

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 17-11500

SHEENA YARBROUGH,
Plaintiff-Appellant,

v.

HOUSING AUTHORITY OF THE CITY OF DECATUR, ALABAMA,
Defendant-Appellee.

Rehearing En Banc
On Appeal from the United States District Court for the
Northern District of Alabama
No. 5:15-CV-2325-AKK

BRIEF OF *AMICUS CURIAE*
HOUSING UMBRELLA GROUP OF FLORIDA,
ATLANTA LEGAL AID SOCIETY,
AND GEORGIA LEGAL SERVICES PROGRAM
IN SUPPORT OF APPELLANT

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

The undersigned attorney certifies, under rule 26.1 of the Federal Rules of Appellate Procedure, that Atlanta Legal Aid Society, Inc. and Georgia Legal Services Program are each non-profit organizations and no publicly held corporation has a 10% or greater ownership in any of them. Housing Umbrella Group of Florida is an unincorporated statewide association of attorneys from legal aid organizations.

The undersigned attorney further certifies, under Eleventh Circuit Rule 26.1-1, that the following may have an interest in the outcome of the case:

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STATEMENTS OF INTEREST OF *AMICUS CURIAE*¹

The **Housing Umbrella Group of Florida (“Housing Umbrella Group”)**, which was founded in the 1980’s, is an unincorporated statewide association of approximately 160 attorneys from 18 independent, county, and regional legal aid organizations and professors from Florida law schools. Housing Umbrella Group attorneys provide civil legal services to low-income clients throughout the State of Florida. The Housing Umbrella Group is concerned with protecting the rights of low-income tenants, particularly those living in federally subsidized housing, including those using Section 8 vouchers.

Founded in 1924 by volunteer attorneys, the **Atlanta Legal Aid Society, Inc. (“ALAS”)** meets the civil legal needs of the poorest and most vulnerable citizens in the Atlanta, Georgia metro area. ALAS has five offices serving five counties in metro Atlanta—Fulton, DeKalb, Cobb, Gwinnett, and Clayton. ALAS has 75 attorneys on staff to provide free legal services to qualifying, low-income clients in issues ranging from family law, to consumer work, to housing and public benefits. In 2018, ALAS opened over 20,000 new cases to provide legal advice and

¹ Pursuant to Fed. R. Civ. P. 29(a)(4)(E), Amici Curiae certify that no party’s counsel authored this brief in whole or in part, that no party or party’s counsel contributed money intended to fund the preparation or submission of the brief, and that no person (other than amicus curiae, their members and their counsel) contributed money intended to fund the preparation or submission of the brief.

representation to ensure that low-income individuals have access to justice in the legal system.

Georgia Legal Services Program (“GLSP”) is a statewide non-profit law firm serving 154 counties in Georgia outside the five-county metropolitan Atlanta area including Troup County. GLSP offers free legal services in civil cases to people with low incomes. GLSP clients have “high stakes” problems such as domestic violence, eviction or foreclosure, denial of hard-earned benefits such as unemployment, inability to get critically-needed employment, housing, health care, food aid, and many more. GLSP’s work is to assure that people with low income have access to justice and opportunities to escape poverty. GLSP represents clients by advocating for increasing and preserving opportunities for decent, affordable housing; improving housing conditions, including physical conditions and management practices; expanding and enforcing low-income tenants’ and homeowners’ rights.

Every day, members of the Housing Umbrella Group, the Atlanta Legal Aid Society, and Georgia Legal Services Program (“Southeast *Amici*”) represent Section 8 voucher participants facing voucher terminations and the threat of eviction. The combined experience of Southeast *Amici* attorneys gives the group a unique depth of understanding of the practical and legal considerations relevant to

the proper interpretation and application of federal housing program policies and requirements. Southeast *Amici* seek to assist this Court by explaining the importance of a Section 8 voucher, the reality our clients face when threatened with the loss of their rental assistance, and the impact this Court's decision may have beyond the immediate concerns of the parties to the case. Because of their experience, Southeast *Amici* are well situated to brief this Court on the widespread significance of this case for current and future tenants with Section 8 Housing Choice vouchers.

