No. SC 95944

IN THE MISSOURI SUPREME COURT

KOHNER PROPERTIES, INC.,

Respondent-Plaintiff,

v.

LATASHA JOHNSON,

Appellant-Defendant.

Appeal from the Circuit Court of St. Louis County, No. 15SL-AC07852

Brief of American Civil Liberties Union of Missouri Foundation, Housing Umbrella Group of Florida Legal Services, Lawyers' Committee for Civil Rights Under Law, Legal Services NYC, National Alliance of HUD Tenants, National Housing Law Project, National Law Center on Homelessness and Poverty, National Legal Aid and Defenders Association, and Sargent Shriver National Center on Poverty Law, as *Amici Curiae*, conditionally filed pursuant to Mo. R. App. P. 84.05(f)(3).

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JURISDICTIONAL STATEMENT

Amici adopt the jurisdictional statement as set forth in Appellant Latasha Johnson's brief.

STATEMENT OF INTERESTS OF *AMICI CURIAE*

I. AMERICAN CIVIL LIBERTIES UNION OF MISSOURI FOUNDATION

The American Civil Liberties Union (ACLU) is a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU has more than 500,000 members nationwide. The ACLU of Missouri Foundation, whose forerunner was also founded in 1920, is an affiliate of the national ACLU. The ACLU of Missouri has more than 4,500 members. In furtherance of its mission, the ACLU engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of all rights guaranteed by the federal and state constitutions, including the access to courts that would be limited by the trial court's decision in this case.

II. HOUSING UMBRELLA GROUP OF FLORIDA LEGAL SERVICES

The Housing Umbrella Group of Florida Legal Services, Inc., founded in the 1980s, is an unincorporated statewide association of approximately 175 public interest law attorneys from eighteen independent, county, and regional legal aid organizations; law professors; and housing advocates. Membership includes attorneys from Legal Services of Greater Miami, Inc., and the Community Justice Project. The members of the Housing Umbrella Group provide free civil legal services to low-income persons throughout Florida, and regularly represent tenants in eviction proceedings.

III. LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit civil rights organization founded in 1963 by the leaders of the American bar,

at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under law. Given our nation's history of racial discrimination, de jure segregation, and the de facto inequities that persist, the Lawyers' Committee's primary focus is to represent the interest of racial and ethnic minorities, and other victims of discrimination, where doing so can help to secure justice for all racial and ethnic minorities. The Lawyers' Committee has litigated numerous fair housing claims under the Fair Housing Act, Title VIII of the Civil Rights Act of 1968 and has an important interest in opposing laws that adversely affect low income and minority people.

IV. LEGAL SERVICES NYC

Legal Services NYC is the largest provider of free civil legal services for low income people in the United States. Through our community based offices and numerous outreach sites located throughout the five boroughs of New York City, we serve more than 80,000 families annually. Legal Services NYC has a robust housing practice geared towards preventing evictions, preserving affordable housing, and ensuring clients' apartments are safe. We are familiar with the struggles low-income families face and believe that all individuals have a right to safe and affordable housing.

V. NATIONAL ALLIANCE OF HUD TENANTS

Established in 1991, the mission of the National Alliance of HUD Tenants (NAHT) is to preserve and improve affordable housing, protect tenants' rights, develop tenant empowerment, promote resident control and ownership, improve the quality of life in HUD-assisted housing and to make HUD accountable to its constituents, HUD tenants.

NAHT achieves its mission by providing organizing and technical assistance, public policy advocacy, training, and publications to a national network of voting member tenant organizations and affiliated area wide HUD tenant coalitions or organizing projects. Today, NAHT's membership consists of 260 voting member tenant organizations and 45 affiliated area wide groups. NAHT coordinates its technical assistance to these organizations through the NAHT Network, which meets bi-weekly by teleconference call, and by several issue Task Forces created by the Network to coordinate organizing and training assistance on issues such as Mark to Market, Opt Out/Prepayments, Right to Organize, Inspections and other issues. NAHT is the first national membership organization of resident groups advocating for 2.1 million lower income families in privately-owned, HUD-assisted multifamily housing. Through NAHT, tenants have proven that united action can mount an effective campaign to save people's homes.

VI. NATIONAL HOUSING LAW PROJECT

The National Housing Law Project (NHLP) is a nonprofit national housing and legal advocacy center established in 1968, whose mission is to advance housing justice for low-income people by increasing and preserving the supply of decent, affordable housing; preserving, expanding, and enforcing tenants' rights in housing; improving existing housing conditions; and minimizing involuntary displacement. NHLP partners with a host of individuals and organizations working in the affordable housing arena, including local and national advocates, tenant and advocacy networks, nonprofit developers, and allied housing organizations. NHLP also provides technical assistance to

public housing authorities and other agencies and officials within local and state governments, and to federal policymakers who develop and implement the housing policies affecting our nation's most vulnerable residents. Through policy advocacy and litigation, NHLP has contributed to many critically important changes to federal housing policy and programs that have resulted in increased housing opportunities and improved housing conditions for low-income people, including tenants living in substandard and uninhabitable living conditions.

VII. NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY

The National Law Center on Homelessness & Poverty is the only national legal group dedicated to ending and preventing homelessness. It works to expand access to affordable housing, meet the immediate and long-term needs of those who are homeless or at risk, and strengthen the social safety-net through policy advocacy; public education; impact litigation; and advocacy training and support. It believes all human beings have the right to a basic standard of living that includes safe, affordable housing, healthcare, and freedom from discrimination and cruelty. The Law Center believes the human right to adequate housing must include both legal security of tenure and habitability, and the right to enforce these components of the right in court.

VIII. NATIONAL LEGAL AID AND DEFENDERS ASSOCIATION

The National Legal Aid and Defenders Association (NLADA), founded in 1911, is the oldest and largest national, nonprofit membership organization devoting all of its resources to advocating equal access to justice for all. NLADA champions effective legal assistance for people who cannot afford counsel, serves as a collective voice for both

civil legal aid and public defense services throughout the nation and provides a wide range of services and benefits to its individual and organizational members. NLADA has more than 800 program members in over 2,000 offices that include attorneys, professionals, and client members throughout all 50 states, the District of Columbia, American Samoa, Guam, Puerto Rico and the U.S. Virgin Islands. Our members represent thousands of individuals and families in eviction proceedings, in need of adequate housing and access to the courts.

IX. SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW

Sargent Shriver National Center on Poverty Law ("Shriver Center") uses a unique, proven approach of blending grassroots advocacy and innovative legal theory to promote economic and social justice for low-income people on a national, state, and local level. Through its housing department, the Shriver Center advocates to preserve and improve affordable housing and to ensure the right to safe, decent, and affordable housing is protected. To this end, the Shriver Center represents tenants through litigation and policy advocacy to promote fair housing and improve the quality of affordable housing.

CONSENT OF PARTIES TO FILING OF THIS BRIEF

Appellant Latasha Johnson consents to the filing of this brief. Respondent Kohner Properties, Inc., does not consent to the filing of this brief, and therefore *Amici* have filed for leave to submit this brief pursuant to Mo. R. App. P. 84.05(f)(3).

POINTS RELIED ON

I. THE IMPLIED WARRANTY OF HABITABILITY HAS BECOME AN ESSENTIAL FEATURE OF UNITED STATES HOUSING LAW.

Jeffrey Hiles, *The Implied Warranty of Habitability: A Dream Deferred*, 48 UMKC L. Rev. 237 (1980)

Donald E. Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 UALR L. Rev. 793 (2013)

Krista L. Noonan & Frederick M. Preator, *Implied Warranty of Habitability: It Is Time to Bury the Beast Known as Caveat Emptor*, 33 Land & Water L. Rev. 329 (1998)

II. THE MAJORITY OF STATES HAVE NO BLANKET REQUIREMENT THAT TENANTS MUST ESCROW RENT IN AN ACTION FOR POSSESSION, CONSISTENT WITH DUE PROCESS PRINCIPLES, AND THIS COURT SHOULD LIKEWISE REJECT SUCH A REQUIREMENT.

Lindsey v. Normet, 405 U.S. 56 (1972)

Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970)

Pugh v. Holmes, 405 A.2d 897 (Pa. 1979)

Teller v. McCoy, 253 S.E.2d 114 (W. Va. 1978)

III. THE UNITED STATES'S OBLIGATIONS UNDER INTERNATIONAL LAW ON HOUSING RIGHTS AND ACCESS TO JUSTICE FURTHER SUPPORT ELIMINATING IN CUSTODIA LEGIS

G.A. Res. 217, Universal Declaration of Human Rights (Dec. 10, 1948)

Rep. of the U.N. Conference on Human Settlements (Habitat II), U.N. Doc. A/CONF.165/14 (June 13-14, 1996)

International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966)

Maria Magdalena Sepulveda Carmona (Special Rapporteur on Extreme Poverty and Human Rights), *Report on Access to Justice for People Living in Poverty*, U.N Doc. A/67/278 (Aug. 9, 2012)

IV. LOW-INCOME RENTERS FACE DIRE CIRCUMSTANCES REQUIRING A COURT'S PROTECTION.

Matthew Desmond, *Evicted: Poverty and Profit in the American City* (2016)

Emily Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice*, 65 Am. U.L. Rev. 275 (2015)

U.S. Census Bureau, American Housing Study, 2013 American Housing Study, Table C-05-RO (generated by the Sargent Shriver National Center on Poverty Law, using American FactFinder; http://factfinder2[.]census.gov) (Oct. 13, 2016)[1]

[1] Pursuant to the protocol of the Missouri Supreme Court, all hyperlinks in this brief are separated with the insertion of a []. This is done, pursuant to this Court's protocol, so that the links do not automatically take a reader to the cited website when that link is clicked on. Thus, in order to find the internet source used in this brief, the reader will have to retype the link without the inserted []. Each bracket is inserted around the "period" following "www" or around the first "period" following the "//".

