No. 17-11500-U

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

SHEENA YARBROUGH,

Appellant,

v.

DECATUR HOUSING AUTHORITY,

Appellee

On *en banc* review following a decision by a panel of this Court on appeal from the United States District Court for the Northern District of Alabama,
Case No. 5:15-CV-2325-AKK
Hon. Abdul K. Kallon

# EN BANC BRIEF OF AMICUS CURIAE NATIONAL HOUSING LAW PROJECT SUPPORTING APPELLANT YARBROUGH AND SEEKING REVERSAL OF THE DISTRICT COURT'S DECISION BELOW

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## CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

**CIP** - *Yarbrough v. Decatur Housing Authority, No. 17-11500-U* - **1 OF 2**

Amicus National Housing Law Project (NHLP) is aware of the following persons and entities who have an interest in the outcome of this matter:

Bradley, Arant, Boult, and Cummings, LLP, counsel for appellee DHA;

Decatur Housing Authority, appellee;

Dunn, Eric, counsel for amicus National Housing Law Project;

Forton, Michael, counsel for appellant Yarbrough;

Hill, Jonathan C. "Rudy," Attorney for DHA.

Housing Authority Insurance Group, insurer of DHA.

Huff, Michael Paul, former counsel for DHA;

Kallon, Hon. Abdul K., trial judge;

Legal Services Alabama, counsel for appellant Yarbrough;

Martin, Hon. Beverly B., participated in panel hearing;

McArthur, Benjamin L., former counsel for DHA;

National Housing Law Project, amicus curiae;

Pryor, Hon, William H., participated in panel hearing;

Ray-Kirby, Holly Nicole, counsel for appellant Yarbrough;

Stewart, Charles, counsel for appellee DHA.

**CIP -** *Yarbrough v. Decatur Housing Authority, No. 17-11500-U* **- 2 OF 2**

Vratil, Hon. Katherine H., participated in panel hearing;

Yarbrough, Sheena, plaintiff-appellant.

The National Housing Law Project (NHLP) is a nonprofit organization; NHLP has no parent corporation or any publicly held corporation that owns 10% or more of its stock. Amicus NHLP is not aware of any publicly traded corporation that has an interest in the outcome of this case.

This brief was authored by the National Housing Law Project. No party's counsel participated in writing this brief. Neither any party nor any party's counsel contributed money related to the preparation or submission of this brief. No person other than amici curiae, their members, and their counsel contributed money related to the preparation or submission of this brief.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Statutes**



**Regulations**

**Other Authorities**

## INTEREST OF AMICUS CURIAE

The National Housing Law Project (NHLP) is a nonprofit organization that advances housing justice for poor people and communities, predominantly through technical assistance and training to legal aid attorneys and through co-counseling on important litigation. NHLP works with organizers and other advocacy and service organizations to strengthen and enforce tenants' rights, increase housing opportunities for underserved communities, and preserve and expand the nation's supply of safe and affordable homes. NHLP also coordinates the Housing Justice Network, a collection of more than 1,400 legal services attorneys, advocates, and organizers from around the country. The network has actively shared resources and collaborated on significant housing law issues for over 40 years, including through a dynamic listserv, working groups, and a periodic national conference.

In addition to various other publications and training materials, since 1981 NHLP has published *HUD Housing Programs: Tenants' Rights.* Commonly known as the "Greenbook," this volume—now on its fifth edition and regularly supplemented between editions—is known as the seminal authority on HUD tenants and program participants' rights by tenant advocates and other housing professionals throughout the country. The procedural rights and protections due housing voucher holders upon termination are a central focus of the Greenbook and of the HJN and its member advocates generally. The outcome of this matter is

likely to significantly affect those rights and protections, and influence the manner in which housing authorities, tenant advocates, and others approach housing voucher terminations at both the administrative hearing level and in related judicial litigation.

This brief is submitted pursuant to leave requested under 11th Cir. R. 35-8.

## STATEMENT OF THE ISSUES

Pursuant to the Court's memorandum of January 31, 2019, the principal issue in this *en banc* rehearing is whether the Court should overrule *Basco v. Machin*, 514 F.3d 1177 (11th Cir. 2008), insofar as it holds 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.