SUMMARY OF THE ARGUMENT

When the Section 8 voucher program was created in the 1970s, millions of families were given the opportunity to escape poverty and live in integrated communities. Now the largest rental assistance program administered by the U.S. Department of Housing and Urban Development (HUD), low-income families across the country rely on the subsidy to access one of the most basic needs—housing. Most families receiving Section 8 vouchers are not only low-income, but come from communities that are particularly vulnerable to the asperities of poverty.

Vouchers have the potential to lift families out of poverty, allow children to attend better schools in safer neighborhoods, and give working parents access to better job opportunities. Vouchers have been proven to reduce homelessness and provide stability. Section 8 vouchers provide families with the opportunity “to afford decent, safe, and sanitary housing,” and currently assists more than 154,000 people in Florida and Georgia alone.²

² 24 C.F.R. § 982.1(a)(1); Center on Budget and Policy Priorities, *Florida Fact Sheet: Federal Rental Assistance* (2017), <https://www.cbpp.org/sites/default/files/atoms/files/4-13-11hous-FL.pdf> (“Florida Fact Sheet”) (100,100 vouchers in FL); Center on Budget and Policy Priorities, *Georgia Fact Sheet: Federal Rental Assistance* (2017), <https://www.cbpp.org/sites/default/files/atoms/files/4-13-11hous-GA.pdf> (“Georgia Fact Sheet”) (54,800 vouchers in GA).

When the Eleventh Circuit decided *Basco v. Machin*,³ it affirmed the protections the U.S. Supreme Court articulated in similar cases regarding the termination of public benefits.⁴ As recipients did in those cases, families with Section 8 vouchers have a protected interest in avoiding the loss of their assistance, which often results in their homelessness and ineligibility from most federal housing programs.

For decades, Southeast *Amici* have used 42 U.S.C. § 1983 to enforce the constitutional rights of Section 8 voucher participants, ensuring that voucher terminations meet the minimal procedural protections of due process. Southeast *Amici* urge this *en banc* panel to uphold the precedent in *Basco v. Machin*. A family with a Section 8 voucher must be able to enforce its right to due process using 42 U.S.C. §1983 whenever a housing authority improperly terminates the voucher without meeting the preponderance of the evidence standard. The stakes for families who participate in the program are too high for this Court to rule otherwise.

³ 514 F.3d 1177 (11th Cir. 2008).

⁴ See, *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

ARGUMENT

I. A Section 8 voucher is a significant property interest warranting the Court's protection.

Due process, particularly procedural due process, is a flexible concept that varies depending on the context of the life, liberty, or property interest at issue.⁵ When determining the procedural protections required by the Fourteenth Amendment, courts are obligated to weigh several factors in what is known as the *Mathews* test. “The *Mathews* test directs courts to weigh the private interest in a property right against the government’s interest in avoiding additional or substitute process, in light of the ‘risk of erroneous deprivation’ of a property holder’s interest ‘and the probable value, if any, of additional or substitute procedural safeguards.’”⁶ Families with Section 8 vouchers have a significant property interest in maintaining participation in the federal subsidy program. Those who are terminated from the program—rightly or wrongly—suffer harsh consequences when they lose the assistance. Because of the high stakes involved in these decisions and the informal nature of Public Housing Authority (PHA) termination hearings, participants need the ability to challenge adverse decisions that do not comply with minimum constitutional guarantees.

⁵ *Zinermon v. Burch*, 494 U.S. 113, 127 (1990).

⁶ *Hicks v. Comm’r of Soc. Sec.*, 909 F. 3d 786, 799 (6th Cir. 2018) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)) (emphasis added).

A. Affordable housing is scarce for low-income families.

There are approximately 966,000 low-income renter households in Florida.⁷ Most of these households—771,000—pay more than 50% of their income toward housing costs.⁸ In Georgia, the statistics are no less bleak. Georgia has 499,000 low-income renter households, and three-quarters of those pay more than 50% of their income in housing costs.⁹ Yet, the Brooke Amendment to the Housing Act of 1937 determined that housing costs should consume no more than 30% of adjusted household income.¹⁰

The majority of low-income Florida and Georgia households are working families, and about one-third are elderly or disabled.¹¹ Many of these families live with children.¹² Low-income families are in desperate need of housing assistance because overpaying for housing prevents them from meeting basic needs in other areas, such as food, clothing, and healthcare.

⁷ Florida Fact Sheet, *supra* note 2.

⁸ *Id.*

⁹ Georgia Fact Sheet, *supra* note 2.