Robert Wood Johnson Found. Comm'n to Build a Healthier Am., *Where We Live Matters for Our Health: The Links Between Housing and Health* (2008)

ARGUMENT

Amici curiae ("*Amici*") American Civil Liberties Foundation of Missouri Foundation, Housing Umbrella Group of Florida Legal Services, Lawyers' Committee for Civil Rights Under Law, Legal Services NYC, National Alliance of HUD Tenants, National Housing Law Project, National Law Center on Homelessness and Poverty, National Legal Aid and Defenders Association, and Sargent Shriver National Center on Poverty Law respectfully submit this brief for the Court's benefit. Through this brief, *Amici* highlight the literature addressing the historical importance of the warranty of habitability and its continued role for economically disadvantaged tenants, how other states have approached the warranty of habitability when used as a defense to an eviction and related due process concerns, the consensus in both domestic and international law regarding tenants' rights to habitable housing, and the social science literature supporting the conclusion that judicially-crafted protections for (often) low-income renters are essential to protect tenants from housing abuses.

I. THE IMPLIED WARRANTY OF HABITABILITY HAS BECOME AN ESSENTIAL FEATURE OF UNITED STATES HOUSING LAW.

Throughout the twentieth century, faced with widespread housing abuses and exploitation of powerless tenants, courts in the United States universally departed from the unforgiving leasehold principles of English feudal law in favor of widespread

adoption of procedures and defenses, such as the implied warranty of habitability, to restore balance in the power between landlords and tenants.[2]

A. In the Years Prior To Widespread Adoption Of The Implied Warranty Of Habitability, Tenants Suffered Hardship With Few Protections Against Landlords.

In the early days of the republic, U.S. courts historically followed English tradition and examined the leasehold relationship within the sphere of property law.[3] Originating in feudal times, English property law principles provided greater rights for the landlord than the tenant.[4] For example, the tenant's obligation to pay rent was absolute, even if the property was completely destroyed during the term of the lease.[5] American courts in the nineteenth century adopted the English doctrine of *caveat emptor*, or "buyer beware,"

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[2] For a detailed history of English common law development and its influence on American landlord-tenant law, see generally Hiram H. Lesar, *Landlord and Tenant Reform*, 35 N.Y.U. L. Rev. 1279 (1960).

[3] *See* 1 Herbert Thorndike Tiffany *Real Property* § 73 (3d ed.); *see also* Hiram H. Lesar, *The Landlord-Tenant Relationship in Perspective: From Status to Contract and Back in 900 Years?*, 9 Kan. L. Rev. 369, 370-72 (1961).

[4] *See* Lesar, *Landlord and Tenant Reform*, *supra* note 2, at 1289.

[5] *See* Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. Rev. 503, 511 (1982).

which shielded landlords from tort liability for structural defects.[6] Tenants in substandard housing were left largely without recourse.

As the United States urbanized in the early twentieth century, the inequity and harshness of the *caveat emptor* doctrine became obvious as residential housing began to require more sophisticated and costly repairs.[7] In recognition of the growing need to create a more equitable landlord-tenant relationship, United States courts began to explore other means to hold landlords accountable for latent defects, breaches of covenants to repair, and negligent repairs.[8] State legislatures throughout the country likewise began promoting tenant rights through housing codes and statutes in response to rapid population growth, increasing urbanization, and concerns about greater social welfare.[9]

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[6] *See* John S. Grimes, *Caveat Lessee*, 2 Val. U. L. Rev. 189, 198 (1968).

[7] *See* Lesar, *The Landlord-Tenant Relationship, supra* note 3, at 372.

[8] *See* Krista L. Noonan & Frederick M. Preator, *Implied Warranty of Habitability: It Is Time to Bury the Beast Known as Caveat Emptor,* 33 Land & Water L. Rev. 329, 331 (1998).

[9] *See* Edward H. Rabin, Symposium, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences,* 69 Cornell L. Rev. 517, 546-54 (1984).

B. With The Development Of The Implied Warranty Of Habitability, Courts Created An Essential Rule To Protect Tenants From Housing Abuses.

While early judicial and legislative solutions provided some avenues of redress for tenants, they did not go far enough. For example, constructive eviction, which allows a tenant to abandon a lease and the property due to a breach of the covenant of quiet enjoyment, provided some relief for severely aggrieved tenants, but became inadequate during the housing shortages of the industrial revolution.[10] Housing codes were also hamstringed by a lack of administrative resources that continues to plague the system today.[11] Despite the best of intentions, courts were slow to order criminal convictions or large fines associated with code violations.[12] Indeed, some landlords considered paying fines the "cost of doing business."[13] "Repair and deduct" statutes did not provide adequate relief either because landlords often found it cheaper to accept the reduced rent than to pay for repairs.[14]

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[10] Donald E. Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 UALR L. Rev. 793, 799 (2013).

[11] *See* Comment, *Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord–Tenant?*, 40 Fordham L. Rev. 123, 127-28 (1971).

[12] *See* Campbell, *Forty (Plus) Years, supra* note 10, at 801.

[13] *Id.*

[14] *See* Comment, *Implied Warranty*, *supra* note 11, at 129.

Spurred by robust movements towards racial equality and poverty mitigation in the 1960s, courts crafted the implied warranty of habitability to aid approximately 4.3 million urban tenants in the struggle against substandard housing.[15] In the seminal case, *Delameter v. Foreman*, 239 N.W. 148 (Minn. 1931), the Supreme Court of Minnesota set the basis for the implied warranty when it held that residential leases have an "implied covenant" that rental premises be "habitable." *Id.* at 149.

The Wisconsin Supreme Court was also a leader in articulating the implied warranty of habitability to excuse tenants from their rent obligations, finding a breach of the warranty where a rental had defective plumbing, heating, and wiring systems. *Pines v. Perssion*, 111 N.W.2d 409, 413 (Wis. 1961). Other states quickly followed suit. *See, e.g., Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1076-77 (D.C. Cir. 1970) (surveying state law).

In Missouri, in response to a "contemporary housing shortage and resultant inequality in bargaining power between the landlord and tenant," the Missouri Court of Appeals adopted the implied warranty of habitability in 1973. *King v. Moorehead*, 495 S.W.2d 65, 71 (Mo. Ct. App. 1973). After surveying the prevailing law at the time, the *King* court concluded that

> in every residential lease there [is] an implied warranty by the landlord that the dwelling is habitable and fit for living at the

[15] *See* Tom L. Davis, *Cooperative Self-Help Housing*, 32 L. & Contemp. Probs. 409, 409 (1967).

> inception of the term and that it will remain so during the entire term. The warranty of the landlord is that he will provide facilities and services vital to the life, health and safety of the tenant and to the use of the premises for residential purposes.

Id. at 75. The implied warranty of habitability thereafter enjoyed widespread recognition; in 1974, the American Law Institute reformed the Restatement of the Law (Second) of Property to incorporate the warranty.[16]

In the 1970s, states also began to adopt the Uniform Residential Landlord and Tenant Act to incorporate the implied warranty of habitability into their statutory frameworks. Uniform Residential Landlord and Tenant Act ("URLTA") § 2.104 (Nat'l Conference of Comm'rs on Unif. State Laws 1972). This model legislation requires landlords to maintain premises in a "fit and habitable condition." *Id.* § 2.104(2). More recently, state legislatures such as Alabama, Colorado, and Indiana have adopted variants of the implied warranty of habitability. *See* Ala. Code. § 35-9A-204 (2006); Colo. Rev. Stat. § 38-12-503 (2008); Ind. Code Ann. § 32-31-8-5 (2002). Indeed, every state with the sole exception of Arkansas has adopted some remedy for a landlord's breach of the warranty of habitability.[17]

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[16] *See* Rabin, *Revolution*, *supra* note 9, at 558 n.222, 559 (citing Restatement (Second) of Property, Landlord & Tenant (Am. Law Inst. Tent. Draft No. 2 1974)).

[17] Campbell, *Forty (Plus) Years*, *supra* note 10, at 809.

C. An Available Implied Warranty Of Habitability Is Critical To Providing Vulnerable Renters With Leverage To Improve Untenable Living Conditions.

The implied warranty of habitability remains an important sword and shield for tenants to combat abusive landlords. Depending on the jurisdiction, a tenant may affirmatively claim that the landlord has failed to maintain the premises, or she may use the implied warranty as a defense in a rent-recovery action by the landlord.[18] The warranty thus offers a direct route for the tenant to check a landlord's abuses—his pocketbook.

This leverage is critical to an often otherwise powerless tenant, but also to the broader wellbeing of the community. As the Supreme Court of Wisconsin observed in *Pines v. Perssion*, "[p]ermitting landlords to rent 'tumbledown' houses is at least a contributing cause of such problems as urban blight, juvenile delinquency, and high property taxes for conscientious landowners." 11 N.W.2d at 413. Tenants therefore need the power to seek redress for substandard housing conditions, which can result in a host of ailments including "dermatitis, respiratory distress, asthma, lead poisoning, and injuries."[19]

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[18] *See id.* at 808; Chris R. Hogshead, *Landlord and Tenant—Covenant of Habitability*, 10 Tulsa L. J. 150, 150-51 (1974).

