her landlord reinforces her due process interest. *Joy*, 479 F.2d at 1240, *citing Perry v. Sinderman*, 408 U.S. 593, 601 (1972).

A variety of HUD lease provisions and federal regulations—several here at issue—protect core components of *Goldberg* due process and guarantee freedom from invidious treatment. In particular, several provisions of the HUD Handbook, replicated in this lease, protect tenants’ due process right to notice prior to adverse action. *Caulder*, 433 F.2d at 1004 (noting that *Goldberg* requires “timely and adequate notice detailing the reasons for a proposed termination”). Under the lease governing this tenancy, if the Plaintiff landlord seeks to change the terms of the lease, it must give 30 days’ notice; to change the rent, 60 days’ notice; to remove a subsidy, at least 10 days’ notice. Lease ¶¶ 3, 22, 17 (R pp. 45, 49-50). These provisions echo requirements outlined in the HUD handbook. *See* HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs, REV-1, CHG 4 (Nov. 2013) (“HUD Handbook”) ¶8-6. And they are precisely the sort of requirements which courts have held to mark the minimum boundary of tenants’ due process rights. *See, e.g., Clark v. Alexander*, 85 F.3d at 150-51. Yet Plaintiff landlord here breached all of these requirements, depriving Ms. Roberts of her constitutional right to due process.

If the landlord contends that the “lease amendment” which purports to remove Ms. Roberts’s subsidy should be governed by Paragraph 17 of the lease, which covers subsidy termination, then both the lease and HUD Handbook required the landlord to advise Ms. Roberts that she had ten calendar days during which to

discuss the proposed termination. *See* (R p 49), HUD Handbook ¶8-6. The lease amendment provided no such notice.

If, in the alternative, the lease amendment should be governed by Paragraph 3 of Ms. Roberts's lease, then both the lease and HUD Handbook required the landlord to provide notice at least 30 days before the date the new rent amount is effective. Lease ¶3 (R p 45), HUD Handbook ¶¶7-8(C)(2), 7-17(B) (landlords seeking to increase gross rents must give 30 days' notice per 24 C.F.R. § 245). Yet the landlord dated the notice January 3, 2017, and claimed it was retroactively effective in raising Ms. Roberts's rent for the full month of January—indeed, this is in part the basis of landlord's non-payment claim. (R p 20), *Winston Affordable Hous., L.L.C. v. Roberts*, No. COA18-553, 2019 N.C. App. LEXIS 530, at *2 (N.C. Ct. App. June 18, 2019).

Finally, if the lease amendment should be governed by Paragraph 22 of Ms. Roberts's lease, which specifically covers amendments, then the landlord was required to provide at least 60 days' notice ahead of the date at which the new rent went into effect. (R p 45); *see also* Handbook ¶6-12(B)(4). Instead, the landlord provided notice only *after* that date. (R p 20).

The landlord thus abided by none of the several notice provisions in Ms. Roberts's lease which govern the termination of her subsidy. It is well-settled federal law that to terminate tenants' federal housing subsidies, landlords must provide due process, and notice is an elementary component of that process. In failing to abide by HUD-mandated notice requirements—which courts have held

delineate due process under *Goldberg*—the landlord violated Ms. Roberts’s constitutional rights under the 14th Amendment. *Clark v. Alexander*, 85 F.3d at 153.

The landlord’s argument that it was permitted to terminate the subsidy because the lease itself had ended, and it was therefore no longer bound by lease terms, is unavailing. The document terminating the subsidy identifies itself as a “lease amendment,” and purports to modify the terms of the lease which landlord now argues was at that same moment no longer in effect. The “lease amendment” explicitly states that apart from Paragraph 3 of the existing lease, which covers rental amounts, “[a]ll other provisions of [Petitioner’s] lease remain in full force and effect.” (R p 20). Indeed, the subsequent “Notice to Pay Rent or Quit” asserts its authority under the terms of Ms. Roberts’s original lease, beginning in 2007. (R p 24). Finally, the trial court held, and the landlord did not cross-appeal, that Ms. Roberts’s lease did *not* terminate on December 31, 2016 because Ms. Roberts paid her rent in November and December. (R p 70). This Court would abandon basic principles of contract law if it held that the landlord was not bound by the preexisting lease even as it incorporated that lease into a contractual obligation the landlord now seeks to enforce.