¹⁰ 42 U.S.C. § 1437f(o)(2)(A)(i); *see also* U.S. Dep't of Hous. and Urban Dev., *Affordable Housing*, https://www.hud.gov/program_offices/comm_planning/affordablehousing/.

¹¹ Florida Fact Sheet, *supra* note 2 (61% are working families and 35% are elderly or disabled) Georgia Fact Sheet, *supra* note 2 (59% are working families and 31% are elderly or disabled).

¹² *Id.* (in Georgia, 44% live with children; in Florida 36% live with children)

In Florida, the average Fair Market Rent (FMR) for a two-bedroom apartment is \$1,118; in Georgia, the average FMR for a two-bedroom rental is \$911.¹³ The FMR for an area (broken down into smaller regions and sometimes zip codes), is the baseline HUD sets to determine payment standards for its Section 8 vouchers.¹⁴ To afford the average rent and utilities without paying more than 30% of income on housing, a household in Florida must earn \$44,716 annually, and a household in Georgia must earn \$36,459. Assuming a 40-hour work week for 52 weeks per year, this level of income translates into a Housing Wage of \$21.50 per hour (Florida) and \$17.53 (Georgia). In both states, a minimum wage worker must work approximately 100 hours per week, 52 weeks per year to afford an average two-bedroom unit. Even households with two full-time workers cannot afford this rent without working significantly more than forty hours per week.

As the statistics above indicate, there is an affordable housing crisis across the southeast. In 2017, the Florida Legislature, recognizing the scope of the affordable housing crisis, created an Affordable Housing Workgroup to “develop recommendations for addressing the state’s affordable housing needs.”¹⁵ The Workgroup found that Florida’s renter population “has grown rapidly” from 2000

¹³ National Low Income Housing Coalition, *Out of Reach 2018*, 53, 59 (2018), https://nlihc.org/sites/default/files/oor/OOR_2018.pdf.

¹⁴ 42 U.S.C. § 1437f(o)(2)(B).

¹⁵ Ch. 17-71, § 46(4)(a), Laws of Fla. (2017).

to 2015, but the state's affordable rental supply "dropped from 75 percent in 2000 to 57 percent in 2015."¹⁶ The Workgroup found that "vouchers provide a safety net for extremely low income renters, acting as a critical deterrent to homelessness resulting from eviction."¹⁷

B. Families wait years for a coveted Section 8 voucher.

Despite an overwhelming lack of affordable housing, only one in four low-income renters who qualify for rental assistance participate in one of the federal programs designed to meet the need.¹⁸ Demand far outstrips the supply, to the extent that many individuals trying to apply for a Section 8 voucher wait years just for program waiting lists to open.¹⁹ If a family is one of the lucky few to get on the

¹⁶ Affordable Housing Workgroup, *Final Report 2017*, 11, 14 (2017), https://issuu.com/fhfc/docs/ahwg-report_2017-web.

¹⁷ *Id.* at 49.

¹⁸ Center on Budget and Policy Priorities, *Three Out of Four Low-Income At-Risk Renters Do Not Receive Federal Rental Assistance* (2017), http://apps.cbpp.org/shareables_housing_unmet/chart.html (noting that the total number of low-income renters is 17 million).

¹⁹ Aaron Shrank, *It's a long wait for Section 8 housing in U.S. cities*, Marketplace, Jan. 3, 2018, <https://www.marketplace.org/2018/01/03/wealth-poverty/its-long-wait-section-8-housing-us-cities> (Los Angeles waiting list not open for 13 years); Mark Price, *Charlotte Section 8 wait list will likely set record*, The Charlotte Observer, Sept. 26, 2014, <https://www.charlotteobserver.com/news/local/article9195905.html> (Charlotte HA only opened waiting list 2 times in 14 years); Jesse Bogan, *St. Louis Section 8 voucher wait list to open for first time since 2007*, St. Louis Post-Dispatch, July 3, 2014, https://www.stltoday.com/news/local/govt-and-politics/st-louis-section-voucher-waiting-list-to-open-for-first/article_49d83baf-a9c5-5d13-927d-348fbe89565a.html (St. Louis waiting list closed for 7 years).

waiting list through a lottery, it is common for that family to remain in limbo for many more years waiting for the housing authority to work its way through the waiting list. In two of the largest cities where *Southeast Amici* clients live, Miami and Atlanta, the largest housing authority waiting lists are over 70,000 and 30,000 people long, respectively.²⁰ Once the housing authority calls the family from the waiting list, it screens the family to ensure they are eligible to receive the valuable housing assistance.

