

CASE NO. S-22-272

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IN THE  
NEBRASKA SUPREME COURT

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NP DODGE MANAGEMENT CO.,

Appellee,

v.

TERESA HOLCOMB,

Appellant.

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ON APPEAL FROM THE DISTRICT COURT  
OF DOUGLAS COUNTY, NEBRASKA

Honorable Judge Michael Coffey presiding

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BRIEF OF AMICI CURIAE  
ACLU OF NEBRASKA AND IOWA-NEBRASKA STATE CONFERENCE OF THE  
NAACP IN SUPPORT OF APPELLANT

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**STATEMENT OF THE CASE**

Amici adopt the Appellant's Statement of the Case.

**PROPOSITIONS OF LAW**

Amici adopt the Appellant's Propositions of Law.

**STATEMENT OF FACTS**

Amici adopt the Appellant's Statement of Facts.

**STATEMENT OF INTEREST OF AMICI CURIAE**

Amici direct the Court to their Motion for Leave to File Brief of Amicus Curiae for their statements of interest.

## INTRODUCTION

This appeal puts before the Court a historical issue of the right to a jury trial on factual issues in an eviction trial, a matter of special importance to women, especially Black women, and their children, as well as people with disabilities.

## ARGUMENT

### **I. The Originalist Analyses of this Court and the U.S. Supreme Court in *Pernell v. Southhall Realty* Confirm that Nebraska’s 1875 FED Statute’s Guarantee of a Jury Trial Is Determinative of the Article I, §6 Jury Trial Right in Contemporary NURLTA Eviction Trials**

This Court has long embraced an Originalist test for the jury trial guarantee set forth in Article I, §6 of the Nebraska Constitution: “The right of trial by jury shall remain inviolate....’[...]the purpose of this constitutional provision is to preserve the right to a jury trial as it existed at common law and under statutes in force when the Nebraska Constitution was adopted in 1875.” *Eihusen v. Eihusen*, 272 Neb. 462, 466, 723 N.W.2d 60, 63 (Neb. 2006). Both the Nebraska ejectment and forcible entry and detainer (“FED”) statutes provided for a jury trial in 1875. The Nebraska FED statutes barred landlord self-help and required landlords to regain possession via a judicial determination that the tenant was not entitled to possession. The FED legislation provided for extremely expedited proceedings—and it expressly provided either party the right to a jury trial. 1873 Rev. Stat. Terr. Neb. Tit. XVIII, Ch. X, §1028.

The determination of whether there is a right to a jury trial in eviction proceedings properly takes note of the historical evolution that has occurred in Nebraska landlord-tenant law and is reflected in the Nebraska Uniform Residential Landlord and Tenant Act (“NURLTA”). It also must be informed by a generous construction of the Article I, §6 jury trial right, which is warranted by the breadth and exuberance of its text--“the right of trial by jury shall remain inviolate”—and by the

Framers' inclusion of the jury trial right in the Nebraska Constitution and its placement in the Constitution's *first* Article, which guarantees individual rights.

Because no Nebraska case has interpreted the Article I, §6 jury trial right in a context similar to the contemporary Nebraska summary possession proceeding, precedent leads directly to *Pernell v. Southhall Realty*, 416 U.S. 363 (1974). *See, e.g., Ex parte Moore*, 880 So.2d 1131, 1135 (Ala. 2003). *Pernell* engaged in Originalist analysis of the constitutional jury trial right in the context of the District of Columbia statute's eviction procedure, which in all material respects was identical to the NURLTA. Each allows trial within 14 days of issuance of summons, and each allows the tenant to contest disputed factual issues and to counterclaim that the landlord had not met its maintenance obligations. In the instant case, whether Teresa Holcomb's words of frustration violated the "violent criminal acts" clause of her lease was a disputed factual issue that she was entitled to have decided by a jury. In *Pernell*, the disputed factual issue was whether lack of habitability reflected sufficient landlord noncompliance with housing code provisions to constitute a defense to the eviction action. *Id.* at 364 n.1. The *Pernell* Court held that the Seventh Amendment jury trial right was not strictly limited to common law proceedings that existed in 1791 and would apply to any contemporary "action [that] involves rights and remedies of the sort traditionally enforced in an action at law." *Id.* at 375. As eviction actions were actions at law historically, *Pernell* concluded that a jury trial right was constitutionally required.

The West Virginia Supreme Court's decision in *Criss v. Salvation Army Residences*, 319 S.E.2d 403 (W.Va. 1984), interpreting the West Virginia Constitution jury trial provision (whose text was virtually identical to Nebraska Article I, §6) is on point—both as to the facts and the Court's analysis. The issue was whether the landlord had grounds to terminate the lease, including the contested factual allegation that the tenant caused a disturbance in the parking lot. *Criss* held the tenant had a constitutional right to a jury trial right in

an eviction trial based on the *Pernell* reasoning that ejectment and FED proceedings were actions at law and therefore a jury trial was required in contemporary eviction trials.