Moreover, federal regulations only permit a landlord to terminate a subsidy for one of a narrow set of reasons—none of which obtained here. 24 C.F.R. § 886.124(c); HUD Handbook, ¶¶ 8-3 to 8-6. North Carolina courts are bound to “ensure procedural and substantive compliance with the federal statutory

framework.” *E. Carolina Reg’l Hous. Auth. v. Lofton*, 369 N.C. at 11 (citing *Charlotte Hous. Auth. v. Patterson*, 120 N.C. App. 552, 555, 464 S.E.2d 68, 71 (1995)). Yet no such protection was provided here: the landlord offered conflicting reasons for terminating Ms. Roberts’s subsidy, only one of which (a change in her income and/or family composition) actually conforms to the regulatory requirements.² (R pp 44, 56-58; T pp 435-36, 454-55, 463-65; Doc. Ex. pp 43, 44). But Ms. Roberts’s income and family composition had not, in fact, changed. (T pp 463-64). To deny tenants the opportunity to know which of the enumerated reasons for subsidy termination applies to their case, and to deny them the chance to “challenge the sufficiency” of those reasons—as the Court of Appeals has done here—is not only to contravene federal regulation, but to deny an essential due process protection. *Holbrook v. Pitt*, 643 F.2d 1261, 1281 (7th Cir. 1981); *see also Perry v. Sindermann*, 408 U.S. at 603.

This action depends on the claim that Ms. Roberts did not pay the landlord a sum of money which the landlord was only able to demand because it had violated the terms of her lease, federal regulations, and her constitutional rights. The Court of Appeals erred in failing to address that underlying deprivation, and this honorable Court should reverse its decision.

² The landlord contends that the subsidy terminated with the lease, but courts below have held that the lease termination was waived by rent acceptance and so did not adjudicate the merits of the landlord’s claims as to the termination. Thus, even if the landlord is correct on the law, it asks this Court to allow an eviction of a subsidized tenant without adjudicating whether it complied with federal regulatory and constitutional protections in terminating *either* lease *or* subsidy.

II. THE COURT OF APPEALS DECISION CONTRADICTS THE DECISIONS OF ALL OTHER STATES THAT HAVE CONSIDERED THIS QUESTION.

Courts across the country have embraced a common-sense rule which protects tenants' constitutional rights: a landlord may not illegally terminate a tenant's federal subsidy and then evict the tenant for failing to pay the full and unsubsidized rent. The reasons for this rule are self-evident: without such a rule, landlords could circumvent the robust protections that Congress has provided to tenants in subsidized units. *Amici curiae* are unaware of a single court in any state, other than the North Carolina Court of Appeals below, that has held that a tenant may be evicted for nonpayment without reviewing the tenant's claims that her subsidy was improperly terminated.

Courts in Georgia, Texas, New Jersey, New York, Massachusetts, Illinois, and Minnesota have held that courts must review a tenant's claim that the landlord improperly terminated a federal subsidy, and that where the subsidy termination is unlawful, a non-payment proceeding cannot be maintained. In *Jessie v. Jerusalem Apartments*—a Texas case with highly analogous facts—the landlord notified a subsidized tenant that her lease was to be terminated on a certain date; after that date, the landlord also terminated her subsidy. 12-06-00113-CV, 2006 WL 3020368, at *1 (Tex. App.-Tyler Oct. 25, 2006). The landlord then filed an eviction action for nonpayment; but on appeal the court dismissed on the independent grounds that the landlord terminated neither the lease nor the subsidy in accordance with federal

regulations and the terms of the lease. *Id.* Similarly, in Georgia, courts have held nonpayment evictions may not proceed unless the legality of an underlying subsidy removal is considered. *Williams v. Paradise Mgmt.*, 187 Ga.App. 292, 370 S.E.2d 45 (1988).