Only 341,000 low-income households in Florida and Georgia receive any form of federal rental assistance.²¹ 177,338 of those families participate in the Section 8 voucher program.²²

C. Section 8 vouchers provide lasting benefits to families.

The Section 8 voucher program is designed to assist low-income families by providing rent subsidies that enable them to rent units in the private housing market. A Section 8 voucher recipient pays approximately 30% of household income towards rent, and the remaining portion of the rent is paid directly from the

²⁰ Miami-Dade County, *Subsidized rental housing programs wait list*, <http://www.miamidade.gov/housing/library/reports/waiting-list-2008.pdf>; Atlanta Housing Authority, *Housing Choice Overview* (2018), https://www.atlantahousing.org/wp-content/uploads/2018/03/housing-choice-overview_061420171.pdf.

²¹ Florida Fact Sheet, *supra* note (206,000); Georgia Fact Sheet (135,000).

²² U.S. Dep't of Hous. and Urban Dev., *Assisted Housing: National and Local*, https://www.huduser.gov/portal/datasets/assthsg.html#2009-2018_query.

housing authority to the landlord.²³ On average, Florida's Section 8 voucher households have an income of \$14,762, which represents 25% of the state's area median income. They pay \$394 per month, on average, toward their rent and utilities--more than \$700 less than the average Florida rent. Georgia's voucher households have similar statistics: Their average annual income is \$13,877 and, on average, they pay \$341 as rent each month.²⁴ Without a Section 8 voucher, these families would be unable to afford their current rents.

Vouchers have been shown to reduce homelessness and provide stability for families. One study found that families coming from emergency shelters who received vouchers were 18 percent less likely to be homeless after three years.²⁵ HUD itself authored a study in 2015 that found vouchers were the most effective tool to end homelessness.²⁶ Families with vouchers "experience greater food security and less economic stress."²⁷ Section 8 vouchers allow low-income families to afford to live in areas of high-opportunity, with better schools, lower crime, and

²³ 24 C.F.R. § 5.628

²⁴ U.S. Dep't of Hous. and Urban Dev., *Assisted Housing: National and Local*, https://www.huduser.gov/portal/datasets/assthsg.html#2009-2018_query.

²⁵ Ingrid Gould Ellen, *What do we know about housing choice vouchers*, Regional Science and Urban Economics 2 (2018), https://furmancenter.org/files/What_do_we_know_about_housing_vouchers.pdf

²⁶ U.S. Dep't of Hous. and Urban Dev., *Family Options Study* 161 (July 2015), http://www.huduser.org/portal/sites/default/files/pdf/FamilyOptionsStudy_final.pdf

²⁷ *Id.*

less poverty. In fact, in both Florida and Georgia, approximately three-quarters of voucher participants live outside high-poverty census tracts.²⁸

Section 8 assistance can lead to improved outcomes for children and a reduction in poverty.²⁹ One study found that voucher families raising children moved 40% less often than those without a voucher,³⁰ and other reports show children changed schools less often, allowing them more educational stability.³¹

Vouchers have also been found to reduce school absences due to health, financial, or disciplinary problems.³² Families with vouchers tend to live in less crowded conditions and in neighborhoods that are safer for children.³³ Families who use

²⁸ U.S. Dep't of Hous. and Urban Dev., *Assisted Housing: National and Local*, https://www.huduser.gov/portal/datasets/assthsg.html#2009-2018_query.

²⁹ Will Fischer, *Research Shows Housing Vouchers Reduce Hardship and Provide Platform for Long-Term Gains Among Children*, Center for Budget and Policy Priorities 1 (October 7, 2015), <https://www.cbpp.org/sites/default/files/atoms/files/3-10-14hous.pdf>.

³⁰ Michelle Wood, et al., *Housing Affordability and Family Well-Being: Results from the Housing Voucher Evaluation*, *Housing Policy Debate* 19(2): 367-412 (January 2008),

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.530.3116&rep=rep1&type=pdf>.