[19] Emily A. Benfer & Amanda M. Walsh, *When Poverty is the Diagnosis: The Health Effects of Living Without on the Individual*, 4 Ind. J. L. & Soc. Equal. 1, 3 (2016). For a

As discussed below, the lack of legal resources for low-income renters heightens the need for the defense of the implied warranty—without excessive procedural hurdles for *pro se* litigants, such as the *in custodia legis* requirement.[20] Early scholarship in Missouri after *King v. Moorehead* correctly observed that "[m]any of those who face the most severe and inadequate housing are low income tenants. It is unrealistic to expect a tenant living in poverty, who withholds his rent, not to spend that money on other necessities of life."[21] In adopting a harsh and broadly applicable escrow requirement, Missouri courts may unintentionally "aid and abet slum conditions and allow landlords to escape liability for maintaining premises below minimum housing standards."[22] Other states, in limiting the escrow requirement, show their hesitancy to follow such a course.

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more complete discussion of the social science literature addressing the vulnerabilities of the renting population, see *infra* Part IV.

[20] *See* Helaine M. Barnett, *Justice for All: Are We Fulfilling the Pledge?*, 41 Idaho L. Rev. 403, 419 (2005).

[21] Jeffrey Hiles, *The Implied Warranty of Habitability: A Dream Deferred*, 48 UMKC L. Rev. 237, 253 (1980).

[22] *Id.*

II. THE MAJORITY OF STATES HAVE NO BLANKET REQUIREMENT THAT TENANTS MUST ESCROW RENT IN AN ACTION FOR POSSESSION, CONSISTENT WITH DUE PROCESS PRINCIPLES, AND THIS COURT SHOULD LIKEWISE REJECT SUCH A REQUIREMENT.

Across the country, states typically provide multiple means by which a tenant may pursue remedies for a landlord's breach of the warranty of habitability. *See, e.g.*, Ala. Code. § 35-9A-401; Md. Code § 8-21; Or. Rev. Stat. § 90.360. For a tenant with limited resources, however, the most realistic option often will be to remain in the home and withhold her rent as a means of inducing her landlord to bring the home to a standard fit for human habitation. Ideally, the landlord will promptly resolve the tenant's concerns, returning the premises to a safe, healthy environment, and allowing the tenant to enjoy the benefit of her bargain with the landlord. But all too often, instead of remedying the serious defect, the landlord will commence an action against the tenant for possession for nonpayment of rent.[23]

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[23] This is precisely the scenario that occurred in the instant action. As recounted by the Court of Appeals, Ms. Johnson had notified her landlord of defects in her apartment posing serious dangers to her health and safety and that of her young, physically disabled daughter. *Kohner Props., Inc. v. Johnson*, No. ED 103133, 2016 WL 4760904, at *1-2 (Mo. Ct. App. Sept. 13, 2016). Instead of remedying the problems, the landlord filed suit for rent and possession for unpaid rent. *Id.* at *1. In Ms. Johnson's answer, she advanced an affirmative defense and counterclaim that her landlord had breached the implied

Like Missouri, many states permit the tenant to defend and/or counterclaim in such an eviction action on the ground that the landlord breached his statutory or judicial duty to maintain the property in a fit and habitable condition. *E.g.*, Me. Rev. Stat. tit. 14, § 6002(3); *Valentine v. Barclay Ass'n*, No. 286622, 2009 WL 3365753, at *3 (Mich. Ct. App. Oct. 20, 2009) (citing *Rome v. Walker*, 196 N.W.2d 850 (Mich. Ct. App. 1972)); *Law v. Franco*, 690 N.Y.S.2d 893, 896 (N.Y. Sup. Ct. 1999) (citing *Park W. Mgmt. Corp. v. Mitchell*, 391 N.E.2d 1288 (N.Y. 1979)). The trial court's interpretation in this case of the *in custodia legis* requirement based on *dicta* in *King v. Moorehead*, however, effectively cuts off an indigent tenant's access to the warranty of habitability. A tenant in Ms. Johnson's position, for example, may have limited funds such that she has to choose between paying for a hotel so that her disabled daughter can bathe or escrowing rent so that she may present a meritorious defense to an eviction action.

The majority of states have no blanket pay-into-court requirement. *See Kohner Props.*, 2016 WL 4760904, at *17 (citing Restatement (Second) of Property § 11.3 n.2, 4

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warranty of habitability. *Id.* at *2. The trial court deprived Ms. Johnson of the defense on the grounds that she had not paid rent into court. *Id.* at *2. It did so even though it had never ordered Ms. Johnson to pay rent into court or notified her of such a requirement. Even in jurisdictions that require rent to be paid into court, the tenant will typically be notified of the requirement, either by notice or by the court's order requiring payment of rent into court. *E.g.*, Colo. Rev. Stat. § 38-12-507(c); Fla. Stat. § 83.60(2); Nev. Rev. Stat. § 118A.490(1); Wash. Rev. Code § 59.18.375(2).

(Am. Law Inst. 1977) (2016 update)). In fact, a number of the states that explicitly permit breach of the warranty to be asserted as a defense or counterclaim in eviction actions make no mention of a requirement to deposit rent with the court. App. A, tbl.3. In these states, a tenant can presumably divert some or all of her rent money to seeking alternate housing or medical care, while at the same time, maintaining access to the habitability defense and her right to fully participate in the eviction proceeding. Other states contemplate a pay-into-court requirement in limited instances where the tenant has made a request that will delay a decision on the merits of the landlord's claims, such as a request for a continuance of the trial date, a trial by jury, or a stay of the proceedings. *Id.* tbl.5. Under these circumstances, the tenant is on notice of the pay-into-court requirement and has nonetheless elected to make a request triggering the requirement.

Amici fully agree with and endorse the position taken by Appellant Ms. Johnson and respectfully submit that fundamental principles of due process mandate that tenants who invoke breach of the warranty of habitability as a defense to an eviction action should not be required to deposit rent with the court.

In any event, at a bare minimum, this Court should give a trial court discretion to decide whether a tenant in possession should be made to deposit rent with the court, and if so, how much. This approach has the chief benefit of providing tenants with notice of the requirement. It also provides the trial court an early opportunity to evaluate whether the habitability defense has been brought in good faith and consider the plight of tenants subject to uninhabitable conditions. And, under the approach advocated by *Amici*, a

tenant's financial inability to comply with this order would not deprive her of the opportunity to raise an inhabitability defense at the eviction hearing.

A. Imposing A Blanket Requirement That Tenants Must Deposit All Rent Claimed To Be Due In Order To Raise A Warranty Of Habitability Defense Violates The Tenant's Due Process Right To Be Heard.

Both the U.S. and Missouri Constitutions prevent a person from being "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V; *id.* amend. XIV, § 1; Mo. Const. art. I, §10. Residential tenancies are a property interest protected by these due process guarantees. *Greene v. Lindsey*, 456 U.S. 444, 450-51 (1982); *Lindsey v. Normet*, 405 U.S. 56, 65 (1972). One of the bedrock principles of due process ensures that every party to a lawsuit can be heard and that the ultimate decision will be based on the merits of the case. The Supreme Court has held that "[t]he fundamental requisite of due process of law is the opportunity to be heard," *Grannis v. Ordean*, 234 U.S. 385, 394 (1914), and due process requires "an opportunity to present every available defense" before a person can be deprived of property. *Lindsey*, 405 U.S. at 66 (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)). Missouri cannot require tenants to deposit rent in order to raise a warranty of habitability defense without violating this important right.

A tenant cannot be stripped of the opportunity to be heard on his or her defenses solely because the tenant fails to deposit rent with the court. In *Lindsey*, the U.S. Supreme Court considered Oregon's eviction statute and held that a tenant cannot be denied an opportunity to present defenses in an eviction proceeding because the tenant

failed to deposit rent with the court. The Oregon statute required the court to schedule a trial within six days after the landlord filed the action, and the statute required a tenant to deposit rent only if the tenant wanted a continuance of the trial. 405 U.S. at 63. The Supreme Court upheld this statute and rent deposit requirement. *Id.* at 64-69. The Supreme Court later explained in *Fuentes v. Shevin*, 407 U.S. 67 (1972), that it upheld Oregon's rent deposit requirement in *Lindsey* because "the tenant was not deprived of his possessory interest even for one day without opportunity for a hearing." *Id.* at 85 n.15. The *Lindsey* Court also warned that a rent deposit requirement would be unconstitutional if it were "applied so as to deprive a tenant of a proper hearing" on the merits of the eviction proceeding. 405 U.S. at 65. Thus, imposing a blanket requirement that a tenant deposit the rent claimed to be due or forfeit his or her right to a hearing on the merits is precisely what *Lindsey* said would be unconstitutional.