Similar holdings are common to the courts of every other state, *amici* believe, that has considered this issue. *See, e.g., New Brunswick UAW v. Fennie*, A-4617-11T4, 2014 WL 861567 (N.J. Super. App. Div. Mar. 6, 2014) (holding that a tenant may not be evicted for nonpayment until a court determined that tenant's subsidy had been properly terminated, and noting that a remand for this determination "balances federal policy of providing housing to low-income persons, with the interests, needs, and obligations of tenants and landlords"); *E. Harlem Pilot Block Bldg. 1 HDFC v. Cordero*, 196 Misc.2d 36, 763 N.Y.S.2d 203 (N.Y. Civ. Ct. 2003) (reviewing landlord's unlawful subsidy termination when landlord commenced a non-payment proceeding in housing court seeking a judgment for market rent); *1199 Hous. Corp. v. McCartney*, 171 Misc.2d 239, 240 656 N.Y.S.2d 592, 592-93 (N.Y. App. Term. 1997) (holding that that where a landlord revoked a tenant's federal rental subsidy, the tenant "should have been permitted to litigate the merits at the eviction proceeding"); *Homesavers Council of Greenfield Gardens, Inc. v. Sanchez*, 70 Mass.App.Ct. 453, 874 N.E.2d 497 (2007) (holding that a landlord was liable for damages for inflicting emotional distress on a subsidized tenant by illegally terminating Section 8 subsidy and then seeking to evict a tenant for nonpayment). *See also Am. Prop. Mgmt. Co. v. Green-Talaefard*, 195 Ill.App.3d 169,

419 N.E.2d 713 (Ill. App. 1990). Even where courts have found in favor of the landlord, courts recognize that whether a landlord complied with federal rules for terminating a housing subsidy is directly implicated in a subsequent nonpayment action. *See, e.g., Seward Towers Corp. v. Ogbe*, A13-0312, 2013 WL 5676924, at *3 (Minn. App. Oct. 21, 2013) (finding that because the landlord *properly* terminated subsidy under HUD regulations, tenant was liable for full rent). North Carolina should join the states that have decided this question directly and ensure that tenants are provided the protections that federal law requires.

III. THE COURT OF APPEALS DECISION WOULD RAISE NEW BARRIERS FOR NORTH CAROLINIANS SEEKING TO VINDICATE THEIR RIGHTS AND HARM WORKING FAMILIES ACROSS THE STATE.

A. Because vulnerable North Carolinians depend on due process and notice requirements for protection, the decision in the Court of Appeals threatens their ability to exercise their substantive rights.

Notice requirements are especially important when they serve the interests of a population that struggles to participate fully and adequately in the legal system. Low-income tenants are less likely to have received a full education, less likely to be financially literate, and more likely to be victims of systematic discrimination. *See, e.g., J. Michael Collins, The Impacts of Mandatory Financial Education: Evidence from a Randomized Field Study*, 95 J. Econ. Behavior & Org.

146 (2013); Pub. Justice Ctr., *Justice Diverted: How Renters Are Processed in the Baltimore City Rent Court* (Dec. 2015).³

These challenges prevent low-income tenants from effectively utilizing the protections afforded them by housing law: “the presumption that all renters know and can leverage housing laws is ... far-fetched.” *Id.* 60% of surveyed defendants had a high school diploma, GED, or less. *Id.* at 12. Having someone to interpret and explain confusing documents and proceedings reduces the chances of eviction by 77%. Carroll Serron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 *Law & Soc’y Rev.* 419, 428 (2001). This profound difference in outcomes demonstrates how often tenants’ substantive rights are functionally abridged.

Moreover, 22% of individuals who benefit from federal housing subsidies, including Ms. Roberts, have disabilities. HUD Office of Policy Development and Research, *Picture of Subsidized Households* (2018)⁴; (R p 5; T p 610:10–13). Such individuals perpetually risk discrimination as they try to find and keep housing. In one study, more than half of individuals with disabilities seeking subsidized housing were subjected to discrimination. Antoinette P. Banks, *HUD Study Shows People With Disabilities Face Discrimination In Up To Half Of Rental Inquiries*, (July 25 2005).⁵ In 2012, more than half of all complaints submitted to HUD

³ Accessible at http://baltimorehealthystart.org/wp-content/uploads/2017/07/JUSTICE_DIVERTED_PJC_DEC15.pdf.

⁴ Accessible at <https://www.huduser.gov/portal/datasets/assthsg.html>.

⁵ Accessible at <https://archives.hud.gov/news/2005/pr05-100.cfm>.

involved a disability. Janet Smith *et al.*, *Department of Housing and Urban Development, Systematic Literature Review Of Research On Discrimination In Rental Housing On The Basis of Mental Disabilities* (August 2017).⁶ This discrimination affects people who especially need subsidies: tenants with disabilities are far more likely than others to struggle to afford housing. *Id.* at 5.

Whatever the disposition of this case, the landlord will retain the right to evict Ms. Roberts for material noncompliance in the future. But to allow landlords to short-circuit their regulatory, statutory, and constitutional obligations to provide sufficient notice—as the Court of Appeals decision would—is to exacerbate the challenges tenants like Ms. Roberts already face, and to disregard the Supreme Court’s admonition that process must be tailored to “the capacities and circumstances of those who are to be heard,” *Goldberg v. Kelly*, 397 U.S. at 268-269.