³¹ U.S. Dep't of Hous. and Urban Dev., *Family Options Study* 161 (July 2015), http://www.huduser.org/portal/sites/default/files/pdf/FamilyOptionsStudy_final.pdf

³² U.S. Dep't of Hous. and Urban Dev., *Effects of Housing Vouchers on Welfare Families*, Executive Summary (Sept. 2006), https://www.huduser.gov/publications/pdf/hsgvouchers_1_2011.pdf.

³³ Will Fischer, *Research Shows Housing Vouchers Reduce Hardship and Provide Platform for Long-Term Gains Among Children*, Center for Budget and Policy

vouchers to move to higher-opportunity neighborhoods can break the cycle of intergenerational poverty—young children who move to better neighborhoods have higher rates of college attendance, are less likely to become single parents, and have increased earnings as adults.³⁴

II. The risks and consequences of an erroneous deprivation at Section 8 informal hearings are high.

The second *Mathews* factor—“the risk of an erroneous deprivation” of a private interest and “the value of additional or substitute procedural safeguards” to protect that interest—weighs heavily in favor of requiring the PHA to meet the preponderance of the evidence standard.³⁵ Further, the *Mathews* test weighs against allowing a PHA to produce only unreliable hearsay evidence to meet that standard. Because every public housing authority (PHA) operates independently, with its own unique hearing procedures and distinct hearing officers, the risk of an erroneous deprivation is high, and the consequences to families are life-altering.

A. PHA hearing procedures create a high risk of erroneous deprivation.

HUD administers the Section 8 voucher program on the national level. In practice, HUD utilizes a multitude of PHAs to administer the Section 8 program

Priorities 1 (October 7, 2015),

<https://www.cbpp.org/sites/default/files/atoms/files/3-10-14hous.pdf>.

³⁴ Raj Chetty, et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment* (2015),

http://scholar.harvard.edu/files/lkatz/files/mto_manuscript_may2015.pdf.

³⁵ *Mathews*, 424 U.S. at 335.

for HUD.³⁶ In Florida, there are 98 separate PHAs and in Georgia there are 184 PHAs.³⁷

Each PHA has the power to make determinations regarding the eligibility of applicants and participants for Section 8 benefits, including any determinations to terminate a participant family's eligibility in the Section 8 program. However, PHAs do not possess unfettered discretion to terminate a participant family's Section 8 benefits. Giving effect to constitutional requirements and federal law, HUD requires PHAs to utilize procedures for a participant family to oppose a PHA's decision, *inter alia*, to terminate Section 8 benefits.³⁸ Once a PHA has determined that a participant is in violation of the regulations and a participant family has invoked the right to an "informal hearing" to contest the determination, the PHA is required to hold an informal administrative hearing.³⁹

State administrative procedure acts do not apply to Section 8 termination hearings in either Florida or Georgia.⁴⁰ At the informal hearing, the participant

³⁶ 42 U.S.C. § 1437a(b)(6); 24 CFR §§ 982.4, *et seq.*

³⁷ U.S. Dep't of Hous. and Urban Dev., *Assisted Housing: National and Local*, https://www.huduser.gov/portal/datasets/assthsg.html#2009-2018_query; U.S. Dep't of Hous. and Urban Dev., *PHA Contact Information*, https://www.hud.gov/program_offices/public_indian_housing/pha/contacts.

³⁸ 24 C.F.R. § 982.555.

³⁹ *Id.* at (d).

⁴⁰ Fla. Stat. § 120.52 (1); O.C.G.A. §§ 50-13-1, *et seq.*

family may present documents and witnesses explaining their positions.⁴¹ The participant is permitted to question all witnesses and challenge any evidence.⁴² Evidentiary rules for judicial proceedings regarding admissibility are not required, and those rules are often not observed.⁴³ Factual determinations relating to the individual circumstances of the participant family are based on a “preponderance of the evidence” and contained in a brief written decision.⁴⁴

Although many PHAs follow HUD regulations and offer participants fair hearings, not all hold themselves to constitutional standards. In this informal setting, voucher participants sometimes face the loss of their rental assistance based solely upon unreliable, hearsay evidence presented by the PHA.

Attorneys at the Southeast *Amici*, through their representation of families threatened with voucher terminations, have witnessed extraordinary abuses of PHA discretion, when agencies make improper decisions that did not meet minimum due process standards. In many cases, PHAs have relied on police reports or printouts from court websites indicating arrests or charges filed to show that an individual committed a program violation—absent a court finding or other

⁴¹ 24 C.F.R. § 982.555(e)(2).

