Docket Number 17-11500

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

On Appeal from the United States District Court
for the Northern District of Alabama

Civil Action Number: 5:15-cv-2325-AKK

SHEENA YARBROUGH, Plaintiff-Appellant

v.

DECATUR HOUSING AUTHORITY, Defendant-Appellee

INITIAL EN BANC BRIEF OF THE APPELLANT

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Certificate of Interested Persons

The Appellant, in accordance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 28-1(b), hereby certifies that, to her knowledge, the following persons have an interest in the outcome of this appeal:

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Hon. Abdul Kallon, United States District Court Judge for the Northern District of Alabama, Northeastern Division.

Housing Authority of the City of Decatur, Alabama, defendant-appellee.

Housing Authority Insurance Group, insurer of DHA.

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No publicly traded corporation has an interest in the outcome of this case or appeal.

Statement Regarding Oral Argument

Appellant, pursuant to Federal Rule of Appellate Procedure 34 and Eleventh Circuit Rule 28-1(c), hereby requests oral argument. This case is currently before the Court for *en banc* consideration and presents the question of whether to overrule *Basco v. Machin*, in which this Court allowed a Section 8 voucher recipient to raise a procedural due process challenge to the termination of her voucher. Due to the gravity of the concerns in this case, Appellant respectfully requests oral argument.

Table of Contents

Table of Citations

Page

United States Supreme Court Cases

United States Circuit Courts of Appeals Cases

United States District Court Cases

Statutes

Rules of Court

Miscellaneous

Statement of Subject-Matter and Appellate Jurisdiction

Subject matter jurisdiction is conferred herein by 28 U.S.C. § 1331. This case is a civil action, raises a federal question, and arises under the laws of the United States. Jurisdiction is also conferred by 28 U.S.C. § 1343(a)(3,4).

This Court has appellate jurisdiction under 28 U.S.C. §§ 1291 and 1294, as this is an appeal from a final order (Doc 41) of the United States District Court for the Northern District of Alabama to the court of appeals for the circuit including that district. Yarbrough timely filed her notice of appeal on April 5, 2017, within 30 days after the District Court's entry of judgment on March 7, 2017. *See* Fed. R. App. P. 4(a)(1), (3).

Statement of the Issues

In its Memorandum to Counsel dated January 31, 2019, this Court directed the parties to brief the following issue for *en banc* consideration:

> Should this Court overrule *Basco v. Machin*, 514 F.3d 1177 (11th Cir. 2008), insofar as it holds that there is an individual right enforceable through 42 U.S.C. § 1983 to a decision based on a preponderance of the evidence when local housing authorities terminate benefits under the Housing Act of 1937, 42 U.S.C. §§ 1437–1437z-10, and its implementing regulations?

Statement of the Case

A. Introduction

This case concerns the right of Appellant, Sheena Yarbrough ("Yarbrough") to receive due process prior to the termination of her Section 8 housing voucher by the Decatur Housing Authority ("DHA"). Yarbrough appealed the decision of the District Court upholding the termination, and that decision was vacated by a three-judge panel of this Court. The question now before the Court is whether Yarbrough, and all other low-income recipients of housing vouchers, have a federal cause of action when a housing authority fails to meet minimum standards before terminating their benefits.

B. Procedural History

On December 23, 2015, Yarbrough filed a Complaint for Declaratory and Injunctive Relief (Doc 1) in the United States District Court for the Northern District of Alabama. In the Complaint, Yarbrough requested that the court order DHA to reinstate Yarbrough's federal housing entitlement subsidy under the "Section 8 Housing Choice Voucher" program authorized by 42 U.S.C. § 1437f and administered nationally by the United States Department of Housing and Urban Development ("HUD"). *Id.* Yarbrough asserted two claims: (1) that DHA violated her constitutional due process rights and (2) that DHA violated her rights under the Housing Act of 1937 and implementing regulations. *Id.* at 2–3.

On January 19, 2016, DHA filed an Answer with Affirmative Defenses (Doc 6) in which DHA denied all essential allegations of the Complaint.

On July 28, 2017, DHA filed a Motion for Summary Judgment and supporting materials (Doc 30 – 32) stating that there were no disputed issues of fact and asking the court to uphold the hearing officer's decision. On August 18, 2016, Yarbrough filed a Response in Opposition to the Motion for Summary Judgment and supporting materials (Doc 34). On March 1, 2017, Yarbrough filed a Motion for Summary Judgment and supporting materials (Doc 40) stating that there were no disputed issues of fact and asking the court to reinstate Yarbrough's benefits.

On March 7, 2017, without holding a hearing, the court issued a decision granting DHA's Motion for Summary Judgment and denying Yarbrough's. (Doc 41-42). Yarbrough filed a timely Notice of Appeal (Doc 43) on April 5, 2017.

The matter was briefed before this Court, and oral arguments were held before a three-judge panel on September 18, 2018. (*See* docket entry 9/18/18.)

The panel issued a decision on October 3, 2018, reversing the District Court, and finding that the evidence before the hearing officer was insufficient to terminate Yarbrough's Section 8 voucher under the preponderance standard in the applicable regulation, 24 C.F.R.§ 982.555(e)(6), and under *Basco v. Machin*, 514 F.3d 1177,

1182 (11th Cir. 2008). (*See* docket entry 10/3/18.) The panel did not reach Yarbrough's arguments under the Fourteenth Amendment. *Id*.

On October 24, 2018, DHA filed a Petition for Rehearing *En Banc*, arguing that *Basco* should be overruled to the extent that it held that a federal cause of action exists to challenge the decisions of hearing officers in public housing authority cases. (*See* docket entry 10/24/18.) This Court vacated the panel opinion on January 28, 2019, and granted the petition for rehearing *en banc*. (*See* docket entry 1/28/19.)

C. Statement of the Facts

Yarbrough is a participant in the Housing Assistance program pursuant to Section 8 of the U.S. Housing Act of 1937, 42 U.S.C. § 1437f ("the Section 8 program"). (Doc 1 – Pg 1). Under the Section 8 program, low income families are given vouchers to assist with housing rental payments. *Id.* The recipient is allowed to use these vouchers at any location approved by the issuing housing authority. *Id.* The Section 8 program is administered by local Public Housing Authorities ("PHAs"), such as the Decatur Housing Authority, which enter into annual contracts with HUD. *Id*. at 1–2. Pursuant to these contracts, subsidies compensate landlords for the difference between the rent a tenant can afford and the market rental rate. *Id.*

As of 2015, Yarbrough had received voucher benefits from the DHA for approximately nine years. (Doc. 40 – Pg 5). On October 8, 2015, Yarbrough received a notice terminating her from the program. *Id.* She requested and received an informal hearing, which was held on November 10, 2015.[1] *Id.* at 5–6. At the hearing, DHA offered two indictments issued two years earlier (in April 2013) regarding drug activity. *Id.* The indictments did not indicate what (if any) evidence was offered at the grand jury hearing. *Id.* DHA offered only the indictments themselves and did not call any witnesses to explain any of the facts or accusations underlying the indictment. (Doc. 40 – Pg 5).

In response, Yarbrough offered an order from the Circuit Court of Limestone County showing that the claims involved were in the process of being dismissed. *Id.* at 7. Yarbrough also testified that she had previously challenged these accusations. *Id.*

On November 30, 2015, the hearing officer in Yarbrough's case issued a decision finding that Yarbrough was terminated from the program for criminal activity. *Id.* The decision indicated that the hearing officer believed that although

[1] The majority of the hearing was spent on the first two reasons for her proposed termination (a purported unauthorized occupant and failure to complete a repayment schedule.) DHA had previously spoken with Yarbrough regarding the alleged criminal activity and elected not to pursue termination based on this. (Doc. 15-1 – Pg 3, 14).

indictments were insufficient for a finding of criminal guilt (which requires proof beyond a reasonable doubt) that an indictment was, without other support, proof by a preponderance of the evidence. *Id.* at 8. It did not address either Yarbrough's silence or DHA's decision not to question her regarding the matter. (Doc 40 – Pg 8).

D. Standard of Review

The Court of Appeals' review of the District Court's grant of summary judgment herein is *de novo*, considering the facts and inferences to be drawn therefrom in the light most favorable to the nonmoving party, in this case Yarbrough's. *Lofton v. Sec'y of the Dep't. of Children & Family Servs.*, 358 F.3d 804, 809 (11th Cir. 2004).

Summary of the Argument

The Due Process Clause of the U.S. Constitution requires that welfare recipients be afforded an evidentiary hearing with minimum procedural safeguards before their benefits may be terminated. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). Courts have held that these due process requirements apply equally to termination from the Section 8 housing program. *See, e.g.*, *Davis v. Mansfield Metro. Hous. Auth.*, 751 F.2d 180, 184 (6th Cir. 1984); *Holbrook v. Pitt*, 643 F.2d 1261, 1278 (7th Cir. 1981); *Caulder v. Durham Hous. Auth.*, 433 F.2d 998, 1001 (4th Cir. 1970).