While it is true that *Lindsey* held that Oregon could constitutionally decouple a warranty of habitability counterclaim from the eviction, that holding is inapplicable to this case because Missouri allows a tenant to raise the warranty of habitability as a defense to eviction. *Detling v. Edelbrock*, 671 S.W.2d 265, 270 (Mo. 1984) (en banc), *abrogated on other grounds by Green v. City of St. Louis*, 870 S.W.2d 794 (Mo. 1994) (en banc). The *Lindsey* Court approved Oregon's framework requiring the tenant to bring a separate lawsuit regarding housing conditions because the warranty of habitability was not a defense to an eviction action in Oregon, but rather a separate claim for damages. If the warranty of habitability was a clearly recognized defense in Oregon, or if the landlord could have sued the tenant for damages in the eviction, the outcome would have been

different. "There is no showing that Oregon excludes any defenses it recognizes as 'available' on the three questions (physical possession, forcible withholding, legal right to possession) at issue in an FED suit." *Id.* at 69. Thus, since Missouri authorizes breach of the warranty of habitability as a defense to an eviction action and a landlord can sue the tenant for damages in such an action, under the *Lindsey* analysis, a tenant in Missouri must be heard on a habitability defense to comply with due process.

The unconstitutionality of a blanket requirement to post all rent claimed to be due is further apparent when analyzed utilizing the factors adopted by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. As to the first requirement, the Supreme Court has acknowledged that one's home is a private interest of "historic and continuing importance." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53-54 (1993). And, this interest extends to the homes of tenants. *Greene*, 456 U.S. at 451 (noting that tenants in eviction actions face "depriv[ation] of a significant interest in property: indeed, of the right to continued residence in their homes"). In describing tenants' homes, the U.S. Court of Appeals for

the Eleventh Circuit said that "[o]ne's home certainly ranks among the most cherished property interests that due process protects, and the uninterrupted enjoyment of its comforts and security is undoubtedly a significant private interest." *Grayden v. Rhodes*, 345 F.3d 1225, 1233 (11th Cir. 2003).

A rent deposit requirement raises serious concerns under the second *Mathews* factor. Tenants with valid habitability defenses may be prevented from raising those defenses and evicted because of a blanket rent deposit requirement. While upper-income tenants might find such a barrier simply an inconvenience, for poor tenants—those most vulnerable to unscrupulous landlords—such a requirement effectively prevents them from receiving a hearing on their defenses. A blanket rent deposit requirement effectively closes the courthouse door for those most likely to need the protection of the courts.

An erroneous deprivation can have serious consequences for tenants. As explained more fully *infra* Part IV, numerous studies have documented a close relationship between evictions and homelessness.[24] Evicted families generally end up in worse housing with higher housing costs.[25] Displacement and relocation can result in the loss of a job, problems in school, loss of personal possessions, and severe mental health

[24] Chester Hartman & David Robinson, *Evictions, The Hidden Housing Problem*, 14 Housing Pol'y Debate 461, 468 (2003).

[25] *Id.*

impacts.[26] All of these problems are further exacerbated in that evicted families are overwhelmingly poor, minority, and headed by women.[27] The impacts of eviction impose additional costs on state and local governments in social services, shelters, and related benefits.[28]

Landlords may argue that a rent deposit requirement prevents an erroneous deprivation of their rental property. But a blanket rent deposit requirement is not narrowly tailored to prevent a landlord from incurring a loss occasioned by the tenant asserting a defense. With a rent deposit requirement, the tenant may be required to deposit funds that were allegedly due before the case was filed. *Cf. Bell*, 430 F.2d at 483 (D.C. Cir. 1970) (finding that any inclusion of back rent alleged to be due would not be protective but would simply be a penalty). A blanket rent deposit requirement requires no showing that the landlord could lose the property through an imminent foreclosure. *Cf. id.* at 484. A blanket rent deposit requirement would not take into account the economic circumstances of the tenant. *Id.* And perhaps most importantly, since due process requires the landlord to proceed to trial, a blanket rent deposit requirement does not protect the landlord from delayed litigation. Indeed in the present case, all parties

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[26] *Id.* at 469; *see generally* Mindy Thompson Fullilove, *Root Shock: How Tearing Up City Neighborhoods Hurts America and What We Can Do About It* (2004).

[27] Hartman & Robinson, *supra* note 24, at 467.

[28] Creola Johnson, *Renters Evicted En Masse: Collateral Damage Arising From the Subprime Foreclosure Crisis*, 62 Fla. L. Rev. 975, 984-85 (2010).

were present when the court held a trial, admitted evidence, and heard witness testimony. The result of that trial, in which the judge found that the landlord violated basic housing codes but ignored those findings believing it was prohibited by the tenant's failure to deposit rent, highlights the fundamental unfairness to tenants.[29]

A blanket rent deposit requirement such as the one imposed by the trial court serves but one purpose: it denies poor tenants the ability to raise their defenses before a judge and to have their day in court. The burden of mandatory rent payments and the risk of eviction falls particularly heavy on the poorest tenants with the result that most landlords would be able obtain possession without ever having to address or improve the conditions of the rental unit.[30]

The third *Mathews* factor also weighs against a rent deposit requirement, because allowing tenants to raise habitability defenses during evictions proceedings will have a minimal fiscal or administrative burden on the state. And Missouri's overriding interest

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[29] *See* David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 Cal. Law Rev. 389, 431 (2011) (suggesting that landlord protective orders' "delay-preventing rationale would make an accelerated trial on the merits a logical response to nonpayment of escrow").

[30] *Id.* at 432 (explaining that blanket rent deposit orders "provide the greatest benefit to the least responsible landlords: those who fail to maintain their units—and thus who would be most likely to lose in a trial on the merits—and those willing to act ruthlessly to drive an assertive tenant from her or his dwelling").

in the administration of justice is fairness, and not simply efficiency. Due process guarantees more than just a correct outcome. It guarantees the parties the belief in the impartial application of justice. That belief is sorely undermined when one of the parties is unable to even raise arguments to a court solely due to her poverty. *See, e.g.*, *Carey v. Piphus*, 435 U.S. 247, 262 (1978) ("[A] purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests."); *Hovey v. Elliott*, 167 U.S. 409, 414 (1897) ("To say that courts have inherent power to deny all right to defend an action, and to render decrees without any hearing whatever, is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."). For that reason, the third *Mathews* factor also weighs in favor of allowing Missouri tenants to raise the habitability defense without depositing rent.

B. *Amici* Agree With Appellant That Requiring A Low-Income Tenant To Either Vacate The Premises Or Escrow Rent Imposes An Unfair Burden And Should Be Rejected.

Consistent with these due process principles—as well as for the reasons stated in Appellant's brief, international law and norms discussed in Part III, and the extensive social science literature regarding the hardships faced by low-income renters summarized in Part IV—*Amici* respectfully submit this Court should reject any procedural requirement that a tenant must vacate premises or deposit rent as a condition for asserting

a claim or defense for breach of the warranty of habitability. In fact, in virtually all other legal contexts, a party asserting a claim or defense is not required, as a matter of course, to provide security for litigation. *See Bell v. Tsintolas Realty Co.*, 430 F.2d 474, 479 (D.C. Cir. 1970) ("Certainly such a protective order represents a noticeable break with the ordinary processes of civil litigation, in which, as a general rule, the plaintiff has no advance assurance of the solvency of the defendant."). As the Court of Appeals correctly observed, "[i]t is unclear . . . why a landlord is entitled to the special protection of being assured of recovery on a monetary judgment before the tenant can even raise an otherwise permissible defense or counterclaim." *Kohner Props., Inc.*, 2016 WL 4760904, at *15.

C. At Minimum, The Court Should Adopt An Approach Providing The Trial Court Discretion.

Nevertheless, if this Court does not wholly reject a rent deposit requirement, *Amici* respectfully suggest that the Court should adopt an approach that affords the trial court discretion to determine on a case-by-case basis whether rent escrow should be required. Relying on equitable principles, numerous state courts and legislatures have concluded such a discretionary approach is appropriate. *Compare* App. A, tbl.1, *with id.* tbl.4. Specifically, fifteen states and the District of Columbia have affirmatively granted the trial court discretion in determining whether to impose a pay-into-court scheme when the tenant remains in possession of the home and has withheld rent on the grounds that the landlord breached the warranty of habitability. *Id.* tbl.1. The majority of those states allow the court to choose between requiring the tenant's payment of all, some, or no rent

into court. *Id.* Six of the states that require tenants to deposit rent still permit the trial court discretion to lower the amount the tenant must pay. *Id.* tbl.4. And three states—Arizona, Massachusetts, and Pennsylvania—mandate the court to hold a hearing before requiring rent to be deposited with the court. *Id.* tbl.2. In all of these states, the tenant would have clear notice of any requirement to pay rent into the court by virtue of the court order—a protection entirely lacking under the trial court's interpretation of *King v. Moorehead*.

Moreover, courts across the country have repeatedly expressed concern about the burden imposed on tenants by an automatic pay-into-court scheme, and many have endorsed—and in some circumstances mandated—approaches providing lower courts with discretion as to whether to require such deposits. For instance, in the landmark case *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), the D.C. Circuit declined the tenants' offer to pay rent into the court during the pendency of the litigation. *Id.* at 1083 n.67. The *Javins* court opined that the requirement to deposit rent with the court could be an "excellent protective procedure" if the tenant remained in possession, but the procedure should be left to the trial court's discretion. *Id.* Moreover, the *Javins* court indicated that the tenant should be required to deposit rent for only a limited period of time—the time between when the landlord files suit and the trial date. *Id.*

The Supreme Court of Pennsylvania similarly adopted a discretionary approach in *Pugh v. Holmes*, 405 A.2d 897 (Pa. 1979). The landlord in that case urged the Supreme Court to require a mandatory method of escrowing unpaid monies as a precondition to asserting a defense based on the breach of warranty in an eviction proceeding. *Id.* at 907.