⁴² *Id.*

⁴³ *See* 24 C.F.R. § 982.555(e)(5).

⁴⁴ 24 C.F.R. § 982.555(e)(6).

evidence to support the claim—to terminate a participant who denies having committed the violation.⁴⁵

In one case, a PHA in Florida sought to terminate a section 8 participant based upon a Facebook post written by her husband, from whom she was separated, which said, “Happy Anniversary!”⁴⁶ The PHA presented the social media post as proof that the husband lived in the subsidized household, even though the participant produced overwhelming evidence—a driver’s license, tax returns, and other mail—all showing a different address for the husband. In that case, the hearing officer upheld the termination based only on the social media posting.⁴⁷ In another case, a PHA terminated a participant for having an unauthorized occupant based solely on a probation form.⁴⁸ The form had been filled out by the participant’s ex-boyfriend, and listed the subsidized unit as his home.⁴⁹ The PHA used that single form to show that he lived with her and the

⁴⁵ See, e.g., *Sanders v. Sellers-Earrest*, 768 F. Supp.2d 1180 (M.D. Fla. 2010) (PHA used police reports as evidence that someone is living in the unit unlawfully without bringing any live witness testimony supporting the allegations)

⁴⁶ *Willis v. Ormond Beach Hous. Auth.*, No. 6:16-cv-00592 (M.D. Fla. filed Apr. 7, 2016).

⁴⁷ *Id.*

⁴⁸ *Corinthian Apartments GP v. Butler*, Case No. 2016-6371-CC-05, 25 Fla. L. Weekly Supp. 90a (Fla. Miami-Dade Cty., 2016).

⁴⁹ *Id.*

hearing officer upheld the termination, even though the PHA presented no witnesses with personal knowledge to support this allegation.⁵⁰

Even more disturbing are the cases where PHAs do not have any evidence to meet the preponderance standard to show that a program violation occurred. In one Georgia case, a PHA terminated the participant for having damages in her unit—after she complained to the PHA about the landlord not making repairs—without ever identifying a legal justification for her termination.⁵¹ The only applicable regulation stated that a participant could be terminated for *causing* damage to the unit beyond normal wear and tear.⁵² The hearing officer upheld the termination, yet later admitted that she never made a determination as to whether the participant or her family had caused the damage for which she was being terminated.⁵³ In that case, the District Court Judge found there was “no evidence in the record” that the participant committed a program violation.⁵⁴

⁵⁰ *Id.*

⁵¹ *Goodman v. Hous. Auth. of DeKalb County*, No. 1:17-cv-00504, (N.D. Ga. filed Feb. 10, 2017).

⁵² 24 C.F.R. § 982.404(b)(1).

⁵³ Opinion and Order, *Goodman*, No. 1:17-cv-00504, 2018 WL 3972364 *14 (2018).

⁵⁴ *Id.*

B. PHA's processes for utilizing hearing officers add to the risk of erroneous deprivation.

In many PHAs throughout Georgia and Florida, hearing officers are not attorneys and have no formal legal training. They can be and often are employees of the same PHA, although HUD regulations prohibit hearing officers from participating in the initial decision to propose program termination (nor can they be a subordinate of that person).⁵⁵ Hearing officers often review decisions made by their own officemates and co-workers. HUD does not provide any further mandates regarding the education or skills that a hearing officer must possess. HUD does not take a stance on whether hearing officers should have legal training or any training at all. As one Federal District Court Judge noted, having administrative hearing officers selected by the agency under review is like “...having the fox guard the hen house. Even the most benign fox can be expected to make supper every now and then.”⁵⁶

Unlike other state and federal agencies which administer public welfare benefits, PHAs do not select or employ their hearing officers for these informal hearings in a consistent, uniform, or predictable manner. Some, such as the Jacksonville Housing Authority in Duval County, Florida, utilize a public request

⁵⁵ 24 C.F.R. § 982.555(e)(4)(i).