This Court has recognized these same due process principles. In *Basco v. Machin*, 514 F. 3d 1177 (11th Cir. 2008), this Court considered whether a PHA could lawfully terminate an individual's Section 8 housing assistance solely based on two police reports. This Court held that the reports were "legally insufficient to establish a prima facie case" as to the conduct of which the tenants were accused. *Id*. at 1183–84. Although the decision referenced 24 C.F.R. § 982.555(e), which details procedural requirements for termination hearings, this Court's holding in *Basco* was explicitly grounded in "due process." 514 F.3d at 1181–82. Indeed, in concluding that the initial burden is on the PHA to prove a prima facie case, *Basco* specifically relied on *Goldberg*, for the proposition that "welfare recipients [must] be afforded an evidentiary hearing with minimum procedural safeguards before

their benefits may be terminated." *Basco*, 514 F.3d at 1182 n.7 (citing *Goldberg*, 97 U.S. at 266). *Basco* additionally noted that there "are due process limits on the extent to which an adverse administrative determination may be based on hearsay evidence," like the police reports at issue there. *Id.* at 1182.

On *en banc* rehearing, this Court directed the parties to brief whether *Basco* should be overruled to the extent that it holds that there is an individual right enforceable through 42 U.S.C. § 1983 to a decision based on a preponderance of the evidence when local housing authorities terminate benefits under the Housing Act of 1937 ("Housing Act"), 42 U.S.C. §§ 1437–1437z-10, and its implementing regulations. However, as just described, the decision in *Basco* was grounded in due process; the Court did not actually address whether individuals can enforce rights under the Housing Act through section 1983. Moreover, this Court did not even have the occasion to apply the preponderance of the evidence standard in *Basco* because it found that the evidence relied upon by the PHA was "legally insufficient" to set out even a prima facie case for termination. *Id*. at 1183.

Thus, Yarbrough would contend that *Basco* reached the correct conclusions. A Section 8 voucher recipient is entitled to procedural due process, which includes notice and a *meaningful* opportunity to be heard. *See Goldberg*, 397 U.S. at 267. Thus, in order to comport with procedural due process, *see Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court must find that a PHA based its decision to

terminate a recipient's housing assistance on some evidence offered by the PHA—otherwise, the hearing itself is meaningless.[2] Moreover, in determining a PHA has set forth such evidence, due process requires that the court evaluate hearsay evidence in particular for its underlying "reliability and probative value." *Richardson v. Perales*, 402 U.S. 389, 407– 08 (1971); *see Basco*, 514 F.3d at 1182–83.

Although *Basco* applied procedural due process, its holding is independently supported by the fact that 42 U.S.C. § 1983 permits Section 8 recipients to enforce their *statutory* rights to a termination hearing and decision based on a preponderance of the evidence. As explained below, numerous courts have held that section 1437d(k) of the Housing Act creates an individually enforceable federal right to a termination hearing, and that the implementing regulations simply "further define[] and flesh[] out the content" of that statutory right. *Harris v. James*, 127 F.3d 993, 1009 (11th Cir. 1997). Indeed, far from creating new obligations, the regulation at issue here, 24 C.F.R. § 982.555(e), merely explicates the default evidentiary standard that is applicable at the termination hearing.

[2] This standard applies to how this Court must evaluate Yarbrough's claim that the grievance process at issue did not comport with due process; it does not purport to establish the standard that the hearing officer must be applying to its own review of the evidence. *See, e.g.*, *LaFaso v. Patrissi,* 161 Vt. 46, 49 (1993) ("*Hill* described the appropriate standard for judicial review of the actions . . . , not the proof necessary for a fact-finder" to make the initial decision.).

In sum, *Basco* should be upheld both because Section 8 voucher recipients have a right to procedural due process before their benefits can be terminated, and because they possess statutory rights that are individually enforceable through 42 U.S.C. § 1983. Because the PHA's termination of Yarbrough's Section 8 housing assistance based solely on two indictments was unlawful under either legal theory, this Court should reverse the district court's grant of summary judgment.

ARGUMENT

I. *BASCO V. MACHIN* WAS CORRECTLY DECIDED BASED ON THE PROCEDURAL DUE PROCESS REQUIREMENT OF THE FOURTEENTH AMENDMENT.

A. Under the Supreme Court's procedural due process analysis articulated in *Mathews v. Eldridge,* some evidence must support the decision to terminate of housing subsidy benefits.

It is a fundamental principle of American jurisprudence that pursuant to the Fourteenth Amendment, no person can be deprived of their property by the state without first being afforded due process of law. In the context of terminating public assistance, the right to due process requires both the "opportunity to be heard" and that the hearing be conducted "at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (citations omitted).

In *Goldberg*, the Supreme Court found that these procedural protections were especially important for welfare recipients who lacked independent financial resources. *Id.* at 264. The due process inquiry "must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Id*. at 263 (citations omitted). Termination of benefits, prior to a hearing, deprives recipients of the very means necessary to live, and based on this potential for harm and the likelihood of error, a hearing must be held before benefits are terminated. *Id.* at 264–66. That

hearing must include the following elements: (1) "timely and adequate notice detailing the reasons for a proposed termination"; (2) "an effective opportunity (for the recipient) to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally"; (3) retained counsel, if desired; (4) an "impartial" decision maker; (5) a decision resting "solely on the legal rules and evidence adduced at the hearing"; (6) a statement of reasons for the decision and the evidence relied on. *Id.* at 266–71.

Six years later, the Supreme Court considered the applicability of *Goldberg* to the termination of Social Security disability benefits in *Mathews v. Eldridge*, 424 U.S. 319 (1976). In *Mathews*, the Court held that a hearing was not required prior to the termination of a disability recipient's benefits, as such a determination was based on highly technical data rather than disputed issues of fact or witness credibility. *Id*. at 343. The Court found that the disability determinations at issue were distinct from the terminations of income-based assistance in *Goldberg* (or, similarly, housing subsidy terminations). *Id.* at 343–44. The Court reasoned that disability determinations do not rely on the "wide variety of information [that] may be deemed relevant" to a welfare entitlement or turn on issues of credibility. *Id*.

The *Mathews* Court laid out the three factors of the balancing test that must be applied to determine if procedural due process has been met:

(1) the private interest that will be affected by the official action;

> (2) the risk of erroneous deprivation through current procedures and the appropriateness of additional procedural safeguards; and
>
> (3) the government's interest, including the governmental function involved and the administrative burdens imposed by additional safeguards.

Id. at 335. (citing *Goldberg*, 397 U.S. at 263–71). A careful analysis of the importance of the rights and the other interests at stake in a given case is necessary to determine which procedures are due. *Id.* at 334–35.

In *Grayden v. Rhodes,* 345 F.3d 1225 (11th Cir. 2003), this Court set out the elements of a claim alleging denial of procedural due process: "(1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process." *Id.* at 1232 (citing *Cryder v. Oxendine*, 24 F.3d 175, 177 (11th Cir. 1994)). The Court elaborated, "There can be no doubt that, at a minimum, the Due Process Clause requires notice and the opportunity to be heard incident to the deprivation of . . . property at the hands of the government." *Id*. (citing *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950)). The hearing required by the Due Process Clause must be "meaningful," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), and "appropriate to the nature of the case." *Mullane,* 339 U.S. at 313. "Ordinarily, due process of law requires an opportunity for 'some kind of hearing' prior to the deprivation of a

significant property interest." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)). This Court has also said that "due process is a flexible concept that varies with the particular circumstances of each case, and to determine the requirements of due process in a particular situation, we must apply the balancing test articulated in *Mathews v. Eldridge*." *Grayden*, 345 F.3d at 1232–33.

Under the first step of the *Mathews* analysis, this court must first determine whether the private interest held by the individual is the type of property protected under due process of law. Federal appellate courts both explicitly and implicitly acknowledge that housing subsidies are property under the *Mathews* analysis. *See generally Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 430–31 (1987); *Jeffries v. Ga. Residential Fin. Auth.*, 678 F.2d 919, 925 (11th Cir. 1982); *Aponte-Rosario v. Acevedo-Vila*, 617 F.3d 1, 9 (1st Cir. 2010); *Hunter v. Underwood*, 362 F.3d 468, 477–78 (8th Cir. 2004); *Woods v. Willis*, 515 F. App'x 471, 480 (6th Cir. 2013); *Nozzi v. Hous. Auth. of City of L.A.*, 425 F. App'x 539, 541 (9th Cir. 2011).

The second prong of the *Mathews* analysis considers the risk of erroneous deprivation of the private interest without the requested procedure—here, the requirement that there be some evidence underlying the decision.