*Pernell* considered and rejected the argument that jury trials would burden the District's court system, and instead found that "the trial court's power to grant summary judgment...provides a substantial bulwark against any possibility that a defendant will demand a jury trial simply as a means of delaying an eviction." 416 U.S. at 384. *Pernell* and *Criss* recognized that most evictions based on nonpayment of rent are uncontested and will continue to be resolved without a jury trial. *Pernell* at 384; *Criss* at 407. Nebraska eviction trials occur in county court where 6-person juries and a non-unanimous verdict are the operative procedures, further easing concerns about burden on the Nebraska judicial system. Neb. Rev. Stat. §25-1125.

The NURLTA also fashioned additional safeguards that guarantee the economic protection of a landlord. Section 76-1428(1) provides that "the landlord may recover reasonable attorney's fees" if a tenant asserts an eviction defense that is "without merit and not raised in good faith," and section 76-1437 provides that the landlord may recover up to 3 months' rent, or treble damages, whichever is greater, AND a reasonable attorney's fee if a tenant's holdover is willful and not in good faith. *See also* §§76-1416(2) and 76-1431(3).

Amici urge this Court to follow *Pernell* and *Criss* and hold that Ms. Holcomb was entitled to a jury trial in the eviction proceeding initiated by NP Dodge based on either, or both, of the two independent rationales this Court has fashioned—because actions to recover possession of real property were considered actions at law in 1875 and because the statutes governing FED eviction proceedings in 1875 expressly provided for a jury trial. *See* Stephen Kalish, *The Nebraska Residential Landlord and Tenant Act*, 54 Neb. L. Rev. 603, 694 (1975) ("Kalish").

The core issue on the merits of Ms. Holcomb's eviction trial was factual under the criminal acts termination provisions in §76-1431(4)



and the lease. Issues of fact under the U.S. and Nebraska Constitutions are for the jury, if one is requested, to decide. Historically, harkening back to the Magna Carta and a vital part of the U.S. Constitution's Bill of Rights, the right to a jury trial was intended to secure and preserve the Rule of Law.

"She was yelling and waving her arms and walking real fast," Bill of Exceptions at 34, hollering, "I'll kick your fuckin' ass." *Id.* at 29. All in the course of 45 to 60 seconds—did Teresa Holcomb commit a "violent, criminal act" or make a threat to put other tenants in reasonable apprehension of imminent harmful conduct? That is a question of fact. There was no police report, charges, or arrest. *Id.* at 38. The trial judge thought it "laughable" that the 31-year-old man was put in fear, *Id.* at 60, though his mother said she was. The trial judge concluded, "[i]t's just a heated comment, but I think that's enough." *Id.* at 61. Under the Nebraska Constitution, however, it was for a jury, not the judge, to decide that issue of fact.

## **II. NURLTA §76-1443's Extraordinary Cause Continuance Limitation, When Coupled with the NURLTA's Expedited Eviction Process, Makes the Abbreviated Eviction Process Vulnerable to Due Process Challenge under *Lindsey*; Recognition of a Jury Trial Right Would Reduce That Constitutional Vulnerability**

This Court can rule that a jury trial is required in the instant case and limit its holding strictly to the facts of the case. However, holding so narrowly would be contrary to property law's goal of stability as it would leave a perception that this important aspect of landlord-tenant law is unsettled. Amici submit that this Court's ruling take into consideration its compatibility with the NURLTA overall and with judicial efficiency. This requires careful consideration of *Lindsey v. Normet*, 405 U.S. 56 (1972), in the context of the NURLTA, its underlying landlord-tenant law and FED process, both of which are significantly different from the Oregon law *Lindsey* upheld.

In *Lindsey*, two components of Oregon's eviction procedures were challenged as unconstitutional. One embraced the common law rule of independent covenants and severely limited the litigable issues to nonpayment of rent; the other provided an exceptionally abbreviated timeline for the trial. *Lindsey* upheld both as consistent with due process, but it emphasized that its holding was confined to proceedings "where the tenant fails to pay rent or holds over after expiration of his tenancy and the issue in the ensuing litigation is simply whether he has paid or held over." *Id.* at 64-65. Although the *Lindsey* Court did not indicate its significance, it noted that Oregon provided the parties with a right to a jury trial in FED cases.