⁵⁶ See John L. Kane, Jr., *Public Perceptions of Justice: Judicial Independence and Accountability*, 17 J. Nat'l Ass'n Admin. L. Judges 203, 207 (1997).

for procurement in order to openly solicit bids from private attorneys to act as the hearing officer for all informal hearings that the agency offers. Others, such as the housing authorities present in Miami-Dade County, Florida and DeKalb County, Georgia, utilize existing staff members within the same housing authority for termination hearings. In Augusta, Georgia, the outside counsel for the PHA is not only the hearing officer, but then represents the PHA in eviction proceedings that later stem from the same terminations. A PHA in Volusia County, Florida once used a board member—a local minister—who admonished the Section 8 participant during the hearing regarding the bible’s teachings on raising children.

The variance in hearing officer selection, including the differences in formal legal education, legal experience (either as an attorney, paralegal, or law-adjacent professional), statutory and regulatory expertise, and practical training, substantially heightens the risk of erroneous deprivation of Section 8 voucher benefits. Members of the Southeast *Amici* participated in or challenged hearings where the decision maker engaged in the following unlawful practices: (1) upholding terminations without deciding factual disputes material to the outcome; (2) rendering decisions based on a “sufficient evidence” standard rather than the “preponderance of evidence” standard called for by HUD regulations; (3) refusing to consider relevant legal arguments or defenses; and (4) deciding cases that have the potential to upend participants’ lives without the skills, training or background

to properly adjudicate factual disputes, interpret and analyze legal arguments, or apply the law to the facts in logical written opinions that conform to the minimum standards set by HUD regulations and case law.

A case from Washington, *Shepherd v. Weldon Mediation Servs., Inc.*,⁵⁷ is illustrative of the problems created when hearing officers do not have the qualifications to decide these cases. In *Shepherd*, tenants challenged the qualifications and actions of Lawrence Weldon, a professionally certified mediator (and former union officer) without formal legal training who the Seattle Housing Authority employed as a hearing officer.⁵⁸ The court found, at the preliminary injunction stage, that Weldon had disregarded legal arguments brought by tenants on matters such as the Fair Housing Act, Americans with Disabilities Act, the United States Constitution, and local laws probate or dispositive of grievance matters.⁵⁹ The court also found that Weldon's lack of legal training or experience in administering the applicable law rendered him unqualified to resolve the Seattle Housing Authority grievance matters.⁶⁰ Ultimately, the court rendered a final

⁵⁷ 794 F. Supp. 2d 1173 (W.D. Wash. 2011).

⁵⁸ *Id.* at 1175 – 76. Though the case focused on Weldon's ability to serve as a hearing officer in public housing hearings, it was uncontested that a consent decree in a prior lawsuit had stripped him of his ability to serve as the hearing officer for Section 8 voucher termination hearings. *Hendrix v. Seattle Hous. Auth.*, No. C07-657TSZ (W.D. Wash., consent decree entered Jun. 9, 2008).

⁵⁹ *Id.* at 1181 – 83.

⁶⁰ *Id.* at 1184 – 85.

judgment entering a permanent injunction requiring that the Seattle Housing Authority's hearing officers must both consider and resolve legal arguments presented at grievance hearings and must have the training and experience necessary to consider and resolve legal arguments.⁶¹

As this case illustrates, the wide variance in hearing officer education, experience, and training further increases the already-substantial risks associated with hearsay evidence and other evidence that lacks an opportunity for full cross-examination or discovery. Once before an untrained or inexperienced hearing officer, participant families often finds their benefits terminated simply because of an accusation made by someone not present at the hearing.

PHA employees who handle dozens or hundreds of participant families in the Section 8 program often obtain second-, third-, or fourth-hand information regarding alleged failures to abide by program rules. The PHA employees sometimes propose to terminate a family's housing assistance based on an unverified anonymous tip or loose gossip. Often, there is no more than a summarily short investigation, followed by notice with sparse detail of the basis for the termination.⁶²

⁶¹ *Shepherd v. Weldon Mediation Servs., Inc.*, No. C10-1217RAJ, 2013 WL 1192630 *2 (W.D. Wash. 2013).

⁶² For example, a recent notice issued to a participant in Broward County, Florida, merely stated the following: "BCHA Housing Choice Voucher Participant [name

In cases such as these, the PHA action is far more pernicious than simple error. In many of the examples cited above, PHAs terminated participants' vouchers based on evidence that did not meet the bare minimum of due process standards. In the Georgia case cited above, there was absolutely no evidence in the record that the participant committed a program violation.⁶³ Hearings such as these do not meet the preponderance of the evidence standard that provides the floor needed to justify the government taking away such an important public benefit. If this Court denies constitutional review of cases such as these, PHAs will have free rein to conduct sham hearings with no due process. They would be free to terminate participants based on mere hunch or rumor.