In examining the second prong of the *Mathews* analysis, one district court in the Eleventh Circuit found that the termination of housing subsidies clearly implicated due process rights:

> Initially, the court notes that an individual's interest in his home is traditionally afforded a certain degree of sanctity in our legal system. That sanctity finds its expression, among other places, in the fourth amendment, and it is no less entitled to recognition here.
>
> Moreover, the fact that the housing involved in this case is provided by the government for those living at subsistence levels implicates special concerns. In this context, the normal burdens associated with the loss of one's home are of heightened intensity and additional burdens not present in normal circumstances are implicated. "The loss of assisted housing is likely to impose financial hardship on the evicted tenant. In addition to financial strain, the evicted tenant will suffer psychological deprivation relating to a change in neighbors and familiar surroundings. If a tenant is evicted for being undesirable, it is likely that he will be unable to qualify for other public housing or even private housing if the stigma of being undesirable follows him."

Jeffries v. Ga. Residential Fin. Auth., 503 F. Supp. 610, 619 (N.D. Ga. 1980), *adhered to*, 90 F.R.D. 62 (N.D. Ga. 1981), and *aff'd*, 678 F.2d 919 (11th Cir. 1982) (quoting James Klein & John Schrider, Procedural Due Process and the Section 8 Leased Housing Program, 66 Ky. L.J. 303, 344–45 (1977)). That court went on to state:

> The termination of a Section 8 tenant for good cause is likely to be highly factual rather than technical, and the generality of cases is likely to involve determinations of credibility. By definition, Section 8 benefits are awarded to people with very small incomes. The court is aware that these individuals are unlikely to be advanced in educational attainment or highly skilled in the use or the techniques of English

> composition. This, of course, is not uniformly true, but as discussed above, the requisite due process rules must be defined in accordance with the generality of cases rather than in accordance with rare cases.

Id. at 620.

Due to the likelihood of error and the potential harm of an erroneous termination, recipients of such needs-based benefits are entitled to robust procedural protections, including a decision resting "solely on the legal rules and evidence adduced at the hearing" and a statement of reasons for the decision and the evidence relied on. *Goldberg*, 397 U.S. at 271. Such protections would be meaningless without requiring that there be some reliable, probative evidence underlying the decision. In making such a determination, "the relevant question is whether there is any evidence in the record that could support the conclusion reached" by the PHA. *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 455–56 (1985).

DHA argues in its Petition for Rehearing *En Banc* that any review of the evidence provided at a grievance hearing is substantive and not procedural. To the contrary, the right to a decision based on some evidence stems from procedural due process and is not a substantive due process right. *See, e.g.*, *Hill*, 472 U.S. at 454 (hearing decisions do not satisfy "the minimum requirements of procedural due

process" unless they "are supported by some evidence in the record").[3] If DHA's position were correct, then a governmental agency could terminate an individual's benefits, not only for an indictment, but also for any reason whatsoever—even a mere theory or hunch. Although the methods and conditions of presenting evidence are a cornerstone of the Goldberg decision, DHA appears to contend that even if it issued a decision without any evidence whatsoever, it would not violate the procedural due process standards that Goldberg established.

In fact, *Bell v. Burson*, 402 U.S. 535 (1971), a case decided a year after Goldberg, explicitly found that the issuing a decision without a particular type of evidence is a violation of procedural due process. *Id.* at 541. In *Bell*, the Court decided that a statutory scheme permitting the suspension of driver's licenses without affording individuals the ability to present evidence as to liability was insufficient under the Fourteenth Amendment. *Id.* at 543. The Court held that in

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[3] The *Hill* Court stated:

> "Requiring a modicum of evidence to support a decision to revoke good time credits will help to prevent arbitrary deprivations without threatening institutional interests or imposing undue administrative burdens . . . . [R]ecognizing that due process requires some evidentiary basis for a decision to revoke good time credits will not impose significant new burdens on proceedings within the prison. Nor does it imply that a disciplinary board's factual findings or decisions with respect to appropriate punishment are subject to second-guessing upon review."

Id. at 455.

order to satisfy procedural due process, there must be some inquiry into whether there was a "reasonable possibility of judgments" being rendered against the licensee. *Id.* at 540. The Court stated that because liability was an "important factor" in the decision to suspend one's license, in order to comport with due process, that factor had to be considered at the hearing. *Id*. at 541.

This second portion of the *Mathews* analysis therefore weighs heavily in favor of requiring there to be some evidence on which the hearing decision is based when depriving people of their ability to afford a home. A Section 8 voucher provides the recipient with the means to secure safe and adequate housing for her family. Its loss is at least as drastic as the loss of welfare assistance at issue in *Goldberg*.

As numerous cases have illustrated, the entire grievance hearing process is valueless when no probative evidence is produced. *See, e.g.*, *Lane v. Fort Walton Beach Hous. Auth.*, 518 F. App'x 904, 905 (11th Cir. 2013) (finding that a single printout showing improper use of the tenant's address by a family member was insufficient under due process to support a termination decision); *Taylor v. City of Decatur,* No. CV-09-S-1279-NE, 2010 WL 8781926, at *1 (N.D. Ala. Dec. 2, 2010) (finding that reliance on a single newspaper article in a termination hearing, where tenant was not provided with the article prior to the hearing and hearing

officer impermissibly shifted burden to tenant to exonerate herself, failed to meet the requirements of due process).

Procedural due process is not met when an agency issues a decision not supported by the evidence in the record. Yarbrough does not argue that the federal court should weigh the evidence or second-guess the factfinder in making a finding of some evidence. *See Hill*, 472 U.S. at 455. But the factfinder in a Section 8 voucher termination hearing must rely on "some evidence" sufficient to meet the appropriate legal standard. Lacking such evidence, the risk of erroneous deprivation of one's protected benefits is high under the second prong of *Mathews*.

The third step of the *Mathews* balancing test requires the court to identify the governmental function involved and to weigh the state interests served by the summary procedures used, as well as the administrative and fiscal burdens, if any, that would result from the substitute procedures sought.

Although Yarbrough would agree that DHA (and all providers of public housing) have a valid interest in providing safe, stable and habitable housing, the procedures required by due process are not onerous. As this Court noted in *Basco*, although the PHA bears the initial burden of proof, it need only present sufficient evidence to establish a prima facie case. 514 F.3d at 1182. Neither *Basco*, nor any of the later cases, indicates that it is the role of the federal courts to weigh evidence

or evaluate the credibility of witnesses. With such a minimal evidentiary requirement, it can hardly be said that the process required of DHA is overly burdensome.

By contrast, an excellent example of when state interests outweigh strong pre-deprivation procedures is the Supreme Court case of *Mackey v. Montrym*, 443 U.S. 1 (1979). In *Mackey,* the Court reviewed a Massachusetts statute that required the suspension of a person's driver's license upon the filing of a document by a police officer stating that the person refused to consent to a breath-analysis test. *Id.* at 4. The Court noted that a formal pre-deprivation hearing was not essential given the availability of a prompt post-deprivation hearing. *Id*. at 13–14. The Court also placed substantial weight on the fact that the issues in question "are objective facts either within the personal knowledge of an impartial government official or readily ascertainable by him." *Id*. at 13. The Court stated further:

> The officer whose report of refusal triggers a driver's suspension is a trained observer and investigator. He is, by reason of his training and experience, well suited for the role the statute accords him in the presuspension process. And, as he is personally subject to civil liability for an unlawful arrest and to criminal penalties for willful misrepresentation of the facts, he has every incentive to ascertain accurately and truthfully report the facts.

Id. at 14. Moreover, the Court stressed the state's considerable interest in public safety—i.e., in keeping unsafe, impaired drivers off the roads. *Id*. at

17–19. Justices Roberts and Scalia have further stated that "the dangers posed by drunk drivers are unique" and that the "Court frequently upholds anti-drunk-driving policies that might be constitutionally problematic in other, less exigent circumstances." *Virginia v. Harris,* 558 U.S. 978, 978 (2009) (collecting cases).

By contrast, in the termination of housing subsidy rights, such as in *Basco* and the instant case, there is no post-deprivation proceeding. Aside from the grievance hearing, a tenant has absolutely no recourse other than to become homeless.[4] Also, in almost direct opposition to the scheme in *Mackey*, the hearing officer in a subsidy termination is not usually relying upon a trained witness, but rather is free to consider any statement made in spite of the unavailability of cross-examination, regardless of whether the information has multiple levels of hearsay or the declarant is biased. In fact, as illustrated by the instant case, under DHA's theory, a hearing officer is free to consider summaries of statements made by completely anonymous individuals.

[4] *See Ferguson v. Metro. Dev. & Hous. Agency*, 485 F. Supp. 517, 523 (M.D. Tenn. 1980) (discussing the absence of any further level of review when Section 8 benefits are terminated, and finding that a pre-termination hearing was required in order to comport with procedural due process under *Mathews*).