Amici answer this question in the affirmative.

## SUMMARY OF ARGUMENT

A participating family's receipt of federal housing assistance benefits through the Housing Choice Voucher Program, 42 U.S.C. § 1437f(o), has long been recognized as a property interest which a public housing agency may not terminate except in accordance with due process of law. The process due upon such a termination requires notice and an opportunity for a hearing that contains the procedural safeguards identified in *Goldberg v. Kelly*, 397 U.S. 254 (1970).

To assist housing authorities in fulfilling their due process obligations in connection with the termination of voucher assistance, the U.S. Department of Housing & Urban Development established rules for so-called "informal hearings," which are quasi-judicial administrative hearings for PHAs to adjudicate voucher termination disputes. See 24 C.F.R. § 982.555. HUD requires that factual issues relevant to informal hearing decisions be decided by a preponderance of evidence. See C.F.R. § 982.555(e)(6).

*Goldberg* did not specify a particular standard of proof to govern benefit termination hearings. But a separate line of U.S. Supreme Court decisions—including *In re Winship*, 397 U.S. 358 (1967), *Addington v. Texas*, 441 U.S. 418 (1979), and *Santosky v. Kramer*, 455 U.S. 745 (1982)—have established that an appropriate minimum standard of proof is an essential requirement of procedural due process in connection with any kind of state-driven deprivation. Termination

of federal housing assistance on less than a preponderance of evidence would run afoul of the constitutional principles set forth in those cases, as well as the bedrock procedural due process formulation in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Accordingly, a public housing agency may not, consistent with the 14th Amendment Due Process Clause, terminate a voucher without establishing the grounds for termination by at least a preponderance of evidence. However, this preponderance standard applies only at the fact-finding stage. A civil action under 42 U.S.C. § 1983 is an appropriate vehicle by which to challenge a termination that is not carried out in accordance with due process requirements, including the appropriate minimal standard of proof. But a court considering such a challenge gives deference to the factual findings made at the informal hearing, upholding those findings so long as they are supported by substantial evidence.

Thus, as a practical matter, a court reviews factual errors in a § 1983 case arising out of a voucher termination hearing only when those errors are attributed to some underlying constitutional error, such as the introduction of excessive hearsay evidence (which infringe on the rights to confront and cross-examine witnesses, not from the need for minimal evidentiary standards) or a lack of even substantial evidence (which does not respect the minimal evidentiary standard due process implies). *Basco v. Machin*, 514 F.3d 1177 (11th Cir. 2008), being consistent with these principles, was correctly decided and should not be overruled.

# ARGUMENT

## A. A Housing Choice Voucher participant has a property interest in continued assistance that a public housing agency may not terminate except in accordance with due process of law.

The Fourteenth Amendment Due Process Clause is well understood to ensure that a state may not deprive a person of an interest in "liberty or property" except through procedures appropriate to the demands of the particular situation. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). A cognizable property interest may arise in the continued receipt of certain government benefits, *see Bd. of Regents v. Roth,* 408 U.S. 564, 569 (1972), including federal housing subsidies. *See Thorpe v. Durham Housing Authority*, 393 U.S. 268, 284 (1967) (public housing tenant may not be evicted except in accordance with due process); *see Jeffries v. Georgia Residential Finance Auth.*, 678 F.2d 919, 927 (11th Cir.1982) ("district court was correct in concluding that Section 8 existing housing tenants have a protected property interest in their government subsidized leases").

The Housing Choice Voucher program, which provides funds to state and local "public housing agencies" (or "PHAs") for use in paying rent subsidies to landlords who lease dwelling units to participating low-income families, is one such federal housing benefit. See 42 U.S.C. § 1437f(o) (establishing the voucher program); see 24 C.F.R. § 982.1 (overview of voucher program). As a state actor, a PHA may not terminate voucher assistance during a tenancy or unexpired

voucher term[1] except in accordance with due process. *See, e.g., Basco v. Machin,* 514 F.3d 1177, 1182 (11th Cir.2008); *Lane v. Ft. Walton Beach Housing Auth.,* 518 Fed. Appx. 904, 910 (11th Cir. 2013).