The high court expressly rejected the request. *Id.* Rather, it held that "the decision whether a tenant should deposit all or some of the unpaid rents into escrow should lie in the sound discretion of the trial judge or magistrate." *Id.* In determining whether rent should be escrowed, the Pennsylvania Supreme Court suggested that trial courts might consider such factors as the seriousness and duration of the alleged defects and the likelihood that the tenant will be able to successfully demonstrate breach of the warranty. *Id.*

The Supreme Court of Appeals of West Virginia took the same approach, even emphasizing that it should be the landlord's burden to establish the need for the deposit of rent. In *Teller v. McCoy*, 253 S.E.2d 114 (W. Va. 1978), the Court concluded that West Virginia courts may enter a "protective order" requiring the tenant to pay rent into escrow. *Id.* at 129-30. It cautioned that such orders "are not favored" and should be "permitted 'only in limited circumstances, only on motion of the landlord, and only after notice and opportunity for a hearing on such a motion.'" *Id.* at 130 (quoting *Bell*, 430 F.2d at 480). The *Teller* court put the burden on the landlord to show "an obvious need for such protection," which must be balanced against "the apparent merits of the tenant's defense." *Id.* In those few cases where the landlord proves an "obvious need," the court may require the tenant in possession to make payment into the court pending disposition of the case. *Id.* Alternatively, if the landlord has an "obvious need" and the tenant seems to have a claim of "some apparent merit," the *Teller* court encouraged lower courts to order an amount less than the full monthly rent. *Id.*

Other states' appellate courts have likewise concluded that a discretionary escrow requirement is the most equitable procedure for both landlords and tenants. *See Hinson v. Delis*, 102 Cal. Rptr. 661, 666 (Cal. Ct. App. 1972) ("If the tenant claims that all or a part of the rent is not due because of defects in the premises, the trial court may . . . at the request of either party, require the tenant to make the rental payments . . . into court . . . ."), *abrogated on other grounds by Knight v. Hallsthammar*, 623 P.2d 268, 273 n.7 (Cal. 1981) (en banc); *Marini v. Ireland*, 265 A.2d 526, 535 (N.J. 1970) (suggesting that "if the trial of the matter is delayed the defendant may be required to deposit the full amount of unpaid rent in order to protect the landlord if he prevails").

State legislatures have also recognized the prudence of an approach that affords trial courts discretion as to whether to require the tenant to pay rent into court to bring a claim or counterclaim for the landlord's breach of warranty. *See* App. A, tbl.1 (listing ten states that adopted the majority rule by statute). For instance, Oregon's Residential Landlord and Tenant Act provides that, in the event the tenant files such a counterclaim in an eviction action, "the court at the landlord's or tenant's request *may* order the tenant to pay into court all or part of the rent accrued and thereafter accruing" and "*may* at any time release money paid into court to either party if the parties agree or if the court finds such party to be entitled to the sum so released." Or. Rev. Stat. § 90.370(1)(b) (emphasis added). In *Napolski v. Champney*, 667 P.2d 1013 (Or. 1983), the Oregon Supreme Court noted this language is "permissive" and gives "the trial court some discretion and flexibility based upon the circumstances of the particular case." *Id.* at 1021 n.15. As an example, the *Napolski* Court noted "if the tenant's counterclaim appears meritorious and

could exceed the rent conceded due, the trial court may choose not to require the tenant to pay any rent into court." *Id.*

The wisdom of permitting the trial judge discretion in setting whether and how much rent should be escrowed is apparent. The trial court is positioned to weigh the hardships created by the pay-into-court scheme against the landlord's risks should the court decline to impose the scheme. And trial courts with experience in overseeing landlord-tenant disputes are well suited to evaluate the credibility of the tenant who alleges that his landlord has breached the warranty and to sniff out frivolous claims. Under these circumstances, the trial court may exercise sound discretion to require rent to be deposited when tenants seek to bring or defend facially meritless claims.

By contrast, a mandatory pay-into-court scheme deprives courts of the flexibility to reduce the tenant's rent or altogether decline the rent requirement based on the circumstances of a particular case. It is unfortunately a well-established pattern that a hostile landlord may, for example, force a tenant to live in squalor, declining repeatedly to remedy hazards in the tenant's home that render it unfit for a human habitation. *See, e.g.*, *Williams v. Hous. Auth. of Balt. City*, 760 A.2d 697, 698 (Md. 2000) (noting that a housing authority failed to respond to complaints that the tenant's "house was infested with rodents and other vermin; the bathtub leaked water, causing sinking holes in the floors and mildew and water damage in other rooms; and there was a large hole in the kitchen ceiling above the stove, from which debris fell into meals when [the tenant] cooked"). In such cases, a mandatory pay-into-court scheme could prevent the tenant from advancing a meritorious defense to her eviction.

D. If Escrowed Rent Is Required In Some Circumstances, This Court Should Define The Boundaries Of The Trial Court's Discretion By Articulating Factors Trial Courts Should Consider, Prohibiting The Deposit Of Back Rent Into Court, And Prohibiting A Trial Court From Imposing The Sanction Of Eviction If the Tenant Cannot Financially Comply With An Escrow Order.

If this Court concludes that escrowed rent may be required in the trial court's discretion, that discretion should not be unfettered. Appellate courts and legislatures in several other states have defined boundaries on trial courts' discretion to ensure that low-income tenants receive adequate protections. This Court should do the same.

First, appellate courts in several states and the District of Columbia have identified factors that should guide the court's analysis in setting an escrow requirement, including, *inter alia*, the hardships of the parties, the bad faith of the parties, and the conditions of the premises. *See, e.g.*, *Pugh*, 405 A.2d at 907 ("Factors to be considered include the seriousness and duration of the alleged defects, and the likelihood that the tenant will be able to successfully demonstrate the breach of the warranty."); *Teller*, 253 S.E.2d at 130 ("[T]he trial court may consider '. . . the amount of rent alleged to be due, the number of months the landlord has not received even a partial rent payment, the reasonableness of rent for the premises, the amount of the landlord's monthly obligations for the premises, whether the tenant has been allowed to proceed in the *forma pauperis*, and whether the landlord faces a substantial threat of foreclosure.'" (omission in original) (quoting *Bell*, 430 F.2d at 484)); *see also Bell*, 430 F.2d at 484 (discussing considerations for a court

entering an order requiring a tenant to pay rent into a court pending litigation, including that "the tenant's financial condition may render the original burden so heavy as to preclude litigation of meritorious defenses"). By articulating specific factors that the trial courts should consider, this Court will aid those trial courts in making decisions concerning escrow and will ensure that a meaningful hearing is held before imposing any rent deposit requirement on the tenant.

Second, some states and the District of Columbia have limited any discretionary deposit requirement to rent that becomes due during the pendency of the litigation and have expressly barred the court's collection of back due rent. *See, e.g.*, *Javins*, 428 F.2d at 1083 n.67 ("The escrowed money will . . . represent rent for the period between the time the landlord files suit and the time the case comes to trial."); *Garcia v. Cruz*, 164 Cal. Rptr. 3d 408, 412 (Cal. App. Dep't Super. Ct. 2013) (noting that the trial court's interim order for back rent in a possession action was not authorized by law); *Circle Mgmt., LLC v. Olivier*, 882 N.E.2d 129, 136 (Ill. App. Ct. 2007) (holding that Illinois's Forcible Entry and Detainer Act authorizes trial courts to require tenants to pay use and occupancy charges to landlords during the pendency of the forcible entry and detainer action). *Amici* suggest the Court adopt this approach. Requiring the payment of back rent may very well be asking a tenant to pay for a benefit that she has not received—namely, habitable housing—and strikes tenants as a penalty. *See, e.g.*, *Law*, 690 N.Y.S.2d at 896 ("[T]he notion that a tenant may be penalized *during the pendency* of proceedings which are brought by the tenant to enforce housing standards, or brought by

way of counterclaim for an abatement for breach of the warranty of habitability, strikes this court as illogical and arbitrary." (emphasis in original)).

Finally, some states have made clear that failure to comply with a court order requiring the payment of rent into court does not bar the tenant from raising a habitability defense or otherwise obtaining a hearing as to the landlord's possession claim. *See, e.g.*, *Circle Mgmt.*, 882 N.E.2d at 141 (holding that the court may not award possession to the landlord until considering the merits of the underlying possession claim). Should a tenant prove financially unable to comply with a court's order to pay rent into court, *Amici* respectfully suggest that the trial court should hold an immediate hearing on the merits of the defense. If the purpose of the pay-into-court scheme is to prevent the landlord from losing rent payments while a delinquent tenant resides in the dwelling rent for free, then an immediate hearing alleviates the need for payment of rent into court at all.

In sum, a survey of case law across the country shows that even in numerous states where trial courts have discretion to impose a rent deposit requirement on tenants facing eviction proceedings, high courts and legislatures have crafted measures to protect low-income tenants facing substandard housing conditions.

* * *

As a threshold matter, for the reasons advanced by Appellant and the legal and social principles discussed by *Amici* in this brief, this Court should eliminate any requirement to escrow rent in order to assert a claim or defense of the implied warranty of habitability. At the very least, however, this Court should define the boundaries of the trial court's discretion by articulating factors the court should consider when determining

whether to adopt a pay-into-court scheme, barring any requirement that back rent be paid into court, and prohibiting the imposition of the sanction of eviction if the tenant cannot financially comply with an escrow order.