Finally, in light of the state interest involved—providing safe, stable housing for all its residents—the procedures imposed are not overly burdensome. Applying the test in *Mathews v. Eldridge*, many courts have found violations of Section 8 tenants' procedural due process rights.[5] In *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), the Supreme Court applied the *Mathews* analysis to find that a utility company violated its customers' procedural due process rights in terminating their services. *Id.* at 16. The Court weighed the utility company's interests and found that providing "some kind of hearing" would not be burdensome. *Id*. at 18. The Court found further that "the cessation of essential services for any appreciable time works a uniquely final deprivation," which further weighed in favor of a pre-deprivation hearing. *Id.* at 20.

In *Mackey*, the Court found that the brief (90 day) suspension was not outweighed by the state's compelling interest in ensuring safety on the roads. A

[5] *See Nozzi v. Hous. Auth. of City of L.A.*, 425 F. App'x 539, 542 (9th Cir. 2011) (finding that the PHA had failed to give proper notice comporting with procedural due process), *subsequent opinion*, 806 F.3d 1178 (9th Cir. 2015) (again finding that the PHA's notice had failed to comport with procedural due process); *Richmond Tenants Org., Inc. v. Kemp*, 753 F. Supp. 607, 609 (E.D. Va. 1990), *aff'd*, 956 F.2d 1300 (4th Cir. 1992); *Davis v. Mansfield Metro. Hous. Auth.*, 751 F.2d 180, 186–87 (6th Cir. 1984) (finding that procedural due process required a hearing for current Section 8 recipients prior to termination of benefits); *Holbrook v. Pitt*, 643 F.2d 1261, 1281 (7th Cir. 1981); *Anderson v. Donovan*, No. CIV.A. 06-3298, 2011 WL 3898843, at *4 (E.D. La. Sept. 2, 2011).

PHA cannot show such a compelling interest here. Giving tenants an informal hearing prior to terminating their subsidy—to ensure, to some degree of reasonableness, that the conduct they are accused of actually occurred—is not overly burdensome, when the consequence of not providing an adequate hearing is a total and permanent deprivation of the subsidy. Thus, the procedures suggested by DHA are simply insufficient because, as the Court said in *Mackey*, "a primary function of legal process is to minimize the risk of erroneous decisions." *Id*. at 14.

Moreover, *Goldberg* and the relevant statutory and regulatory provisions already require housing authorities to provide a written statement that explains the evidence relied upon. "[R]ecognizing that due process requires some evidentiary basis for a decision . . . [does] not impose significant new burdens on proceedings." *Hill*, 472 U.S. at 455. Thus, under the framework set out in *Mathews v. Eldridge*, in order to meet the requirements of procedural due process, there must be some evidence that supports the decision to terminate a tenant's housing subsidy.[6] This comports with this Court's finding in *Basco*—that "welfare

[6] The *Basco* Court did not reach the question of whether the preponderance of the evidence standard was required by procedural due process because it found that the PHA in that case failed to even present a prima facie case. 514 F.3d at 1182; *see also Greenlaw v. U.S,* 554 U.S. 237, 244 (2008) (noting that the Court "rel[ies] on the parties to frame the issues for decision and assign the courts the role of neutral arbiter of matters the parties present"); *Jones v. Comm'r*, 812 F.3d 923, 924 (11th Cir. 2016) (recognizing the "general rule that '[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for

recipients [must] be afforded an evidentiary hearing with minimum procedural safeguards before their benefits may be terminated," and that the PHA must introduce evidence that establishes at least a prima facie case. 514 F.3d at 1182. And, for the reasons discussed in Part B below, this conclusion further mandates adherence to certain minimum standards for that evidence to reduce the risk of error.

B. Eleventh Circuit cases support *Basco* in requiring that, to conform with due process, the underlying reliability and probative force of hearsay offered at administrative hearings should be considered.

DHA violated due process by basing its termination decision entirely on an indictment without allowing Yarbrough to confront any witnesses making such allegations of criminal activity. As *Goldberg* made clear, recipients of needs-based assistance are entitled to "confront and cross-examine adverse witnesses" prior to termination of benefits. 397 U.S. at 269. Confrontation is especially important "where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." *Id.* at 270 (quoting *Greene v. McElroy*, 360 U.S. 474, 496–97 (1959)). Confrontation is a "fundamental aspect of procedural due process," especially where an agency "allegedly makes an actual

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advancing the facts and arguments entitling them to relief'" (quoting *Greenlaw*, 554 U.S. at 243–44)).

finding that a specific individual is guilty of a crime." *Jenkins v. McKeithen*, 395 U.S. 411, 428–29 (1969).

Due process does not guarantee anyone a hearing that is conducted in a manner so as to "assure perfect, error-free determinations." *Mackey v. Montrym*, 443 U.S. 1, 13 (1979). However, it does mandate certain steps be taken to "minimize the risk of erroneous deprivation" under *Mathews*. *Nelson v. Colorado*, 137 S. Ct. 1249, 1257 (2017). The type of evidence relied upon in the instant case is pure, unreliable hearsay. Standing alone, uncorroborated hearsay evidence has too high a risk of error and cannot, in accordance with due process, sustain a termination decision.

Hearsay may be received in an administrative hearing and may constitute by itself sufficient evidence to support an agency determination, but only when there are factors that assure the underlying reliability and probative value of the evidence. In *Richardson v. Perales*, 402 U.S. 389 (1971), the Supreme Court found there were many reasons why the hearsay reports by doctors were reliable and probative. At the same time that it held that an administrative decision could be based on hearsay, it reaffirmed the principle from *Consol. Edison v. NLRB*, 305 U.S. 197 (1938) that such hearsay evidence had to have "rational probative force." *Id.* at 407–08. The *Richardson* Court held that a doctor's written report "set[ting] forth . . . medical findings" concerning a Social Security disability claimant could

be received as hearsay evidence in a disability hearing, given "a number of factors . . . [that] assure[d the] underlying reliability and probative value" of the report. *Id.* at 402. *Richardson* distinguished *Goldberg* and its finding that due process requires confrontation of adverse witnesses because of the centrality of "credibility and veracity" to the questions of fact at issue in termination procedures. *Id.* at 407 (quoting *Goldberg*, 397 U.S. at 269).

The "reliability and probative worth of written medical reports" was critical to the *Richardson* Court's due process analysis. *Mathews*, 424 U.S. at 344; *see also Woods v. Willis*, 515 F. App'x 471, 483 (6th Cir. 2013) ("[R]eliability and probative value were the linchpin of the Court's decision[] [in *Richardson*]."). The Eleventh Circuit has consistently followed this directive of *Richardson* to determine whether an agency decision based on hearsay can stand. In *Sch. Bd. of Broward Cty. v. Dep't of Health, Educ. and Welfare*, 525 F.2d 900, 906 (5th Cir. 1976), the Court noted that *Richardson* required it to "look to those factors which 'assure underlying reliability and probative value,'" to determine whether the school board could base its decision on hearsay.[7] *Id.* at 906 (quoting *Richardson*,

[7] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

402 U.S. at 402). Although the Court ultimately upheld the decision of the school board on other grounds, it first said:

> After considering the administrative record in depth, we agree with the School Board that certain portions of the record consists of nothing more than rumor and opinion on the part of unidentified out-of-court declarants. Such evidence is to be given little weight, and would not constitute substantial evidence in the present record.

Id. (citing *McKee v. United States*, 500 F.2d 525 (1974)).[8]

In *U.S. Pipe & Foundry Corp. v. Webb*, 595 F.2d 264 (5th Cir. 1979), the Court again recognized that *Richardson* limited the types of evidence that could by themselves support an administrative decision. "[H]earsay may constitute substantial evidence in administrative proceedings as long as factors that assure the 'underlying reliability and probative value' of the evidence are present." *Id.* at 270 (quoting *Richardson*, 402 U.S. at 402). The Court looked at the nature of the

[8] Though this Court was applying the "substantial evidence" test based on the statutory standard, the analysis does not change in any meaningful way under the analysis that Yarbrough asserts must be applied under due process. *Compare Pierce v. Underwood,* 487 U.S. 552, 564–65 (1988) ("'[S]ubstantial evidence' . . . does not mean a large or considerable amount of evidence, but rather 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'") *with Hill*, 472 U.S. at 455–57 ("[T]he relevant question is whether there is any evidence in the record that could support the conclusion reached," and "the record [must not be] so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary."); *see also Billington v. Underwood*, No. 81-7978, 1983 WL 855694, at *1–2 (11th Cir. May 23, 1983) (finding that the "some evidence" and "substantial evidence" tests "are merged into a single standard").

medical reports at issue in the case and found that they had "reliability and probative value." *Id.*

In *J.A.M. Builders, Inc. v. Herman*, 233 F.3d 1350 (11th Cir. 2000), a building company challenged the admissibility of an out-of-court statement by a declarant warning the building company not to dig near live electric lines. *Id.* at 1352. This Court listed the factors to consider in determining whether hearsay could constitute substantial evidence in an administrative hearing:

> We have identified several factors that demonstrate hearsay's probative value and reliability for purposes of its admissibility in an administrative proceeding: whether (1) the out-of-court declarant was not biased and had no interest in the result of the case; (2) the opposing party could have obtained the information contained in the hearsay before the hearing and could have subpoenaed the declarant; (3) the information was not inconsistent on its face; and (4) the information has been recognized by courts as inherently reliable.