B. North Carolina has a strong interest in avoiding unnecessary evictions, because eviction carries devastating consequences for low-income tenants and families—and imposes substantial costs on the public.

Access to affordable housing in North Carolina, and in Forsyth County, is already extremely precarious. Across the state, there is a 200,000-unit shortage in housing for individuals who, like Ms. Roberts, have extremely low incomes. National Low Income Housing Coalition, *Housing Needs By State: North Carolina* (2019).⁷ In

⁶ Accessible at <https://www.huduser.gov/portal/sites/default/files/pdf/MentalDisabilities-ShortPaper1.pdf>.

⁷ Accessible at <https://nlihc.org/housing-needs-by-state/north-carolina>

Forsyth County alone, 25,000 renters have difficulty affording their homes. North Carolina Housing Coalition, *The 2019 Housing Need in North Carolina* (2019).⁸ Over 40% of these people faced an eviction filing in 2018. *Id.* With more than 170 evictions per day, North Carolina has an eviction rate more than double the national average. The Eviction Lab at Princeton University, *Understanding Eviction in North Carolina* (Feb. 2019).

In this context, it is easy to understand why eviction is a leading cause of homelessness. *See* Bos. Bar Ass'n Task Force on the Civil Right to Counsel, *The Importance of Representation in Eviction Cases and Homelessness Prevention, Appendix A 1-3* (Mar. 2012). The cost of homelessness is borne not just by the individuals subjected to it, but by taxpayers. While the cost of subsidizing rent for Ms. Roberts's apartment is about \$4,800 annually, the cost to taxpayers of caring for a homeless individual is more than \$35,000. National Coalition to End Homelessness, *Ending Chronic Homelessness Saves Taxpayers Money* (Feb. 17 2017). Recent efforts in Charlotte demonstrate how supportive housing can reduce the medical expenses of otherwise homeless individuals by almost \$50,000 a year—a sum which would otherwise be borne by charities and taxpayers. M. Lori Thomas et al., *Moore Place Permanent Supportive Housing Evaluation Study Final Report* (April 2015).

The cost of eviction to tenants is stark: getting evicted once—however preventable that eviction was—makes it extraordinarily hard to find affordable

⁸ Accessible at <https://nchousing.org/wp-content/uploads/2017/01/NCH-CountyProfile-Forsyth.pdf>

housing again. See Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 Yale L.J. 1344 (2007); Kim Barker & Jessica Silver-Greenberg, *On Tenant Blacklist, Errors and Renters With Little Recourse*, *N.Y. Times* (Aug. 16 2016). Tenants who are evicted are up to 20% more likely to lose their jobs. Matthew Desmond, *Unaffordable America: Poverty, Housing, and Eviction*, *Fast Focus* 5 (Mar. 2015). Evicted tenants “[wind] up in neighborhoods with a poverty rate 5.4 percentage points higher and a crime rate nearly 1.8 percentage points higher than those of renters who moved by choice.” Matthew Desmond & Tracey Shollenberger, *Forced Displacement from Rental Housing: Prevalence and Neighborhood Consequences*, 52 *Demography* 1751, 1763 (2015). Evictions hurt children too: lowering test scores, making them more likely to drop out, and delaying the age at which they learn to read. Matthew Desmond et al., *Evicting Children*, 92 *Social Forces* 303 (2013).

The devastating consequences of eviction are not abstract risks for the 138,000 North Carolina families who depend on federal rental assistance. Ctr. on Budget and Policy Priorities, *North Carolina Fact Sheet: Federal Rental Assistance* (May 14, 2019). The probability of these harms—to all North Carolina taxpayers, but above all to low-income North Carolina families—only heightens the need for this Court to properly enforce federal due process protections for Ms. Roberts and the thousands of tenants like her across the state.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the Court of Appeals.

Respectfully submitted, this day 2nd of December, 2019.

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N.C. R. App. P. 33(b) Certification: I, William D. Rowe, certify that the attorneys listed below have authorized me to list and sign their names on this document as if they had personally signed it.

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* Nothing in this brief purports to represent the views of Yale Law School, if any.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing PROPOSED BRIEF OF *AMICI CURIAE* was served upon the parties in the matter by placing a copy of same in the U.S. Mail, first-class postage paid, addressed to:

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