**B. The preponderance of evidence standard in PHA informal hearings.**

PHAs generally fulfill their due process obligations in voucher termination situations through so-called "informal hearings," which the U.S. Department of Housing & Urban Development requires by regulation. *See* 24 C.F.R. § 982.555; *see also* 42 U.S.C. § 1437d(k). The elements of informal hearings are substantially derived from the core requirements for the termination of public assistance benefits that "provide[ ] the means to obtain essential food, clothing, housing, and medical care" first set forth in *Goldberg v. Kelly,* 397 U.S. 254, 264 (1970).

Informal hearings take place before PHA-appointed hearing officers. *See* 24 C.F.R. § 982.555(e)(4, 6). Both the PHA and the voucher holder may present evidence and question witnesses. *See* 24 C.F.R. § 982.555(e)(5). The family (at its own expense) can have a lawyer or other representative. *See* 24 C.F.R. § 982.555(e)(3). Afterward, the hearing officer must issue a written decision in which "[f]actual determinations relating to the individual circumstances of the

[1] Families issued housing vouchers are given a limited time, known as the "voucher term," to lease housing before the voucher expires. *See* 24 C.F.R. § 982.303. This Court held in *Ely v. Mobile Housing Bd.,* 605 Fed.Appx. 846, 850 (11th Cir.2015), that the property interest lapses when the voucher term expires.

family shall be based on a preponderance of the evidence presented at the hearing." 24 C.F.R. § 982.555(e)(6). Each PHA is required to adopt and abide by its own informal hearing policy, which must be consistent with this preponderance standard. See 24 C.F.R. § 982.555(e)(1) (PHA "administrative plan must state the PHA procedures for conducting informal hearings for participants.").

**1. A minimum standard of proof is an essential component of procedural due process in connection with any deprivation.**

HUD's informal hearing regulation imposes a preponderance of evidence standard even though the *Goldberg* majority did not itself explicitly mandate a minimum standard of proof applicable to welfare termination cases. *Compare* 24 C.F.R. § 982.555(e)(6), *with Goldberg*, 397 U.S. at 267-71. Yet adherence to *some* evidentiary standard is necessary, for an appropriate minimum standard of proof is a necessary component of the process due when depriving any kind of property interest. See *Cooper v. Oklahoma,* 517 U.S. 348, 362 (1996), citing *Addington v. Texas,* 441 U.S. 418, 423 (1979). That is, "in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Santosky v. Kramer,* 455 U.S. 745, 755 (1982), discussing *Addington*, 441 U.S. at 423.

This principle is grounded in a series of U.S. Supreme Court cases stretching back at least to *Woodby v. INS,* which held that the preponderance standard then in

use for immigration proceedings was insufficient under the Fifth Amendment due process clause given the grave nature of deportation. See *Woodby* 385 U.S. 276, 286 (1966) ("[A] deportation proceeding is not a criminal prosecution. But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case."). Following *Woodby*, the Court extended the same reasoning to state-driven deprivations in *In re Winship*, 397 U.S. 358, 365 (1967) (proof beyond a reasonable doubt required in juvenile delinquency proceedings involving charge for violation of criminal law), *Addington v. Texas*, 441 U.S. at 423 ("clear, unequivocal, and convincing evidence" sufficient for mental health commitment), *Santosky v. Kramer*, 455 U.S. at 768 ("fair preponderance of evidence" standard too low for termination of parental rights), *Cruzan by Cruzan v. Director*, 497 U.S. 261, 282-83 (1990) (upholding law clear-and-convincing standard for withdrawal of life support from patient in persistent vegetative state), and *Cooper v. Oklahoma*, 517 U.S. at 363 (placing burden on criminal defendant to prove lack of competence to stand trial offends due process).