(citing *U.S. Pipe*, 595 F.2d at 270; *Richardson*, 402 U.S. at 402–06); *see also Williams v. U.S. Dep't of Transp.*, 781 F.2d 1573, 1578 n.7 (11th Cir. 1986) ("Hearsay is admissible in administrative hearings and may constitute substantial evidence *if* found reliable and credible." (emphasis added)).

In *Basco v. Machin*, this Court held that a PHA bears the initial burden of proof "to establish a prima facie case" in Section 8 voucher termination hearings. 514 F.3d at 1182. The Court relied on *U.S. Pipe*, which in turn cited *J.A.M. Builders* and *Richardson*, for the proposition that there are "due process limits on

the extent to which an adverse administrative determination may be based on hearsay evidence." *Basco*, 514 F.3d at 1183. It found that the evidence proffered by the PHA lacked probative value in that it did not demonstrate that the tenant had violated any of the rules upon which the PHA had based its termination. *Id.*

In *Ervin v. Housing Authority of Birmingham District,* 281 F. App'x 938 (11th Cir. 2008), this Court relied on *Basco* and *Williams* to find that the evidence upon which the PHA had relied in terminating Ervin's benefits was constitutionally deficient in light of "due process limits on the extent to which an adverse administrative determination may be based on hearsay evidence." *Id.* at 942. The Court found that the evidence at issue had "less reliability and probative value" than the evidence in *Basco*, and that the "factors that assure the underlying reliability and probative value of the evidence" were not necessarily present. *Id*. The issue of whether the tenant received an adequate hearing turned on this consideration. *Id*. On similar reasoning, in *Lane v. Fort Walton Beach Housing Authority,* 518 F. App'x 904 (11th Cir. 2013), this Court reversed the grant of a motion to dismiss the tenant's due process claim. *Id.* at 913. Relying on *Basco*, the Court held that the tenant stated a claim for violation of due process because, among other things, the tenant had alleged that the hearsay evidence supporting the termination decision did not have probative value regarding whether a guest had stayed too long. *Id.* at 912.

Similarly, courts in other circuits have recognized due process claims under *Richardson* where individuals were unable to confront the declarants of hearsay statements. In *Woods v. Willis*, 515 F. App'x 471 (6th Cir. 2013), the Sixth Circuit found that a PHA violates the Due Process Clause by resting a Section 8 termination decision on unreliable hearsay presented at the grievance hearing. *Id.* at 483–84. Where the hearing officer relied solely on a letter from an unreliable declarant, who was not present or subject to cross-examination, and the allegations of fraud in the letter were "unsupported by any facts," the court found that the "letter's reliability and probative value was nonexistent." *Id.* The court thus held that the letter could not support the finding that the tenant had committed fraud.

The Fifth Circuit also reversed the dismissal of a due process claim where the plaintiff was not given an opportunity to confront the author of an adverse affidavit in hearings disqualifying the plaintiff for unemployment benefits. *Cuellar v. Tex. Emp't Comm'n*, 825 F.2d 930, 939–40 (5th Cir. 1987). The court noted that the "critical question" was "whether the plaintiff is afforded a *viable* opportunity to confront *the witnesses* against him—not just to anticipate or to respond to the substance of their testimony—or has been denied the opportunity to cross-examine such witnesses." *Id.* at 938 (emphasis in original).

Therefore, this Court should not overrule *Basco*, as its decision regarding the reliability and probative value of hearsay at administrative hearings is grounded in

prior precedent and the Due Process Clause. In the case currently before this Court, the only evidence the Decatur Housing Authority submitted in Yarbrough's hearing were two indictments. Under the Due Process Clause, these lacked the necessary "reliability and probative value" to support a decision to terminate Yarbrough's housing benefits.

In *Richardson*, the Court found that reliance on the hearsay report did not violate procedural due process in part because the claimant had "not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician." 402 U.S. at 402. Even where the claimant waived the right to cross-examination of the adverse doctor, the Court also analyzed a number of other factors that it felt "assure[d] underlying reliability and probative value" of the evidence. *Id.*

Basco noted the same distinguishing features of *Richardson*, and further noted that the *J.A.M. Builders* factors counseled against basing any decision on such hearsay given the inability to subpoena the declarants of the hearsay. Yarbrough concedes that the law of this Circuit "does not require an absolute or independent right to subpoena witnesses in administrative hearings." *Foxy Lady, Inc. v. City of Atlanta*, 347 F.3d 1232, 1237 (11th Cir. 2003). However, *Basco*, decided five years after *Foxy Lady*, never reached the issue of "whether that deficiency renders the Hearing Officer's reliance on the reports and the statements described therein a

violation of due process." *Basco*, 514 F.3d at 1183. In general, the right to subpoena a declarant remains a valid consideration for weighing "hearsay's probative value and reliability for purposes of its admissibility in an administrative proceeding." *J.A.M. Builders*, 233 F.3d at 1354 (citing *U.S. Pipe,* 595 F.2d at 270; *Richardson*, 402 U.S. at 402–06).

The sole basis for DHA's determination in this case were two indictments, presumably based on witness testimony received by the grand jury. One must consider, however, the procedural limitations on a grand jury proceeding:

> One indicted by a grand jury has no right to appear before that body, under oath or otherwise. He is not entitled to present evidence or to have particular persons called as witnesses. He has only a limited right to counsel if he appears, and no right to be present in person or by counsel while evidence is being presented. *He has no right to confrontation and to cross-examination*, and no right to present argument. He is not entitled to know the identity of the witnesses who testified concerning him, and even after the grand jury has completed receiving evidence, its evidence is unavailable to him. He may not demand a statement of reasons supporting the body's conclusion. The evidence and the witnesses underlying the grand jury's action surface, if at all, at a criminal trial.

United States v. Briggs, 514 F.2d 794, 804 (5th Cir. 1975) (emphasis added). DHA's determination, therefore, was based on layers of hearsay evidence developed outside of Yarbrough's presence, without her knowledge, without an opportunity to confront or to cross-examine the witnesses, and without her ability to request "a statement of reasons supporting the body's conclusion." *Id*. Neither did she have the opportunity to subpoena any witnesses for the termination hearing.

In sum, procedural due process requires Section 8 tenants facing termination to be given a meaningful opportunity to confront adverse witnesses, and does not allow a decision to be supported only by uncorroborated hearsay, deficient in both reliability and probative force.

II. THE HOUSING ACT CREATES AN INDIVIDUAL RIGHT TO A HEARING AND DETERMINATION BASED ON PREPONDERANCE OF THE EVIDENCE.

In enacting the Housing Act of 1937, Congress sought to ensure that tenants are provided with due process prior to losing their Section 8 benefits. Accordingly, the grievance hearing provision of the Housing Act of 1937, codified at 42 U.S.C. § 1437d(k) and further defined by 24 C.F.R. § 982.555(e)(6), grants a specific right to tenants faced with adverse action by a PHA: the right to a pre-deprivation hearing and factual determination based on a preponderance-of-the-evidence standard. This statutory right bears all the hallmarks of those federal rights that the Supreme Court has found privately enforceable through 42 U.S.C. § 1983. *See Gonzaga Univ. v. Doe,* 536 U.S. 273 (2002); *Blessing v. Freestone,* 520 U.S. 329 (1997). Because *Basco*'s due process holding is consistent with this individually enforceable right, this Court should conclude that *Basco* remains good law.

A. Section 1437d(k) of the Housing Act creates a federal right to a grievance hearing enforceable under Section 1983.

In the Housing Act, Congress imposes specific grievance hearing requirements on PHAs to protect tenants at risk of losing their housing assistance. 42 U.S.C. § 1437d(k). In raising claims under this provision, Yarbrough has "assert[ed] the violation of a federal right, not merely a violation of federal law," which she may vindicate through a section 1983 suit. *Gonzaga Univ.,* 536 U.S. at 279–80 (quoting *Blessing,* 520 U.S. at 340).