Shortly after *Lindsey*, the Uniform Residential Landlord Tenant Act was adopted as a model act, and its purpose was to provide a more balanced law of landlord-tenant. The elimination of the common law doctrine of independent covenants was the exemplar of its fundamental changes that provided more protection for tenants. Versions of it were soon enacted in 21 states, including Nebraska, in 1974. The NURLTA provided tenants with a host of judicially enforceable rights that could be asserted as affirmative claims and as counterclaims that could be interposed as defenses in eviction actions. The NURLTA continued the expeditious summary eviction trial and the right to jury trial; however, the right to a jury trial was stricken in 1995. While experience indicates that only a minority of eviction cases will actually be litigated, the systemic NURLTA reforms sought to ensure that tenants with meritorious claims could contest lease terminations and/or assert counterclaims/defenses based on landlord noncompliance with the NURLTA.

Two key URLTA provisions authorize tenant defenses and counterclaims in the eviction proceedings. Section 76-1445 provides, "[o]n or before the day fixed for his appearance, the defendant may appear and answer and assert any legal or equitable defense, setoff, or counterclaim." Section 76-1428 provides, "In an action for possession based upon nonpayment of the rent or in an action for rent where the tenant is in possession, the tenant may counterclaim for any amount

which he or she may recover under the rental agreement or the URLTA.”

Professor Kalish persuasively suggested that section 76-1428 should be construed “as a subclass of section 76-1445, and to allow a defendant to counterclaim in any suit for possession. This interpretation will promote judicial efficiency, and if a plaintiff is harmed, he can move to have the counterclaim tried separately.” Kalish at 691. There are other NURLTA provisions, such as the prohibition of landlord retaliation, that authorize tenant counterclaims that can double as defenses against an eviction lawsuit. Neb. Rev. Stat. §§76-1439(2); 76-1405. *See also* Neb. Rev. Stat. §§76-1415(2); 76-1420(1); 76-1425(2); 76-1430; 76-1438(2). These changes in Nebraska landlord-tenant law have significantly increased the likelihood of contested factual issues arising in eviction trials, as in Ms. Holcomb’s case, and the resolution of factual issues—finding the truth—has always been the key historic role for a jury.

Ms. Holcomb’s eviction trial was clearly more factually complex than *Lindsey*. Furthermore, because the NURLTA allows for tenant counterclaims to offset a landlord’s claim of nonpayment of rent, there will be many instances in which the eviction trial will involve factual issues more complex than the termination of Ms. Holcomb by NP Dodge.

Finally, the *Lindsey* Court’s concerns about Oregon’s early trial timeline were eased because Oregon’s continuance procedures were reasonable and lenient: “The provision for continuance of the action if the tenant posts security for accruing rent means that in cases where tenant defendants, unlike appellants, deny nonpayment of rent and may require more time to prepare for litigation, they will not be forced to trial if they provide for rent payments in the interim.” 405 U.S. at 65. Section 76-1443 provides for a continuance upon a showing of “good cause” and a “subsequent continuance” upon a showing of “extraordinary cause.” It is evident that the good cause continuance is limited to days, as section 76-1443 authorizes the court to require that the tenant deposit “such rental payments as accrue during the

pendency of the suit” only when a “subsequent continuance extend[s] the initial trial date into the next periodic rental period.” The extraordinary cause requirement for continuance “is not defined in Nebraska’s landlord-tenant statute, nor in the state’s caselaw.” Ryan P. Sullivan, *Survey of State Laws Governing Continuances and Stays in Eviction Proceedings*, 24 CITYSCAPE 231, 233 <https://www.huduser.gov/portal/periodicals/cityscape/vol24num2/article17.html> (2022). Nebraska stands alone as “the only state in the country that required the showing of extraordinary cause to obtain a continuance in an eviction action.” *Id.* See also Ryan Sullivan, *Nebraska’s Anything-But-Uniform Residential Landlord Tenant Act*, 100 Neb. L. Rev. 831, 868 (2022) (“Sullivan”). It is far more grudging than the continuance provision in the 1875 Nebraska FED statute that allowed an 8-day continuance upon request and a “longer period” as a matter of course if the tenant gave a bond approved by the judge “conditioned for the payment of the rent that may accrue.” 1873 Rev. Stat. Terr. Neb., Title XVIII, Ch. X, §1026.

In sum, today’s NURLTA “eliminates any reasonable opportunity for the tenant to prepare a defense.” Sullivan at 866. Inclusion of a right to a jury trial might not save the NURLTA eviction process from future constitutional challenge, but a jury trial would reduce the risk of erroneous decision that results from the abbreviated trial preparation time because virtually every juror will bring life experience relevant to the deliberations and that will ensure more enlightened verdicts and the appearance of fairness to the community.