III. THE UNITED STATES'S OBLIGATIONS UNDER INTERNATIONAL LAW ON HOUSING RIGHTS AND ACCESS TO JUSTICE FURTHER SUPPORT ELIMINATING *IN CUSTODIA LEGIS*.

Under international law, just as under domestic law, the *in custodia legis* requirement should not be an automatic prerequisite to a tenant's raising the warranty of habitability as a defense or counterclaim. Core international human rights treaties—including ones ratified or signed by the United States—provide that adequate housing is a human right and that meaningful access to justice is critical to safeguarding that right.

A. International Human Rights Law Should Guide Domestic Constitutional Interpretation.

International law—including ratified treaties and customary international law—has been part of the United States' legal framework and held enforceable by state and federal courts since the founding of this nation. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations." (citing cases)); *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) ("International law . . . is part of our law, and must be ascertained and administered by the courts of justice . . . ."); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) ("[T]he Court is bound by the law of nations which is a part of the law of the

land."). This Court has previously drawn on "the views of the international community," including international treaties and agreements, to inform its conclusions. *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 411 (Mo. 2003).[31]

Both the treaty obligations of the United States and customary international law are binding upon state and federal courts. Under the Supremacy Clause, "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or

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[31] Several federal agencies have recently affirmed the relevance of human rights standards to informing policy on the criminalization of homelessness. *See* U.S. Interagency Council on Homelessness, *Searching out Solutions: Constructive Alternatives to the Criminalization of Homelessness* 8 (2012) ("In addition to violating domestic law, criminalization measures may also violate international human rights law . . . ."); U.S. Dep't of Hous. & Urban Dev., *Alternatives to Criminalizing Homelessness*, https://www[.]hudexchange.info/homelessness-assistance/alternatives-to-criminalizing-homelessness (last visited Oct. 22, 2016), (stating "criminalization policies . . . may even . . . violate our international human rights obligations"); Letter from U.S. Dep't of Justice, Office for Access to Justice, to Seattle City Council Members Lisa Herbold, Rob Johnson, Mike O'Brien & Kshama Sawant 3 (Oct. 13, 2016), https://assets[.]documentcloud.org/documents/3141894/DOJ-ATJ-Letter-to-Seattle-City-Council-10-13-2016.pdf (stating that the Department of Justice had previously acknowledged "the human rights of people experiencing homelessness").

Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2; *see* Restatement (Third) of Foreign Relations Law § 701 cmt. E (Am. Law Inst. 1987) ("The United States is bound by the customary international law of human rights."). International treaty obligations supersede inconsistent state laws. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 204 (1796).

B. The United States Has Accepted Obligations With Regard To The Human Rights To Housing, Non-Discriminatory Access To Housing, And Access To Justice.

Amici respectfully submit that continued application of the *in custodia legis* requirement for tenants that intend to raise a breach of the implied warranty of habitability defense or counterclaim would be plainly inconsistent with the United States' obligations under international law.

First, the United States has accepted basic commitments to the principle that all people have the right to adequate housing. G.A. Res. 217 (III) A, art. 25(1), Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Economic, Social and Cultural Rights art. 11(1), Jan. 3, 1976, 993 U.N.T.S. 3 (signed by the U.S. on Oct. 5, 1977) [hereinafter ICESCR]. In June 1996, the United States and 150 other countries participated in the United Nations Conference on Human Settlements to discuss and pledge support for "adequate shelter for all." Rep. of the U.N. Conf. on Human Settlements (Habitat II), U.N. Doc. A/CONF.165/14, ¶ 2 (June 13-14, 1996). They specifically reaffirmed their "commitment to the full and progressive realization of the right to adequate housing, as provided for in international instruments." *Id.* ¶ 39.

Although these are not ratified treaties, the U.S. State Department affirmed in 2011 that the United States is "committed to not defeating the object and purpose" of the ICESCR, and emphasized "the U.S. policy of providing food, housing, medicine, and other basic requirements to people in need." Michael H. Posner, Asst. Sec'y, Bureau of Democracy, Human Rights & Labor, The Four Freedoms Turn 70, Address to the American Society of International Law (Mar. 24, 2011), http://www[.]state.gov/j/drl/rls/rm/2011/159195.htm; *see also* Restatement (Third) of the Foreign Relations Law of the United States § 312(3) (Am. Law Inst. 1987) ("Prior to the entry into force of an international agreement, a state that has signed the agreement or expressed its consent to be bound is obliged to refrain from acts that would defeat the object and purpose of the agreement.").

Second, the United States has ratified treaties that guarantee the individual right to be free from discrimination, including in housing. G.A. Res. 2106, Annex art. 5(e)(iii) (1966) (ratified by the U.S. on Nov. 20, 1994); *see also* U.N. Charter art. 55(c) (promoting the "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"); U.N. Comm'n Human Rights Res. No. 2004/21 ¶ 6(e)(i) (Apr. 16, 2004) (calling upon States to "ensur[e] non-discriminatory access to adequate housing for indigenous people and persons belonging to minorities").

Third, the United States has covenanted to ensure that all individuals have meaningful access to justice. Access to justice is "much more than improving an individual's access to courts" and "must be defined in terms of ensuring that legal and judicial outcomes are just and equitable." U. N. Development Programme (UNDP),

Access to Justice Practice Note 6 (Sept. 3, 2004). Under the International Covenant on Civil and Political Rights ("ICCPR"), ratified by the United States in 1992, the State parties agree that "[a]ll persons shall be equal before the courts and tribunals." G.A. Res. 2200A (XXI), art. 14(1) (Dec. 16, 1966). Other international conventions have similar provisions. *See, e.g.*, The American Declaration of the Rights and Duties of Man, OAS Res. XXX, adopted by the Ninth International Conference of American States, art. XVIII (signed by the U.S. on May 2, 1948) ("Every person may resort to the courts to ensure respect for his legal rights."); Organization of American States, American Convention on Human Rights, art. 25, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (signed by the U.S. on June 1, 1977) ("Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state.").

For the reasons that follow, an *in custodia legis* requirement in Missouri would violate this nation's international human rights obligations.

C. Human Rights Law Requires Removal Of Arbitrary Barriers To Access To Justice And To Housing.

This Court should conclude it violates international norms of due process and equality before the law to require a tenant to deposit the entire contracted-for rent to a court *in custodia legis* as an automatic prerequisite to raising the breach of the warranty of habitability as a defense or counterclaim. Such a requirement disproportionately affects low-income tenants whose inability to deposit rent into the court causes them to lose their housing. That these tenants are not allowed to first assert a defense or

counterclaim and have a court hearing on the merits to determine whether their homes are habitable is an indisputable deprivation of their access to justice. "Access to justice is essential for tackling poverty and protecting the human rights of persons living in poverty. . . . When the poor are unable to access justice equally and without discrimination, they are prevented from enjoying and claiming their human rights, and from seeking remedies to violations of their rights." Maria Magdalena Sepulveda Carmona (Special Rapporteur on Extreme Poverty and Human Rights), *Report on Access to Justice for People Living in Poverty*, U.N Doc. A/67/278, ¶ 92 (Aug. 9, 2012) [hereinafter Carmona, Report on Access to Justice].

Access to justice is a principle that underpins the protection of all human rights. Failure to ensure meaningful access to justice thus also undermines the substantive human right to housing. The United Nations Committee on Economic, Social, and Cultural Rights, which monitors the ICESCR, has stated that "[a]dequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well." Comm. on Economic, Social, and Cultural Rights on Its Sixth Session, General Comment 4, The Right to Adequate Housing, U.N. Doc. E/1992/23, ¶ 8(d) (Dec. 13, 1991). An inability to bring a legal challenge to the habitability of one's home therefore violates international law norms. *See id.* ¶ 8(a) ("[A]ll persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats."); Carmona, Report on Access to Justice, ¶ 62 ("Lack of legal aid for civil

matters can seriously prejudice the rights and interests of persons living in poverty, for example when they are unable to contest tenancy disputes . . . ."). Indeed, the ICCPR provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence," and that "[e]veryone has the right to the protection of the law against such interference or attacks." G.A. Res. 2200 (XXI), Section A, Annex Part III, art. 17 (Dec. 16, 1966).

When an *in custodia legis* requirement prohibits vulnerable tenants from raising a breach of the warranty of habitability defense or counterclaim, those tenants are prevented from exercising their legal rights. Accordingly, this Court should interpret the Missouri Constitution consistent with international human rights standards.

IV. LOW-INCOME RENTERS FACE DIRE CIRCUMSTANCES REQUIRING A COURT'S PROTECTION.

Tenants living in uninhabitable housing face a dire situation: try to repair poor housing conditions themselves or somehow finance a move they likely cannot afford. Low-income tenants are more likely to live in substandard housing, with people of color disproportionately impacted by poor rental housing quality.[32] Tenants may be motivated

[32] Approximately 41.4 million households in the United States rent their homes, with tenants making up 35.6% of total households. U.S. Census Bureau, American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table B25003 (generated by the Sargent Shriver National Center on Poverty Law, using American FactFinder; http://factfinder2[.]census.gov) (Oct. 13, 2016). Low-income

to finance repairs or utility services necessitated by the landlord's failure to provide habitable housing, and they may feel justified in doing so based on the reduced value of their home. Tenants likewise may be unable to pay their rent as a result of health conditions exacerbated by the poor quality of their housing. Tenants may also choose to save their rent money so they can afford to move to habitable housing, which requires money for background checks, first month's rent, security deposits or move-in fees, and a moving truck, among other costs.