In undertaking this analysis of Yarbrough's rights under the Housing Act, this Court does not write on a blank slate. In *Wright v. Roanoke Redevelopment & Housing Authority*, the Supreme Court held that rent-ceiling provisions of the Housing Act are enforceable under section 1983. 479 U.S. 418, 431 (1987). The Court later reaffirmed *Wright*'s reasoning in *Gonzaga*, explaining that "[t]he key to our inquiry [in *Wright*]" was that "Congress spoke in terms that 'could not be clearer,' and conferred entitlements 'sufficiently specific and definite to qualify as enforceable rights.'" *Gonzaga*, 536 U.S. at 280 (quoting *Wright*, 479 U.S. at 430, 432).[9] The Court also found "significant" that neither Congress nor HUD evidenced an intent to foreclose resort to the courts or create a comprehensive enforcement scheme. HUD itself "ha[d] never provided a procedure by which tenants could complain to it about the alleged failures [of state welfare agencies] to

[9] This Court has also confirmed that the holding and reasoning of *Wright* "remain[] good law." *Harris v. James*, 127 F.3d 993, 1004–5 (11th Cir. 1997).

abide by [the Act's rent-ceiling provision]." *Gonzaga*, 536 U.S. at 280, 290 (quoting *Wright*, 479 U.S. at 426); *see also Wright*, 479 U.S. at 429 (finding no provision that "evidences that Congress intended to supplant the § 1983 remedy").

Following this precedent, courts have *uniformly* held that section 1437d(k) *in particular* creates federal rights enforceable under section 1983.[10] *See Clark v. Alexander*, 85 F. 3d 146, 149–50 (4th Cir. 1996) (reviewing section 1983 action challenging implementation of grievance procedures under section 1437d(k) and implementing regulations); *Farley v. Phila. Hous. Auth.*, 102 F. 3d 697, 698 (3d Cir. 1996) ("[Plaintiff] can bring a § 1983 action to enforce her federal right to implement the grievance procedure provided for in the Housing Act [under section 1437d(k)]."); *Saxton v. Hous. Auth. of City of Tacoma,* 1 F.3d 881, 883–84 (9th Cir. 1993) (holding that plaintiff could sue the housing authority under section 1983 for failing to provide section 1437d(k) grievance hearing); *Samuels v. District of Columbia*, 770 F.2d 184, 188 (D.C. Cir. 1985) (same); *see also Luvert v. Chi. Hous. Auth.*, 142 F. Supp. 3d 701, 712 (N.D. Ill. 2015) ("The only Court of Appeals statements of the law regarding Section 1437d(k) are unanimous in treating it as a source of a private right to grievance procedures."); *Sandoval v. Chi. Hous. Auth.*, No. 15 C 8158, 2016 WL 110507, at *6 (N.D. Ill. Jan. 8, 2016)

[10] *See Blessing*, 520 U.S. at 342 (courts must "ascertain whether *each separate claim* satisfies the various criteria . . . for determining whether a federal statute creates rights" (emphasis added)).

("[A]ppellate courts that have addressed this issue seem to be in agreement that section 1437d(k) provides a private right of action for individuals who seek to challenge whether grievance procedures comply with the statute").[11]

Three factors guide a court's determination of whether a statutory provision creates a federal right:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation. In other words, the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms.

Blessing, 520 U.S. at 340–41 (citations omitted).

[11] District courts have also uniformly found that section 1437d(k) creates an individual right to a grievance hearing enforceable through § 1983. *See, e.g.*, *Poole v. Hous. Auth. for the Town of Vinton*, 202 F. Supp. 3d 617, 624 (W.D. La. 2016); *Sager v. Hous. Comm'n of Anne Arundel Cty.*, 855 F. Supp. 2d. 524, 562–63 (D. Md. 2012); *Shepherd v. Weldon Mediation Servs.*, 794 F. Supp. 2d 1173, 1175 (W.D. Wash. 2011); *Stevenson v. Willis*, 579 F. Supp. 2d 913, 915–16 (N.D. Ohio 2008); *Gammons v. Mass. Dep't of Hous. & Cmty. Dev.*, 523 F. Supp. 2d 76, 85 (D. Mass. 2007); *Conway v. Hous. Auth. of City of Asheville,* 239 F. Supp. 2d 593, 598–99 (W.D.N.C. 2002); *Fields v. Omaha Hous. Auth.*, No. 8:04CV554, 2006 WL 176629, at *1 (D. Neb. Jan. 23, 2006); *Lowery v. D.C. Hous. Auth.*, No. Civ.A. 04-1868(RMC), 2006 WL 666840, at *5 (D.D.C. Mar. 14, 2006); *Morse v. Phila. Hous. Auth.,* No. Civ.A. 03–CV–814, 2003 WL 22097784, at *2 (E.D. Pa. Aug. 12, 2003); *see also Long v. D.C. Hous. Auth.*, 166 F. Supp. 3d 16, 33 (D.D.C. 2016) (reviewing § 1983 challenge to violations of § 1437d(k) and observing that "courts broadly agree that 42 U.S.C. § 1437d(k) and 24 C.F.R. § 982.555 give [Section 8] participants certain procedural rights with respect to termination of their assistance that participants can privately enforce through § 1983").

As detailed herein, Yarbrough has demonstrated that 42 U.S.C. § 1437d(k) uses unambiguous "rights-creating" language and clearly evidences a congressional intent to impart rights to tenants like Yarbrough under this three-pronged analysis. *Gonzaga*, 536 U.S. at 284.

i. Section 1437d(k) is intended to impart rights to tenants.

The focus of section 1437d(k) on individual tenants such as Yarbrough is "unmistakable." *Gonzaga,* 536 U.S. at 284 (citation omitted). The text and structure of the provision indicate that Congress intended to confer the right to grievance hearing procedures for "an identifiable class" of beneficiaries, *Gonzaga*, 536 U.S. at 284 (citation omitted): tenants facing adverse action by a PHA. The statute provides that "*tenants will . . . have an opportunity*" for a hearing and to examine relevant records, and "*be entitled*" to call and examine witnesses and receive a written decision. 42 U.S.C. § 1437d(k)(1)-(6) (emphasis added).

Neither does section 1437d(k) supply a standard that is "simply a yardstick for the Secretary to measure the *systemwide* performance" of a program. *Blessing*, 520 U.S. at 343. The statutory provision found unenforceable in *Blessing* required the Secretary to bring states' "aggregate [child support enforcement] services" into "substantial compliance" with federal requirements. *Id.* This standard was "intended to improve the overall efficiency of the States'" program, not to ensure that "the needs of any particular person have been satisfied." *Id.* at 343, 345. Here,

by contrast, the needs of particular persons are the focus of section 1437d(k), which requires PHAs to guarantee tenants such as Yarbrough *individual* entitlements to hearing procedures. This individual focus likewise distinguishes section 1437d(k) from the statutory provision held unenforceable in *Gonzaga*. *See* 536 U.S. at 287. Whereas that provision prohibited federal funding of educational institutions that engaged in certain policies or practices, the grievance hearing provisions at issue here do not merely "describ[e] the type of 'policy or practice' that triggers a funding prohibition." *Gonzaga,* 536 U.S. at 288. To the contrary, section 1437d(k) clearly emphasizes the distinct grievances of individual tenants; it does not feature the "'aggregate' focus" fatal to the plaintiffs' enforceability arguments in *Blessing* and *Gonzaga*. 536 U.S. at 288 (quoting *Blessing*, 520 U.S. at 343).

And section 1437d(k) goes beyond merely imposing a "generalized duty on the State." *Suter v. Artist M*, 503 U.S. 347, 363 (1992). It "mandates the very grievance process that PHAs must follow and *details the rights to which the tenants are entitled*." *Farley*, 102 F.3d at 704 (emphasis added); *compare with Harris*, 127 F.3d at 1010 (concluding that Medicaid recipients could not enforce provisions that "imposed only a generalized duty on the States," or that Congress "intended only to guide the State in structuring its efforts to provide care and services").

These conclusions are well settled. *See Farley*, 102 F.3d at 702 (holding that the tenant was the "intended beneficiary of the procedures outlined in section 1437d(k) and its accompanying HUD regulations"); *Samuels*, 770 F.2d at 197–98 (noting that section 1437d(k) "uniformly speaks of a tenant's *entitlement* to particular procedural protections in the face of adverse PHA action" and thus that Congress intended the provision "to create enforceable section 1983 rights"); *Stevenson*, 579 F. Supp. 2d at 922 (holding that "Congress intended § 1437d(k) to benefit Housing Choice Voucher Program participants like [plaintiff]"); *Gammons*, 523 F. Supp. 2d at 84 ("The language of the statute unambiguously confers rights for the benefit of Section 8 subsidy recipients.").

ii. The procedural protections guaranteed under section 1437d(k) are sufficiently specific and definite to be judicially administrable.