**2. A minimal standard of proof is particularly important in quasi-judicial proceedings, such as voucher termination.**

The need for an evidentiary standard is especially important in quasi-judicial tribunals, such as voucher termination hearings, which involve the finding of facts and application of legal rules to specific cases. *See Steadman v. SEC*, 450 U.S. 91,

95 (1981) ("Obviously, weighing evidence has relevance only if the evidence on each side is to be measured against a standard of proof which allocates the risk of error."), *citing Addington* at 423. More amorphous standards may suffice in proceedings oriented more toward policy and quasi-legislative functions. *See, e.g.*, *U.S. v. Florida East Coast Ry. Co.*, 410 U.S. 224, 245 (1973) (clearer due process requirement for judicial-type safeguards in hearings "designed to adjudicate disputed facts in particular cases" compared with "proceedings for the purpose of promulgating policy-type rules or standards"); *see also ACLU of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1229 (11th Cir. 2009) (adequate notice and full, fair opportunity to be heard satisfied due process requirements in connection with removal of book from school libraries). But in a quasi-judicial setting, if the evidentiary standard is not already prescribed then it becomes necessary for courts to determine one. *See Steadman* at 95 ("Where Congress has not prescribed the degree of proof which must be adduced by the proponent of a rule or order to carry its burden of persuasion in an administrative proceeding, this Court has felt at liberty to prescribe the standard[.]"), *citing Woodby*, 385 U.S. at 284; *see also Santosky*, 455 U.S. at 757 ("Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance.").

### C. The minimum constitutional evidentiary standard for voucher termination cannot be lower than preponderance of evidence.

While due process requires some minimal evidentiary standard, what that minimal standard actually is can vary. See *Santosky*, 455 U.S. at 754. The Supreme Court observed in *Addington* that the evolution of law "has produced across a continuum three standards or levels of proof for different types of cases." *Addington*, 441 U.S. at 423. At the highest extreme, proof "beyond a reasonable doubt" is required in cases where criminal punishments or other deprivations at stake are so great as to call for "exclud[ing] as nearly as possible the likelihood of an erroneous judgment." *Id*. at 423. The intermediate standard of proof by "clear, unequivocal and convincing" evidence "protect[s] particularly important individual interests in various civil cases." *Id*. at 424. At the lowest end is the preponderance of evidence standard, where "society has a minimal concern with the outcome [and] litigants thus share the risk of error in roughly equal fashion." *Id*. at 423. Put another way, the preponderance standard is ordinarily the lowest standard of proof that satisfies procedural due process requirements in judicial-style tribunals.

**1. Fact-finding based on less than a preponderance of evidence would be arbitrary.**

The preponderance standard is commonly understood to mean "more-likely-than-not." *See Blossom v. , Transp., Inc.*, 13 F.3d 1477, 1480 (11th Cir. 1994). Far from establishing a fact with certainty, the preponderance standard requires a party asserting the truth of a fact only to persuade the tribunal that its existence "is

more probable than its nonexistence." *Winship*, 397 U.S. at 369-70 (Justice Harlan concurring); see *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 622 (1993). To make this showing, one must set forth at least enough evidence for a reasonable person to conclude that the asserted fact is more likely true than not. See *Concrete Pipe* at 622 ("Before any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty."). The evidence offered to support the assertion must also be more persuasive than the evidence offered against it. See *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 fn 9 (1997).

Hence the very notion of "proof" implies at least proof by a preponderance of evidence—for a failure to establish a fact by a preponderance essentially means that, after considering the party's evidence, the tribunal found the existence of the asserted fact as least as unlikely as its existence. See, *e.g.*, *Brown v. Fauver*, 819 F.2d 395, 399 (3d Cir. 1987) (if "burden of proof lower [is] than a preponderance of the evidence, then it follows that an inmate can be punished for acts which he in all probability did not commit. We have grave doubts about the constitutionality of such a regulation."); *see also Cooper*, 517 U.S. at 369 (because placing burden to prove incompetence on criminal defendant "allows the State to put to trial a

defendant who is more likely than not incompetent, the rule is incompatible with the dictates of due process."). A deprivation based on evidence amounting to less than a preponderance would thus be arbitrary, for it occurs either without or in spite of the relevant evidence.