C. Arbitrary and unfair PHA terminations harm families and can have collateral consequences for the program.

The loss of a Section 8 voucher often causes families to become homeless and less stable. In the Georgia case, the client who lost her voucher was immediately evicted and made homeless.⁶⁴ She was forced to move the family's belongings into storage, and she and her eight children lived in a one-bedroom

redacted] is allowing unauthorized resident [name redacted] to reside in the Housing Choice Voucher residence.”

⁶³ Opinion and Order, *Goodman*, No. 1:17-cv-00504, 2018 WL 3972364 *14 (2018).

⁶⁴ Order, *Goodman*, No. 1:17-cv-00504, 2017 WL 714105 *3 (N.D. Ga., signed Feb. 23, 2017) (Granting Motion for Temporary Restraining Order and Preliminary Injunction).

motel in a dangerous neighborhood for months. They lived in overcrowded conditions and had no access to fresh food or cooking facilities. On weekday mornings, the children had to walk in the dark, pre-dawn hours to catch the first of two buses that would take them to school. This family, as all families who lose this valuable assistance, suffered extreme hardship because of the PHA's termination of their Section 8 voucher.

Southeast *Amici* have represented clients in cases where single (and sometimes anonymous) complaints to the PHA lead to participants receiving program violation notices and proposed terminations. Based on our experience representing clients, tenants sometimes experience uninhabitable living conditions that cause them to complain to their local PHA. On occasion, private landlords facing demanding inspections and loss of rental income will submit false complaints to a PHA in retaliation against a participant. Yet, those landlords rarely participate in termination hearings to provide firsthand testimony. If PHAs are given free rein to terminate based on these hearsay statements alone, participants will be hesitant to complain about unsafe and unsanitary conditions for fear of retaliation, and housing quality in the program will suffer.

Southeast *Amici* are also concerned about the impact on domestic violence survivors when PHAs terminate vouchers without meeting the preponderance of the evidence. Federal housing assistance such as a Section 8 voucher can give a

survivor a pathway to freedom, allowing her/him to maintain economic independence and safety from an abusive relationship.⁶⁵ Yet, survivors “often face discrimination in accessing or maintaining housing based on the violent and criminal actions of perpetrators.”⁶⁶ Along those lines, *Amici* defended voucher terminations where domestic violence abusers use false complaints to a PHA to sabotage a victim’s attempt to leave a relationship or to retaliate for calling the police to report violence. If PHAs rely on these statements alone to terminate a participant, they risk the family’s safety. In some cases, a survivor may feel forced to return to the relationship, simply to avoid homelessness.

CONCLUSION

The minimal procedural safeguard of requiring a PHA to meet the preponderance of the evidence standard must be maintained under the *Mathews* test. The procedural requirement must be commensurate with the weight of the private interest at stake, and a Section 8 voucher is critical to a family’s livelihood. Because of the informal nature of these hearings and the wide variance in the qualifications of hearing officers, due process requires that the PHA meet this minimal constitutional threshold when terminating a voucher. Without it, the risk

⁶⁵ McLaughlin, M. and Fox, D., *Housing Needs of Victims of Domestic Violence, Sexual Assault, Dating Violence, and Stalking*, National Low Income Housing Coalition 6-1 (2018).

⁶⁶ *Id.*

of erroneously terminating a family from the voucher program will dramatically increase. This Court should not overrule *Basco* and these families must be able to seek recourse for due process violations using 42 U.S.C. §1983.

Respectfully submitted this 12th day of March, 2019.

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(g)(1)

The undersigned certifies that this Brief complies with the applicable type volume limitations in Rule 32(a)(7). This brief contains 6,130 words, exclusive of the components that are excluded from the word count limitation in Rule 32(f).

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Dated: March 12, 2019

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CERTIFICATE OF SERVICE

In accordance with Rule 25(d) of the Federal Rules of Appellate Procedure, I hereby certify that on March 12, 2019, I electronically filed the Amici Curiae Brief in Support of Appellants by Florida Housing Umbrella Group, Atlanta Legal Aid Society, Inc. and Georgia Legal Services Program using the Court's CM/ECF system, which will automatically send electronic copies to the following counsel of record:

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