The benefits Congress intended § 1437d(k) to confer on Section 8 tenants "are sufficiently specific and definite" to be within the "competence of the judiciary to enforce." *Wright*, 479 U.S. at 432. The statutory guarantees to a hearing—including the rights to present and examine evidence and receive a written decision—are even more discrete, observable, and measurable than the rent ceiling statutory provisions held enforceable in *Wright*, which, as interpreted by implementing regulations, allowed for a "reasonable" charge for the use of utilities. 479 U.S. at 431 (quoting 24 C.F.R. § 860.403).

Many circuit and district courts have accordingly held that section 1437d(k) is sufficiently specific to enforce. *See, e.g.*, *Farley*, 102 F.3d at 702 ("The language of 1437d(k) . . . is mandatory, specific, and clear. The language is not too vague or amorphous to be enforced by courts."); *Poole*, 202 F. Supp. 3d at 624 ("[T]he language of § 1437d(k) . . . is unambiguous and can easily be applied by a court."); *Stevenson*, 579 F. Supp. 2d at 922 **(**"Per the reasoning of *Wright*, § 1437d(k), is not so vague and amorphous that its enforcement would strain judicial competence."); *Conway*, 239 F. Supp. 2d at 599 ("[T]he language of . . . 42 U.S.C. § 1437d(k) . . . is clear and mandatory[,] . . . not too ambiguous to be enforced by courts." (citing *Farley*, 102 F.3d at 702)); *cf. Hill v. S.F. Hous. Auth.*, 207 F. Supp. 2d. 1021, 1028 (N.D. Cal. 2002) (finding the interest in housing quality standards asserted by Section 8 tenants too vague and amorphous where those standards varied depending on the content of local and state building codes).

iii. Section 1437d(k) unambiguously imposes a binding obligation on Public Housing Authorities.

The explicitly mandatory language and legislative history of section 1437d(k) demonstrate Congress's intent to obligate local public housing authorities to afford tenants such as Yabrough a hearing before terminating housing assistance.

First, the text of section 1437d(k) is "unequivocally specific and mandatory." *Samuels*, 770 F.2d at 197. It obligates the Secretary of HUD to

"*require each public housing agency* . . . to establish and implement an administrative grievance procedure" providing certain protections to tenants. 42 U.S.C. § 1437d(k). As courts have concluded, "[o]n any fair reading . . . the Act's grievance procedure provision subjects local PHAs to mandatory obligations within the meaning of *Pennhurst*." *Samuels*, 770 F.2d at 197. The Supreme Court in *Wright* agreed, and cited *Samuels* in finding that "*Congress ordered continued*" HUD's "longstanding regulatory requirement that each PHA provide formal grievance procedures for the resolution of tenant disputes with the PHA" through section 1437d(k). 479 U.S. at 426 (emphasis added).

Samuels and other courts have explicitly rejected the contention urged by DHA—that "the mandatory character of the grievance procedure provision is altered by the fact that Congress directed HUD to issue binding regulations implementing section 1437d(k)."[12] *Id.* at 197 n.10; *see also, e.g.*, *Farley*, 102 F.3d at 698–99 (explaining that section 1437d(k) "provides that *each public housing agency must implement* an administrative grievance procedure for the resolution of

[12] This language cannot be categorized as "two steps removed" from individual rights like the statute at issue in *Gonzaga*. 536 U.S. at 287. There, plaintiffs sought to enforce a statute that mandated only that "no funds shall be made available" by the Department of Education to schools that have "a policy or practice of permitting the release of education records." *Id.* In contrast, the language of § 1437d(k) does not involve a conditional mandate to defund noncompliant housing agencies. *Compare id.* Rather, it specifically requires *PHAs* to afford *tenants* an *unqualified right* to a pre-termination grievance hearing.

all tenant disputes concerning adverse PHA action" and "sets forth the grievance/arbitration procedure that the *local PHAs must follow*" (emphasis added)); *Stevens*, 579 F. Supp. 2d at 921–22 (concluding that section 1437d(k) "imposes an unambiguous duty on public housing authorities to develop procedures that provide voucher holders with the right to an administrative hearing before deprivation of the voucher benefit"); *Conway*, 239 F. Supp. 2d at 599 ("Section 1437d(k) and its regulations impose mandatory obligations on PHAs").

Courts have enforced similar statutory provisions under section 1983 that impose duties on state or local actors through the federal government, such as where a federal agency must approve a state plan. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 523 (1990) (permitting section 1983 suit to enforce a reimbursement provision of the Medicaid Act that requires "a State plan for medical assistance" to guarantee the right); *Briggs v. Bremby*, 792 F.3d 239, 244 (2d Cir. 2015) (finding Food Stamp Act provisions enforceable though they were "written as requirements for a 'State plan of operation,'" as such language "can be fully consistent with a legislative intent to confer enforceable rights upon the relevant plaintiffs"); *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 190 (3d Cir. 2004) (finding it "difficult, if not impossible, as a linguistic matter, to distinguish the import" of the relevant language in that case—"A State plan must provide"—from the "exemplars of

rights-creating language" identified in *Gonzaga*—the "No person shall" language of Titles VI and IX. (citing *Gonzaga*, 536 U.S. at 287)).

Second, "nothing in the legislative history of section 1437d(k) suggests that Congress thought the grievance procedure provision any less mandatory because it directed HUD to specify the precise content of the required procedures in future regulations." *Samuels*, 770 F.2d at 197 n.10. The *Samuels* decision provides a detailed examination of the legislative history of section 1437d(k), as well as the enforcement history of the circulars that section 1437d(k) codified. Drawing extensively on the House of Representatives committee report recommending passage of section 1437d(k), the *Samuels* court concluded that "[t]he particular historical context of § 1437d(k) . . . confirms that the grievance procedure provision was intended to impose mandatory obligations on local PHAs." *Id.* at 197. As the House committee itself succinctly stated, "[t]he bill provides that the grievance procedures *shall be available* for all disputes." *Id.* (quoting H.R. Rep. No. 123, 98th Cong., 1st Sess. 35 (1983)) (emphasis added) [hereinafter House Report].

Indeed, Congress passed section 1437d(k) in response to a 1982 proposal from HUD to replace the federal requirement that PHAs provide tenants a grievance hearing "with a general statement permitting, but not mandating, such procedures to the extent that local PHAs found them useful." *Id.* (citing 47 Fed.

Reg. 55686–92 (Dec. 13, 1982)). Congress repudiated that "advisory approach" when it incorporated the administrative grievance procedures into section 1437d(k) itself. *Id.* at 197. Thus, in enacting section 1437d(k), Congress "clearly intended to *mandate a regulatory framework* that required an administrative forum for all tenant disputes." *Id.* at 200.

> [I]t is the judgment of the Committee that these lease and *grievance requirements must be retained*. Thus, the bill adds a new subsection . . . under which the Secretary must by regulation require PHAs to maintain grievance procedures and utilize fair leases.

Id. at 200 (quoting House Report at 35–36) (emphasis added).

Furthermore, section 1437d(k) was passed against the background of "extensive litigation" challenging early iterations of HUD's grievance procedure regulations later codified as section 1437d(k). *Id.* at 198 (collecting cases). Those cases—including one before the Supreme Court—unanimously held the grievance procedures mandatory and binding for PHAs. *See Thorpe v. Hous. Auth. of City of Durham,* 393 U.S. 268, 276 (1969) (holding that a 1967 HUD circular prescribing procedural protections later incorporated into section 1437d(k) was enforceable under section 1983, and expressly concluding that HUD's administrative eviction procedures were "mandatory, not merely advisory"); *King v. Hous. Auth, of City of Huntsville*, 670 F.2d 952, 954 (11th Cir. 1982) (enforcing grievance procedure regulations against PHA); *Chi. Tenants Hous. Org. v. Chi. Hous. Auth.,* 512 F.2d 19, 22–23 (7th Cir. 1975) (holding that HUD circulars 8 and 9, which superseded

the circular considered in *Thorpe*, bound the PHA to provide grievance procedures for tenant complaints of housing code violations); *Brown v. Hous. Auth. of City of Milwaukee,* 471 F.2d 63, 67 (7th Cir. 1972) (enjoining eviction of public housing tenant for failure to comply with circular 9); *Glover v. Hous. Auth. of City of Bessemer*, 444 F.2d 158, 161–62 (5th Cir. 1971) (holding that circular 9 "entitled" the plaintiff to an administrative grievance hearing). As *Samuels* concluded, it is "reasonable to assume that Congress was aware of the enforcement history of the very regulatory scheme it chose to codify in the Act," even more so considering the explicit reference to this history in the House Report. *Samuels*, 770 F.2d at 198 (citing House Report at 35).