Multiple U.S. Courts of Appeals have thus recognized the preponderance standard as a floor under which no deprivation can ordinarily occur consistent with due process. *See, e.g., Charlton v. F.T.C.*, 543 F.2d 903, 907-08 (D.C.Cir. 1976) ("[I]n American law a preponderance of the evidence is rock bottom at the fact-finding level of civil litigation. Nowhere in our jurisprudence have we discerned acceptance of a standard of proof tolerating 'something less than the weight of the evidence' . . . That the proceeding is administrative rather than judicial does not diminish this wholesome demand[.]"); *Brown v. Fauver*, 819 F.2d at 399 (regulation that enabled a fact to be proven by "substantial evidence" as established a standard of review, and did not "set[ ] forth a burden of proof with which we are heretofore unfamiliar"); *Young v. Apfel*, 198 F.3d 260 (Table), 1999 WL 979240 at *2-3 (10th Cir. Oct. 28, 1999); *see also, cf., Goff v. Dailey*, 991 F.2d 1437, 1441 (8th Cir. 1993) ("Administrative fact-finding occurs throughout our legal system, yet no examples can be cited in which a fact is 'found' by less than a preponderance of the evidence") (Judge Heaney dissenting).

**2. Final adjudications require fact-finding by at least a preponderance of evidence, even if lesser standard may apply to provisional proceedings.**

The *Goldberg* opinion did suggest that a lower evidentiary standard (such as probable cause) might apply to a preliminary or provisional fact-finding hearing in the public benefits context, but only so long as the ultimate factual determinations are made in a proceeding amounting to "full administrative review" (which need not necessarily occur before the termination). See *Goldberg*, 397 U.S. at 266-67 (since "the statutory 'fair hearing' will provide the recipient with a full administrative review. Accordingly, the pre-termination hearing [need only] produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments"). Yet a standard below preponderance even in a provision hearing is difficult to reconcile with *Goldberg's* command that the resulting decision "must rest solely on the legal rules and evidence adduced at the hearing." *Goldberg* at 271. This requirement would have little meaning if a termination could be sustained even though the evidence presented at a such a hearing did not establish that the grounds for termination were more likely true than not. *See generally Blossom*, 13 F.3d at 1480 (preponderance of evidence means more likely true than not).

Regardless, voucher termination hearings are not provisional or temporary but final adjudications; if the hearing officer upholds termination, then the PHA

may permanently cease the subsidy. *See* 55 Fed. Reg. 28538, 28541 (1990) ("There is no need or requirement for a post-termination hearing because the pre-termination hearing fully comports with due process requirements."); *see also Goldberg* at 267 fn 14 (due process does not require multiple hearings if all necessary safeguards provided in pre-termination hearing). Accordingly, HUD properly requires that the factual grounds for voucher termination be proven by at least a preponderance of evidence. *See* 24 C.F.R. § 982.555(e)(6).

**3. The importance of federal housing assistance to participating families and the societal interest in avoiding wrongful voucher termination require at least a preponderance standard.**

The foundational constitutional standard governing the sufficiency of procedures used in various kinds of state-driven deprivations remains *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Mathews* held that the specific minimal procedural safeguards a particular hearing must afford depend on the importance of the private interest at stake, the risk of erroneous deprivation, and a balance of the value in providing additional safeguards (in terms of reducing the risk of error) versus the costs and burdens those additional requirements would impose. See *Mathews* at 335. Specifically with respect to standards of proof, however, this calculus has less to do with reducing the risk of erroneous deprivation than with properly allocating that risk between the parties; as Justice Harlan explained in *In re Winship*:

> "[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the fact-finder cannot acquire unassailably accurate knowledge of what happened. Instead, all the fact-finder can acquire is a belief of what probably happened. The intensity of this belief—the degree to which a fact-finder is convinced that a given act actually occurred—can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.

*Winship* at 371-72 (Justice Harlan concurring). The constitutional approach for assessing the minimum standard of proof required in connection with a particular deprivation thus incorporates to the *Mathews* test an additional consideration: "a societal judgment about how the risk of error should be distributed between the litigants." *Santosky* at 754, discussing *Addington* at 423.