For those tenants who withhold rent for one or more of these reasons, the propriety of their withholding decision will often be adjudicated in eviction court. Depriving such

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households are more likely to be tenants, and people who are low-income are disproportionately people of color. For example, approximately 59.5% of households earn less than $25,000 per year rent, compared with only 17.3% of households earning more than $75,000 per year. U.S. Census Bureau, American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table B25118 (generated by the Sargent Shriver National Center on Poverty Law, using American FactFinder; http://factfinder2[.]census.gov) (Oct. 13, 2016). As of 2014, 57% of African-American households and 53.7% of Hispanic or Latino households are tenants, compared with only 28.1% of non-Hispanic white households. U.S. Census Bureau, American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table B25003B, B25003H, B25003I (generated by the Sargent Shriver National Center on Poverty Law, using American FactFinder; http://factfinder2[.]census.gov) (Oct. 13, 2016).

a tenant of an opportunity to be heard likely guarantees the housing unit will remain uninhabitable, which may ultimately force the tenant into homelessness.

A. Low-Income Tenants Are Unable To Move Quickly When Housing Becomes Uninhabitable.

There is not a state, county, or metropolitan area in the United States in which a full-time worker earning the state's minimum wage can afford to rent a modest two-bedroom apartment.[33] As a result, low-income tenants are unlikely to be able to afford to move even when their housing becomes uninhabitable. This is the problem of rent burden. Residents are considered to be rent burdened when they spend more than 30 percent of their income on rent. In the United States, 38.3% of tenants spend more than 35% of their income on rent, and 23.5% spend more than 50% of their income on rent.[34] African-American, Hispanic, and Latino households are disproportionately likely to face rent burdens, with 46.4% of African-American and 49.9% of Hispanic or Latino tenant

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[33] Nat'l Law Income Hous. Coalition, *Out of Reach: No Refuge for Low Income Renters* 1-3 (2016), http://nlihc[.]org/sites/default/files/oor/OOR_2016.pdf. To afford a two-bedroom apartment in Missouri, a full-time worker must earn $14.98, nearly double the state's minimum wage of $7.65. *Id.* at 130.

[34] U.S. Census Bureau, American Community Survey, 2010-2014 American Community Survey 5-Year Estimates, Table B25070 (generated by the Sargent Shriver National Center on Poverty Law, using American FactFinder; http://factfinder2[.]census.gov) (Oct. 13, 2016).

households spend more than 35% of their income on rent, and 30% of African-American households and 31.9% of Hispanic or Latino households spending more than 50% of their income on rent.[35] Many tenants may be both rent burdened under their lease agreement and spending more than their housing is worth due to the uninhabitable housing conditions.

When tenants are rent-burdened, they cannot save for unexpected expenses, including an emergency move as a result of uninhabitable housing conditions that a landlord refuses to remedy. Moving is expensive. To finance a move, tenants are generally required to pay first month's rent, a security deposit or move-in fee, background check fees, and actual moving costs.

B. Substandard Housing Conditions Burden Both Individuals and Communities.

Poor housing quality can lead to permanent health problems, which have a substantial cost and impact not only the individual but on society as well. Poor housing conditions pose particular harm to children and the elderly, who are most vulnerable to the permanent effects of home-based health hazards. Low-income communities of color disproportionately experience health impacts caused by substandard housing. The health

[35] U.S. Census Bureau, American Housing Study, 2013 American Housing Study, Table C-05-RO (generated by the Sargent Shriver National Center on Poverty Law, using American FactFinder; http://factfinder2[.]census.gov) (Oct. 13, 2016).

effects of hazardous housing can also result in medical bills and missed school or work days, further frustrating a tenant's ability to pay rent.

When tenants withhold their rent and end up in eviction court, imposing a financial burden essentially denies them the right to raise the defense of the warranty of habitability. This exacerbates the harm done to the tenant and his or her community.

1. Substandard Housing Conditions Can Lead To Poor Health

Low-income tenants are likely to experience adverse health consequences as a result of substandard housing conditions. Tenants may experience a range of health issues, including respiratory problems caused by mold, lead poisoning from lead paint or pipes, and physical injury due to structural deficiencies. When five housing characteristics were studied—quality, stability, affordability, ownership, and receipt of housing assistance—poor quality housing was the strongest and most constant predictor of emotional and behavioral problems in low-income children and teens.[36] Tenants living in substandard housing may stop paying rent so they can afford pest control or space heaters or other expenses necessitated by the landlord's failure to provide habitable housing.

[36] Rebekah Levine Coley, *Poor Quality Housing Is Tied to Children's Emotional and Behavioral Problems*, MacArthur Found. 2 (Sept. 2013), https://www[.]macfound.org/media/files/HHM_Research_Brief_-_September_2013.pdf.

Children living in substandard housing are likely to experience asthma-related health effects resulting from indoor allergens.[37] As a result of these housing conditions, children are more likely to miss school and suffer resulting educational delays.[38] Approximately 40% of childhood asthma cases can be attributed to allergen exposure in the home, and this exposure plays a significant role in asthma-related deaths.[39] Mold exposure in homes causes approximately 21% of asthma cases in the United States.[40] According to one study, infants exposed to high mold levels at home are twice as likely to develop childhood asthma.[41] In addition to mold, pest infestations exacerbate asthma,

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[37] Marcus Powlowski, *Making Public Health Motivated Evictions Consistent with the Right to Housing*, 9 Quinnipiac Health L.J. 271, 281 (2006).

[38] *See, e.g.*, Coley, *supra* note 36, at 2; Powlowski, *supra* note 37, at 281.

[39] Robert Wood Johnson Found. Comm'n to Build a Healthier Am., *Where We Live Matters for Our Health: The Links Between Housing and Health*, 2 (2008), http://www[.]commissiononhealth.org/PDF/e6244e9e-f630-4285-9ad7-16016dd7e493/Issue%20Brief%202%20Sept%2008%20-%20Housing%20and%20Health.pdf.

[40] David Mudarri & William J. Fisk, *Public Health and Economic Impact of Dampness and Mold*, 17 Indoor Air J. 4, 226, 235 (2007).

[41] Tiina Reponen, *High Environmental Relative Moldiness Index During Infancy as a Predictor of Asthma at 7 Years of Age*, 107 Annals of Allergy, Asthma, & Immunology 120, 126 (2011).

allergies, and other respiratory health issues.[42] Pest infestations disproportionately impact low-income tenants of color.[43]

Additionally, millions of tenants nationwide live in lead-contaminated housing.[44] Although lead paint and pipes have been banned inside homes for decades, their impact lingers and can cause irreparable harm when not properly abated. Lead exposure can lead to neurological damage, learning disabilities, behavioral health problems, high blood pressure, stunted growth, seizures, anemia, gastrointestinal distress, coma, and even

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[42] *See generally* Sachin Baxi & Wanda Phipatanakul, *The Role of Allergen Exposure and Avoidance in Asthma*, 21 Adolesc. Med.: State of the Art Revs. 57 (2010), https://www[.]ncbi.nlm.nih.gov/pmc/articles/PMC2975603/pdf/nihms240280.pdf.

[43] Of children with asthma in rental housing, 59.5% are children of color, and 45% of children in rental housing who have asthma live in households with incomes below the federal poverty line. U.S. Census Bureau, American Housing Study, 2011 American Housing Study, Table S-01-RO (generated by the Sargent Shriver National Center on Poverty Law, using American FactFinder; http://factfinder2[.]census.gov) (Oct. 13, 2016).

[44] *See Protect Your Family from Exposures to Lead*, EPA, https://www[.]epa.gov/lead/protect-your-family-exposures-lead (last visited Oct. 22, 2016) ("Lead paint is still present in millions of homes, sometimes under layers of new paint.").

death.[45] Young children are the most vulnerable to the permanent effects of lead poisoning because lead interferes with early brain development.[46] These effects are irreversible.[47] Over 500,000 young children in the United States are estimated to have elevated blood lead levels.[48] Further, significant lead exposure during pregnancy can result in miscarriage, stillbirth, premature birth, and low birth weight.[49] When a landlord fails to abate a lead hazard in a rental property, low-income tenants are forced to choose between living in a home that is potentially permanently damaging their children or financing an emergency move that they may be unable to afford.

[45] Emily Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice*, 65 Am. U.L. Rev. 275, 293-95 (2015).

[46] *Id.* at 294-95.

[47] *Id.* at 295.

[48] U.S. Ctrs. for Disease Control & Prevention, *Blood Lead Levels in Children Aged 1-5 Years–United States, 1999–2010*, 62 Morbidity and Mortality Weekly Report 238, 246 (April 5, 2013), http://www[.]cdc.gov/mmwr/pdf/wk/mm6213.pdf.

[49] *Lead Poisoning and Health*, World Health Org., http://www[.]who.int/mediacentre/factsheets/fs379/en (last visited Oct. 22, 2016).