In sum, "Congress' clear rejection of HUD's proposal and its decision to add an explicit grievance procedure requirement to the Act strongly indicate that section 1437d(k) was intended to create enforceable section 1983 rights within the meaning of *Pennhurst.*" *Id.*; *see also Farley*, 102 F.3d at 198 (relying on *Samuels* to conclude "that in enacting the grievance procedure under the Housing Act, Congress intended to impose mandatory obligations on PHAs"; "[s]ection 1437d(k) is not a general policy section or a 'nudge in the preferred direction[ ]' (quoting *Pennhurst*, 451 U.S. at 19)); *Wright*, 479 U.S. at 426 (citing *Samuels*' examination of the legislative history of 1437d(k) with approval); *Saxton*, 1 F.3d at 883–84 (same); *Pool*, 202 F. Supp. 3d at 624 (same).

Thus, section 1437d(k) satisfies all three factors of the *Blessing* test and confers an individual right to a hearing enforceable through section 1983.

B. The regulation defines the content of the statutory right.

In its petition, DHA contends that Yarbrough's action is barred by this Court's decision in *Harris v. James*, 127 F.3d 993 (11th Cir. 1997),because the regulatory provisions contained in 24 C.F.R. § 982.555(e)(6) "lack[] any connection to any requirements set forth in the text of the Act itself." DHA Pet. 8–9. DHA is deeply mistaken. Far from creating a novel right, the regulatory provision at issue merely "further defines and fleshes out the content" of the right to a hearing and a written decision in the Housing Act. *Harris*, 127 F.3d at 1009. The title of the regulatory provision—"Issuance of decision," 24 C.F.R. § 982.555(e)(6)—clearly ties its mandates to the statutory entitlement to "a written decision by the public housing agency," 42 U.S.C. § 1437d(k)(6). The text of the regulation further defines that right, in providing for a "written decision, stating briefly the reasons for the decision," and requiring "[f]actual determinations . . . [to] be based on a preponderance of the evidence presented at the hearing." 24 C.F.R. § 982.555(e)(6).

This Court provided a framework for the enforceability of regulations in *Harris* by reference to the Supreme Court's decision in *Wright*. In *Wright*, the regulation defined the content of the right created under the Housing Act; it did not

impose "distinct obligations," but rather fleshed out the content of the statutory right by including "'reasonable' amount for utilities" under the definition of permissible rent in the statute. *Harris*, 127 F.3d at 1009 (citation omitted). "[S]o long as [a] statute itself confers a specific right upon the plaintiff, and a valid regulation merely further defines or fleshes out the content of that right, then the statute—in conjunction with the regulation—may create a federal right as further defined by the regulation." *Id.* at 1009–10. In contrast, no rights can be conferred "if the regulation defines the content of a statutory provision that creates no federal right under the three-prong test," or "if the regulation goes beyond explicating the specific content of the statutory provision and imposes distinct obligations in order to further the broad objectives underlying the statutory provision." *Id.* at 1009.

This regulation clearly fleshes out the rights contained in the Housing Act. The statute "explicitly direct[s] HUD to issue mandatory grievance procedure regulations designed to ensure PHA compliance" with the statutory requirements. *Samuels*, 770 F.2d at 199. Because HUD is following explicit directives to flesh out the rights at issue in issuing the regulations at issue, this context "presents perhaps the strongest case for permitting the enforcement of federal regulations in a section 1983 action." *Id.*

The preponderance standard required under 24 C.F.R. § 982.555(e)(6) provides no "distinct obligation," *Harris*, 127 F.3d at 1009, but rather defines the

parameters of the written decision mandated in 42 U.S.C. § 1437d(k).The requirement that determinations must be based on a preponderance of evidence presented at the hearing "clarif[ies] what constitutes a proper written decision." *Gammons*, 523 F. Supp. 2d at 84; *see also Stevenson*, 579 F. Supp. 2d at 922 (Section 982.555(e)(6)—requiring that hearing determinations be rooted in the preponderance of the evidence—clarifies the statutory hearing rights). In requiring a hearing and a reasoned decision, there must also be a standard applied to making such determination; HUD is merely making explicit a standard that would presumptively apply. *See, e.g.*, *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 99 (2003) (noting that "Title VII's silence with respect to the type of evidence required . . . also suggests that we should not depart from the conventional rule of civil litigation that generally applies in Title VII cases. That rule requires a plaintiff to prove his case by a preponderance of the evidence.") (internal citations omitted); *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (noting that "[b]ecause the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we *presume* that this standard is applicable in civil actions between private litigants unless 'particularly important individual interests or rights are at stake.'" (emphasis added) (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389–90 (1983)). This provision was indeed enacted because "commenters questioned the lack of . . . specific guidelines for burden of

proof." Section 8 Certificate Program, Moderate Rehabilitation Program and Housing Voucher Program, 55 FR 28538-01.

Other cases have similarly found these regulatory provisions enforceable. *See, e.g.*, *Fields*, 2006 WL176629, at * 2; *see also Litsey v. Hous. Auth. of Bardstown*, No. 3:99CV-114-H, 1999 WL 33604017, at *3 (W.D. Ky. April 1, 1999); *Lowery*, 2006 WL 666840, at *11. And other regulations that similarly detail the hearing process have been held enforceable as merely fleshing out statutory hearing rights. For instance, the Second Circuit held that a regulation requiring hearings to be heard and decided within 90 days was enforceable under the Medicaid Act's right to fair hearings. *Shakhnes v. Berlin*, 689 F.3d 244, 251 (2d Cir. 2012); *see also Doe 1-13 v. Chiles*, 136 F.3d 709, 717 (11th Cir. 1998) (distinguishing *Harris* to hold that regulations requiring Medicaid eligibility determinations to be made within a certain time frame were enforceable as "defin[ing] the contours of the statutory right to reasonably prompt [Medicaid] assistance"). Providing the appropriate evidentiary standard for a hearing is of a kind with regulating the timeliness of a hearing or eligibility determination.

C. Indictments and evidence of arrest are legally insufficient to support the decision of a PHA to terminate Section 8 housing subsidies.

As established above, 42 U.S.C. § 1437d(k) and 24 C.F.R. § 982.555(e)(6) give Yarbrough the enforceable right to a Section 8 termination

decision based on a preponderance of the evidence. DHA cannot meet its burden under this evidentiary standard through exclusive reliance on copies of indictments and arrest records. Standing alone, these documents are legally insufficient to establish by a preponderance of evidence that Yarbrough engaged in drug-related criminal activity warranting the termination of her Section 8 subsidy.

Proof of an act under a preponderance-of-the-evidence standard demands more than a finding of probable cause. Whereas probable cause merely requires a "fair probability" of illicit conduct, *Kaley v. United States*, 571 U.S. 320, 338 (2014) or, put similarly, a "reasonable belief of guilt," *Gerstein v. Pugh*, 420 U.S. 103, 121 (1975), a preponderance standard requires proof that the person "more likely than not" committed the offense, *United States v. Fuentes* 107 F.3d 1515, 1531 (11th Cir. 1997) (equating, in the criminal context, the preponderance of the evidence standard of review with the more-likely-than-not standard of review). As the Supreme Court has recognized, "a probable cause determination . . . does not require the fine resolution of conflicting evidence that a . . . preponderance standard demands." *Gerstein*, 420 U.S. at 12; *see also Florida v. Harris*, 568 U.S. 237, 243–44 (2013) ("'Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in the [probable-cause] decision.' All we have required is the kind of 'fair probability' on which 'reasonable and prudent [people,] not legal technicians, act.'" (citations and

internal quotations marks omitted)); *cf. Agan v. Singletary*, 12 F.3d 1012, 1019 (11th Cir. 2013) (explaining that, in the context of claims for ineffective assistance of counsel, "reasonable probability" . . . is a standard less than proof by a preponderance of the evidence").

No parties dispute that indictments and arrests are based on a finding of probable cause that an individual has committed a crime—not the preponderance of the evidence standard. *See Kaley,* 571 U.S. at 338; U.S. Const. amend. IV. Thus, a finding of probable cause for arrest or indictment is necessarily insufficient to prove the underlying conduct by a preponderance of the evidence.

Accordingly, the evidence relied on by the hearing officer was legally insufficient under 42 U.S.C. § 1437d(k) and 24 C.F.R. § 982.555(e)(6) to sustain DHA's decision terminating Yarbrough's Section 8 subsidy. That decision therefore cannot stand.

Conclusion

This Court should uphold *Basco v. Machin* for the foregoing reasons. Recipients of housing vouchers are entitled to procedural due process prior to the termination of their benefits, and housing authorities must provide some minimum amount of proof in order to meet this requirement. Voucher recipients also have a federal cause of action under 42 U.S.C. § 1983 because section 1437d(k) of the Housing Act creates an individual right to a hearing and a determination based on the preponderance of the evidence. This Court should therefore reverse the District Court's decision upholding DHA's termination of Yarbrough's Section 8 benefits.

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