An evidentiary standard for voucher termination lower than preponderance would not meet due process requirements under these standards. A federal housing subsidy is a critical property interest, often meaning the difference between stable, affordable housing from which a family can build educational and economic resources and potentially exit poverty and public benefit programs altogether—or continued instability, uncertainty, and possible homelessness on the other.[2] Unlike many other public benefits, which may be regained after a period of suspension or

[2] *See* Center for Budget and Policy Priorities, *Housing Vouchers Work* blog series (2017), on-line at: https://www.cbpp.org/vouchers-work, last visited Feb. 26, 2019.

revocation, voucher loss is invariably long-term and usually permanent due to the extreme shortage of vouchers relative to the need.[3]

The implications of voucher termination extend far beyond the individual or family and into the surrounding community as well. A termination directly affects the tenant's landlord (who loses the stability and relative certainty of monthly housing assistance payments). See 24 C.F.R. § 982.309(b)(2)(iii). Voucher loss can also affect the family's employers and schools, as nearly 70% of non-disabled, working-age voucher households have at least one working member and "[t]he typical working family with a voucher is headed by a 39-year-old woman with two school-age children."[4] Voucher revocation further taxes community resources by

[3] *See*, e.g., National Low-Income Housing Coalition, "The Long Wait for a Home," 6 Housing Spotlight (Oct. 11, 2016), available on-line at: https://nlihc.org/sites/default/files/HousingSpotlight_6-1_int.pdf, last visited Mar. 7, 2019 *; see also* Alicia Mazzara, Center for Budget and Policy Priorities, "Huge Demand, Insufficient Funding for Housing Vouchers Means Long Waits," *Housing Vouchers Work blog series* (Apr. 19, 2017), available on-line at: https://www.cbpp.org/blog/housing-vouchers-work-huge-demand-insufficient-funding-for-housing-vouchers-means-long-waits, last visited Feb. 26, 2019.

[4] *See* Alicia Mazzara, Center for Budget and Policy Priorities, "Providing Stable Housing to Low-Wage Workers," *Housing Vouchers Work blog series* (Apr. 12, 2017), available on-line at: https://www.cbpp.org/blog/housing-vouchers-work-providing-stable-housing-to-low-wage-workers, last visited Feb. 26, 2019.

rendering the family reliant on other emergency relief programs, social services, and homeless shelters.[5]

Although Congress has not imposed the preponderance standard by statute, the HUD regulation establishing the informal hearing procedure and its subsequent amendment prescribing the preponderance standard were both products of formal rulemaking and adopted after consideration of extensive stakeholder comments. *See* 49 Fed. Reg. 12215, 12222-30 (Mar. 29, 1984) (establishing informal hearing requirement for prior tenant-based voucher program), 55 Fed. Reg. at 28540 (adopting preponderance standard). The resulting regulation is evidence of a societal judgment that the risk of error in a voucher termination hearing should be allocated at least as heavily to PHAs as to voucher holders. *See also* 55 Fed. Reg. at 28541 ("The Department believes that the procedures strike an appropriate balance between the participant's interest in avoiding erroneous terminations of assistance, and a PHA's need to have practical and expeditious procedures for determining the facts concerning a proposed termination.").

The practical considerations relevant to voucher termination hearings also call for PHAs to bear at least as much of the risk of error as voucher holders—who

[5] *See* Anna Bailey, "Vouchers the Best Tool to End Homelessness," *Housing Vouchers Work blog series* (Apr. 6, 2017), available on-line at: https://www.cbpp.org/blog/housing-vouchers-work-vouchers-the-best-tool-to-end-homelessness, last visited Feb. 26, 2019.

are by-definition persons of low income, with many having disabilities.[6] Voucher tenants have no right to legal representation (though they may have counsel if able to obtain it), and no subpoena powers or other mechanisms to compel discovery from third parties.[7] By comparison, PHAs have professional staff, which often include investigators or attorneys, and may have cooperation from local police or other agencies as well.[8] And a PHA's witnesses will usually be its own employees, agents, or other persons whom the PHA can cause to appear and give testimony.

### D. Preserving the preponderance-of-evidence standard does not require judicial review of routine factual determinations.

A voucher holder who claims a PHA terminated her assistance without due process may challenge that termination under 42 U.S.C. § 1983. *See, e.g., Basco* at 1182; *Lane* at 910. Such actions often resemble judicial review proceedings when

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[6] Approximately 89% of households participating in the voucher program have at least one disabled family member. *See* Center for Budget and Policy Priorities, *Federal Rental Assistance Fact Sheet* (Mar. 30, 2017), available on-line at: https://www.cbpp.org/sites/default/files/atoms/files/4-13-11hous-US.pdf, last visited Feb. 28, 2019.