**III. Apart from Housing Instability, Eviction’s Adverse Effects Include Poorer Health Outcomes, Harm to Children, and Decreased Civic Engagement; and the Effects Are Disproportionately Experienced by Women, People of Color, and People with Disabilities.**

### **A. Eviction Harms Encompass More Than Housing Instability.**

Eviction can mean more than the immediate loss of one's home, possible homelessness, job loss, and the perpetuation of a cycle of poverty. Evictions also cause harm to children and result in poorer health outcomes. To illustrate, one eviction study found:

Low-income tenants who are displaced are generally forced into substandard housing in poorer and higher-crime neighborhoods. Evictions cause psychological trauma, increase the likelihood of suicide, increase emergency room usage, decrease credit access, and lead to homelessness. This problem is especially traumatizing for children, impacting their emotional, social, and physical well-being, and increasing the likelihood of lead poisoning, food insecurity, and issues with academic performance.

Carl Romer, Andre M. Perry, & Kristen Broady, *The coming eviction crisis will hit Black communities the hardest* (August 2, 2021), <https://www.brookings.edu/research/the-coming-eviction-crisis-will-hit-black-communities-the-hardest/>. The study also found that “[w]ould-be tenants are often denied housing based on past eviction filings, even if they weren’t evicted...An eviction filing, regardless of the outcome, is functionally an indefinite blacklist for tenants trying to find new, high-quality housing.” *Id.*

Dealing with housing instability deteriorates the physical and mental health of individuals. People facing eviction are more likely to suffer from depression, anxiety, cardiovascular issues, and food insecurity. Hugo Vasquez-Vera et al., *The Threat of Home Eviction and its Effects on Health Through the Equity Lens: A Systematic Review*, 175 SOC. SCI. & MED. 199, 205 (2017). These issues can result in those at risk for eviction to develop unhealthy coping behaviors such as substance abuse. *Id.* Yet as their need for medical care grows, evicted families are less likely to have access to medical care and medications, exacerbating the already detrimental health effects of eviction. Megan E. Hatch & Jinhee Yun, *Losing Your Home Is Bad for Your Health:*

*Short-and Medium-Term Health Effects of Eviction on Young Adults*, 31 HOUSING POL'Y DEBATE no. 3-5 469, 470 (2021).

Being evicted can have a lasting negative impact on a child's life. Forcing a child out of their home and into a new one can impede school performance, stunt social skills, and negatively impact behavior. Rebekah Levine Coley & Melissa Kull, *Is Moving During Childhood Harmful?* 1 (2014). Childhood moves are empirically "associated with lower earnings, fewer work hours, and less educational attainment later in life." Kathleen Ziol-Guest & Ariel Kalil, *Frequent Moves in Childhood Can Affect Later Earnings, Work, and Education* 2 (2014).

### **B. The Many Harms of Eviction Disproportionately Impact Women, People of Color, and People with Disabilities.**

Black renters suffer a disproportionately high risk of eviction and eviction-related harm. An Eviction Lab study analyzing millions of renters across the United States found that, while Black renters constituted 19.9% of all renters, they were 32.7% of all evictions. Peter Hepburn et al., *Racial and Gender Disparities Among Evicted Americans*, 7 SOCIO. SCI. 649, 653 (2020) ("Hepburn"). In Douglas County, Nebraska, the racial disparity was significantly greater than the national average. Black people in Douglas County constituted 17% of all renters but 39% of evictions. *Id.*

<https://evictionlab.org/demographics-of-eviction/> (Figure 1 interactive chart). With all other things equal, the average Black American is more likely to be evicted than their white neighbor. Across the 1,195 counties studied, Black renters were continually subjected to the highest average eviction filing rate and the highest average eviction rate. *Id.* Because Black renters are evicted or held under the threat of eviction at a disproportionate rate, they likewise experience disproportionate harm, health issues, and life disruption.

Moreover, evictions disproportionately affect women. Women are evicted at a rate 16% higher than their financially identical male counterparts. Hepburn at 655. The harm is even greater for Black

women, who are evicted at nearly twice the rate of white women. *Id.* Black people and women are disproportionately impacted by evictions, and by being at the intersection, Black women are impacted more than any other group. People with disabilities, like Ms. Holcomb, also face disproportionate challenges resulting from evictions being filed against them. *See* Sarah Abdelhadi & Ranya Ahmed, *Fast and Cheap, The speed and cost of evicting tenants for nonpayment of rent*, 9 (December 14, 2021), *available at* <https://lsc-live.app.box.com/s/mwq50tpyipqipkm2sbawilghr99fydrb>.

## CONCLUSION

For the reasons stated above and in Ms. Holcomb's brief, the Court should rule in favor of Appellant.

Dated this 24<sup>th</sup> day of October 2022.

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Neb. Ct. R. Pldg. § 6-1503 and Neb. Ct. R. App. P. § 2-103, I hereby certify that this brief complies with the applicable font and formatting instructions. This brief contains 3732 words, 1.5 margins, in 12-point Century Schoolbook font, excluding the Certificate of Compliance. The brief has been prepared using Microsoft Word Version 16.66 and Adobe Acrobat Professional 17.

*/s/ Rebecca Scout Richters*



# Certificate of Service

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