Additionally, deficiencies in plumbing, electricity, structural integrity, and heating, affect 9% of all tenants.[50] Tenants with inadequate heat not only risk exposure to dangerously cold temperatures in the winter, but a lack of adequate heat leads to a greatly increased risk of carbon monoxide poisoning. Of tenant households with inadequate heat, 32.5% have incomes below the federal poverty line, and 47.4% of tenants with inadequate heat are African-American, Hispanic, or Latino.[51] Many tenants with inadequate heat turn to alternatives, such as extra space heaters or heating their apartment with their ovens, which can cause fires and increase the risk of carbon monoxide poisoning.[52] Space heaters can spark electrical overloads and fires when used excessively, leading to 21,800 annual residential fires, over 6,000 annual injuries, and 300 annual deaths, all of which are preventable.[53] Additionally, injuries incurred in the

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[50] Joint Center for Housing Studies of Harvard University, *The State of the Nation's Housing*, 32 (2015), http://www[.]hchs.harvard.edu/sites/jchs.harvard.edu/files/jchs-sonhr-2015-full.pdf.

[51] U.S. Census Bureau, American Housing Study, 2013 American Housing Study, Table C-05-RO (generated by the Sargent Shriver National Center on Poverty Law, using American FactFinder; http://factfinder2[.]census.gov) (Oct. 13, 2016).

[52] U.S. Dep't of Hous. & Urban Dev. & U.S. Dep't of Health & Human Servs., *Healthy Housing Reference Manual* § 12-12 (2006), https://www[.]cdc.gov/nceh/publications/books/housing/housing_ref_manual_2012.pdf.

[53] *Id.*

home due to structural hazards and inadequacies lead to approximately 4 million emergency room visits and 700,000 hospital admissions annually.[54] Severe physical problems exist in 2.9% of all tenant households, with these problems falling disproportionately on low-income households and racial and ethnic minorities.[55]

C. Substandard Housing Can Lead To Out-of-Pocket Expenses Low-Income Residents Cannot Afford And Can Cause Lost Earning Potential.

Even when substandard housing is the cause of their health conditions, many low-income tenants must choose between paying for medical treatment and paying rent.[56]

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[54] Robert Wood Johnson Found. Comm'n to Build a Healthier Am., *supra* note 39, at 2.

[55] Of this population, 37.1% have incomes below the federal poverty line. African-American, Hispanic, and Latino households make up approximately 40.6% of the population of tenants, but 50.1% of tenant households whose homes have severe physical problems are African-American, Hispanic, or Latino. U.S. Census Bureau, American Housing Study, 2013 American Housing Study, Table C-05-RO (generated by the Sargent Shriver National Center on Poverty Law, using American FactFinder; http://factfinder2[.]census.gov) (Oct. 13, 2016).

[56] As of 2014, 13.4% of Missourians did not have health insurance, and the low-income insured who are not eligible for Medicaid are unlikely to be able to afford to pay for unexpected medical bills. U.S. Dep't of Health & Human Servs., *5 Years Later: How the Affordable Care Act Is Working for Missouri*, http://www[.]hhs.gov/healthcare/facts-and-

Health problems caused by substandard housing often result in emergency room visits and can result in missed work and school days. [57] And the health impact of home-based hazards such as lead exposure, allergens, inadequate heat, and structural deficiencies are not limited to one's physical health. Studies have shown that the stress of living in substandard housing takes a psychological toll on both parents and children.[58]

Home-based health hazards have extreme costs not only on the individuals who are immediately affected but on the larger society as well. For example, eliminating asthma-inducing hazards such as mold and pests would decrease the estimated 500,000 hospitalizations, 1.8 million emergency room visits, 12.3 million physician office visits, and 10.5 million school days missed each year, which together amount to an estimated annual cost of $56 billion in medical expenses and lost productivity.[59] One study links 21% of asthma cases to indoor mold exposure, with an estimated $3.5 billion lost

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features/state-by-state/how-aca-is-working-for-missouri/index.html (last updated Nov. 2, 2015).

[57] Robert Wood Johnson Found. Comm'n to Build a Healthier Am., *supra* note 39, at 6.

[58] *See generally* Rebekah Levine Coley et al., *Relations Between Housing Characteristics and the Well-Being of Low-Income Children and Adolescents*, 49 Developmental Psychol. 1775 (2013).

[59] Office of Policy & Dev. Research, U.S. Dep't of Hous. & Urban Dev., *Leveraging the Health–Housing Nexus*, *Evidence Matters* (Winter 2016), https://www[.]huduser.gov/portal/periodicals/em/winter16/highlight1.html.

annually in missed school and work days, medical costs, and mortality.[60] Lead poisoning likewise costs society between $192 to $270 billion annually in medical treatment, lead-linked ADHD cases, lost earnings, tax revenue, special education, and criminal activity.[61]

D. Eviction Impairs Low-Income Tenants' Abilities To Rent Housing In The Future.

When a tenant is evicted without the ability to present her defense in court, the cost to that tenant is steep. An evicted family loses their home, their school, their neighborhood, and frequently, their possessions. To make matters worse, evicted families generally relocate to worse neighborhoods and lower quality housing than families who move under less demanding circumstances.[62]

Evicted tenants face immediate barriers to finding housing because they must move quickly. Eviction almost always leads to increased residential instability and homelessness, including relocation to low-opportunity neighborhoods and to substandard

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[60] *See generally* David Mudarri & William J. Fisk, *Public Health and Economic Impact of Dampness and Mold*, 17 Indoor Air J. 226 (2007).

[61] Elise Gould, *Childhood Lead Poisoning: Conservative Estimates of the Social and Economic Benefits of Lead Hazard Control*, 117 Envtl. Health Persp. 1162, 1165 (2009).

[62] Matthew Desmond & Tracey Shollenberger, *Forced Displacement from Rental Housing: Prevalence and Neighborhood Consequences*, 52 Demography 1751, 1763 (2015).

housing.[63] As the evicted tenant is desperately trying to avoid homelessness, she typically moves to homes with conditions worse than those of her previous housing.[64]

Even after the initial move after an eviction, once a tenant has an eviction record, she will most likely be unable to obtain habitable housing in the future. Landlords frequently use tenant screening reports to select prospective tenants and reject applicants perceived as undesirable. These reports are obtained from various companies that collect court records and create tenant screening reports.[65] Typically, the reports contain a standard credit report, a criminal background check, and a list of possible housing court actions against the individual.[66] While the mere filing of an eviction action can make it more difficult to find housing prospectively, a tenant who is actually evicted will face even greater difficulty.[67] A tenant screening report may say, for example, that tenants are "not adjudicated as the prevailing party" unless they obtain a judgment in their favor.[68]

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[63] Matthew Desmond, *Evicted: Poverty and Profit in the American City* 296 (2016).

[64] *Id.* at 297.

[65] Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal To Protect Public Records*, 116 Yale L.J. 1344, 1356 (2007).

[66] *Id.*

[67] Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 Nw. U.L. Rev. 1667, 1680-81 (2008).

[68] Mary Spector, *Tenant Stories: Obstacles and Challenges Facing Tenants Today*, 40 J. Marshall L. Rev. 407, 416 (2007).

Applicants who have evictions listed on their screening reports are virtually guaranteed to be pushed to the worst rental housing stock, often to uninhabitable apartments in low-income, segregated communities.[69] Given these applicants' eviction histories, landlords may also demand higher rents or excessive move-in fees or security deposits, leaving these tenants open to the risk of future evictions because they cannot afford the higher cost of housing.[70]

Recently evicted tenants also have a difficult time qualifying prospectively for affordable housing programs. If a tenant is evicted from a subsidized housing program, he or she is frequently denied subsidized housing in the future.[71] Many public housing authorities likewise reject tenants with eviction records and debts owed to previous

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[69] Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 Am. J. Soc. 88, 118 (2012).

[70] Kleysteuber, *supra* note 65, at 1377.

[71] *See, e.g.*, 24 C.F.R. § 960.203(c)(1) (providing that public housing authorities may consider an applicant's "past performance in meeting financial obligations, especially rent"); Hous. Auth. of Kansas City, Mo., *Admissions and Continued Occupancy Policy* ch. 3 at 9-10, http://www[.]hakc.org/affordable_housing/liph_acop.aspx (instructing that "applicants must demonstrate through an assessment of current and past behavior the ability . . . [t]o pay rent and other charges required by the lease in a timely manner" and "[n]ot owe debts to other landlords").

landlords.[72] When a tenant is evicted from a subsidized housing program, it is also highly unlikely that he or she will be able to find available subsidized housing later due to its scarcity.

* * *

The social science literature highlighted here shows the need for safe, stable, and affordable housing and reflects at least two core problems. Removing the rent-deposit barrier to tenants' access to habitability claims and defenses in eviction proceedings will help to improve the safety of rental properties and reduce the prevalence and cycle of eviction.

CONCLUSION

For the foregoing reasons, this Court should reject any procedural requirement that a tenant must vacate premises or deposit rent as a condition for asserting a claim or defense for breach of the warranty of habitability, or, at a minimum, guide trial courts in the exercise of discretion when rent deposit may be required.

[72] 24 C.F.R. § 960.203(c); Hous. Auth. of Kansas City, *supra* note 71.

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned hereby certifies:

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 13,373, excluding the cover, certificate of service, this certification, the signature block, and the appendix, as counted by Microsoft Word software; and

2. The attached brief includes all of the information required by Supreme Court Rule 55.03; and

3. The attached brief was served by means of the electronic filing system this October 24, 2016, upon Counsel of Record.

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