[7] *See* 24 C.F.R. § 982.555 (providing no mechanism to subpoena witnesses) and 55 Fed. Reg. at 28541 (noting that HUD "has no subpoena power to grant either PHAs or participants with respect to these matters").

[8] *See, e.g.*, HUD, *Housing Choice Voucher Program Guidebook* 7420.10G at 22-11 (April 2001) (recommending staffing and resources PHAs should leverage in investigating suspected program violations, and noting that the PHA may expect cooperation from "PHA staff, representatives from another local agency (police, welfare agency, and other third parties, such as the person reporting the abuse, landlord, tenant, or employer.").

the evidence bearing on whether an alleged constitutional defect occurred lies in the PHA's informal hearing record. *See, e.g., Basco* at 1183, *Lane* at 912-13. Yet always the question in such a § 1983 suit must be whether the voucher holder received constitutionally adequate process. *See e.g., Lane* at 9110-11 ("In this circuit, a § 1983 claim alleging a denial of procedural due process requires proof of three elements: (1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process."), *quoting Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir.2003).

**1. 42 U.S.C. § 1983 entitles a voucher holder to seek review of voucher termination hearings for constitutional errors.**

Superficially, recognition that due process requires the factual basis for a voucher termination to be proven by at least a preponderance of evidence may suggest that a voucher holder could secure review of any material adverse factual finding merely by alleging that the preponderance of evidence did not support it. Such a rule would indeed be a recipe for assuring the kinds of "perfect, error-free determinations" of which the panel concurrence was concerned. See Opinion at 19. But voucher termination cases have never been subject to such review.

Rather, factual findings from voucher termination hearings are entitled to deference the same as in most forms of judicial review. *See generally Clark v. Alexander*, 85 F.3d 146, 152 (4th Cir. 1996). The hearing officer's findings are ordinarily disturbed only if unsupported by substantial evidence, or what the *Basco*

court deemed "legally insufficient to establish a prima facie case." *Basco* at 1183; *see also Washington v. Comm'r of Social Security*, 906 F.3d 1353, 1358 (11th Cir. 2018) ("Substantial evidence means 'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"), *quoting Richardson v. Perales*, 402 U.S. 389, 401 (1972). A bare contention that a critical factual finding was contrary to the preponderance of evidence thus does not establish a claim for improper termination; rather, there must be a lack of substantial evidence, either because the proof simply does not establish the asserted conclusion, as in *Basco*, or because some underlying constitutional error renders the evidence legally insufficient. See *Basco* at 1183.

**2. An overreliance on hearsay evidence that violates a voucher holder's rights of confrontation and cross-examination is a cognizable constitutional error irrespective of the evidentiary standard.**

This Court has recently seen a number of cases in which PHAs brought voucher termination proceedings based entirely or almost entirely on hearsay evidence. *See Lane* at 913; *Ervin v. Birmingham Housing Auth*, 281 Fed.Appx. 938, 941 (11th Cir. 2008); *see also Basco* at 1182. Such cases raise important constitutional questions because procedural due process in connection with critical public benefits has long included rights to confront and cross-examine adverse witnesses. *See Goldberg* 397 U.S. at 270.

Allowing hearsay bearing particular indicia of objectivity and reliability may assist the tribunal in reaching the correct result and doing so more efficiently. *See Richardson v. Perales*, 402 U.S. at 402 (medical report by impartial, disinterested author could constitute substantial evidence for finding against disability claimant). But introducing such material against a voucher holder comes directly into tension with her rights of confrontation and cross-examination, for which reason "there are due process limits on the extent to which an adverse administrative determination may be based on hearsay evidence." *Basco* at 1181. The *Basco* court balanced that tension by ruling that hearsay evidence may constitute substantial evidence to support voucher termination only when factors assuring the "reliability and probative force of such evidence" are present.[9] *Basco*, 514 F.3d at 1182, *citing U.S. Pipe & Foundry Co. v. Webb*, 595 F.2d 264, 270 (5th Cir. 1979). This means a termination based on hearsay lacking such indicia of reliability and probative force is not merely inaccurate, but constitutionally deficient.[10] *See Basco* at 1182, *citing Webb* at 270.

[9] These factors, paraphrased, were (1) disinterested and unbiased declarant, (ii) information not facially-inconsistent, (iii) courts have been recognized the information as inherently reliable, and (iv) the opposing party could not have obtained the information before the hearing or subpoenaed the declarant. *See Basco* at 1182; *citing J.A.M. Builders*, 233 F.3d at 1354.

[10] Despite articulating this standard, the *Basco* court ultimately found it did not need to determine whether the challenged hearsay at issue there was properly

*Basco* went on to observe that the principal factors bearing on reliability and probative force had been previously identified in *J.A.M. Builders, Inc. v. Herman,* 233 F.3d 1350, 1354 (11th Cir. 2000); *see Basco* at 1182. As the *Basco* court noted, the *JAM Builders* factors were themselves drawn from the Supreme Court's ruling in *Richardson v. Perales*, and may reflect "a lesser standard than would apply to the consideration of hearsay in hearings initiated to terminate benefits, where the concerns of *Goldberg* might attach." *Basco* at 1182-83. In particular, since a voucher holder has no mechanism for subpoenaing or otherwise compelling the attendance of witnesses at voucher termination hearings, only hearsay bearing the most compelling indicia of objectivity, reliability, and probative value would seem to be appropriate. See *Richardson* at 407. Tightening this standard may dissuade more PHAs from continuing to initiate voucher termination proceedings based on the more marginal forms of hearsay present in cases like *Basco* and *Lane* (and the instant matter). *See Basco* at 1183, *see Lane* at 912-13.

A contrary approach, such as unsettling the evidentiary standards applicable in voucher termination cases, would likely have the opposite effect; such would only amplify the willingness of some PHAs to initiate voucher termination based on questionable evidence, while § 1983 cases challenging voucher termination for

admitted because the evidence would not have even established the PHA's asserted grounds for termination even if properly considered. See *Basco* at 1183.

lack of procedural due process would be decided under implied evidentiary standards derived from the likes of *Santosky* and *Addington*. See *Steadman* at 95 (court will imply evidentiary standard if none prescribed).

Indeed, ultimately *Basco's* analytical test only superficially touches on the evidentiary standard applicable in voucher termination cases; its true function is weighing a voucher holder's confrontation and cross-examination rights against the efficiencies and possible probative value of hearsay. *See Goldberg* at 270; *Richardson* at 402; *Basco* at 1182. Only when unreliable or insufficiently probative hearsay is excluded does the evidentiary standard come into play (in determining whether the balance of remaining proof is yet sufficient to justify a termination). This does not imply a basis for searching and non-deferential review of garden-variety factual errors springing from whatever cause, but rather a focused analysis tied directly to constitutional minimum safeguards established long ago. *See Goldberg* at 267, *see Richardson* at 402.

## CONCLUSION

For all of the foregoing reasons, the Court should conclude, consistent with *Basco v. Machin*, that when a person who received assistance under the Housing Choice Voucher program demonstrates an action under 42 U.S.C. § 1983 that a PHA terminated her assistance without proving the grounds for that termination by

a preponderance of evidence, the termination violates the Fourteenth Amendment Due Process Clause. The District Court's decision should therefore be reversed.

Respectfully submitted this 12th day of March, 2019,

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**CERTIFICATE OF COMPLIANCE WITH WORD LIMIT**

Eric Dunn hereby certifies that this brief contains 5,814 words, exclusive of the cover page, corporate disclosure statement and statement of interested persons, tables of contents and authorities, signature block, this certificate of compliance with FRAP 32(g), and the certificate of service. This word total was calculated using Microsoft Word, and is beneath the limit of 6,500 words permitted by FRAP 32(a)(7) and FRAP 29(a)(5).

## CERTIFICATE OF SERVICE

The undersigned certifies that on March 12, 2019, he filed this brief in the electronically filing system and placed 20 paper copies in the mail to the Clerk of the Court at 56 Forsyth Street, N.W., Atlanta, Georgia 30303. In addition, he also placed paper copies of this brief in the mail to the following persons and addresses by FedEx overnight delivery:

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