No. 12-AA-1896

DISTRICT OF COLUMBIA COURT OF APPEALS

EARL MITCHELL,

Appellant,

v.

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION,

Appellee.

CONSENT MOTION OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT EARL MITCHELL

Pursuant to Rule 29(a) of the Rules of this Court, the Legal Aid Society of the District of Columbia respectfully moves for leave to file a brief as *amicus curiae* in support of appellant Earl Mitchell. Counsel for Appellant and counsel for Appellee, the District of Columbia Rental Housing Commission, have consented to this motion.

This case concerns the legal relationship that arises when a landlord undergoes foreclosure and the tenant of that landlord remains on the property. The issue in this case—whether a tenant of a defaulting mortgagor automatically loses his status as "tenant" under the D.C. Rental Housing Act if he withholds rent for any reason—is of great significance to tenants residing in the District of Columbia, and particularly to tenants living in poverty and in rental units upon which banks have foreclosed and taken ownership.

The Legal Aid Society of the District of Columbia is the District's largest provider of free legal assistance to the poorest residents of the District of Columbia. Each year, Legal Aid lawyers handle some 10,000 requests for assistance, represent some 800 clients in judicial and administrative proceedings, and provide in-person counseling to more than 1,500 individuals in the areas of family law, landlord-tenant law, consumer law, and public benefits. Legal Aid's Barbara B. McDowell Appellate Advocacy Project, founded in 2004, has represented parties or *amici* in more than 80 cases before this Court, including many appeals involving housing law and tenants' rights.

Because this *amicus* has a unique perspective on how tenants of defaulting mortgagors are impacted by foreclosures and subsequent bank ownership, this consent motion should be granted. A copy of Legal Aid's proposed *amicus* brief is attached hereto.

Respectfully submitted,

John C. Keeney, Jr. (No. 934307)
Stephen M. Blank (No. 1002849)
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, D.C. 20005
Telephone: (202) 628-1161
Facsimile: (202) 727-2132

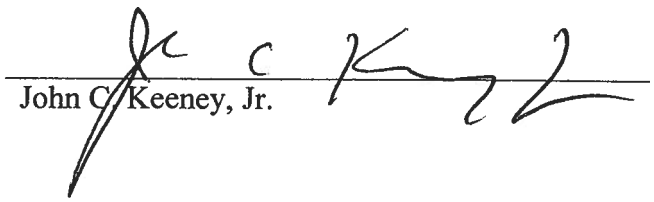
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Motion of the Legal Aid Society of the District of Columbia for Leave to File a Brief as *Amicus Curiae* in Support of Appellant to be delivered by first class mail postage prepaid this 31st day of January 2013 to each of the following:

Todd S. Kim
Donna Murasky
Office of the Attorney General for the District of Columbia
441 4th St. NW
Suite 600 S
Washington, D.C. 20001

Kenneth C. Crickman
1111 14th Street , N.W. Suite 1000
Washington, D.C. 20005



John C. Keeney, Jr.

No. 12-AA-1896

DISTRICT OF COLUMBIA COURT OF APPEALS

EARL MITCHELL,

Appellant,

v.

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION,

Appellee.

On Appeal from the District of Columbia Rental Housing Commission

BRIEF OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA, AS AMICUS CURIAE IN SUPPORT OF APPELLANT

John C. Keeney, Jr. (No. 934307)
Stephen M. Blank (No. 1002849)
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, D.C. 20005
(202) 628-1161
Facsimile: (202) 727-2137

Counsel for Amicus Curiae

RULE 28(a)(2)(B) DISCLOSURE STATEMENT

The Legal Aid Society of the District of Columbia is a District of Columbia non-profit corporation. It has no parents, subsidiaries or stockholders.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

*Authorities principally relied upon.

INTERESTS OF AMICUS CURIAE

The Legal Aid Society of the District of Columbia was formed in 1932 to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs." Legal Aid By-Laws, Art. II, Sec. 1. Legal Aid is the oldest general civil legal services program in the District of Columbia. Since its inception, Legal Aid has represented numerous indigent tenants and participated as *amicus curiae* in many appeals involving a landlord's lease with indigent tenants. Legal Aid has an interest in the correct interpretation and effective enforcement of the laws designed to protect tenants, particularly those laws that affect tenants of defaulting mortgagors.

STATEMENT OF THE CASE

The petition in this case asks the Court to decide an issue of great importance to tenants residing in the District of Columbia, and especially to tenants living in poverty, who are especially likely to reside in bank-foreclosed housing and to withhold rent as a means of forcing the landlord to make repairs necessary to satisfy the implied warranty of habitability. The Rental Housing Commission (Commission) decision, if it were upheld by this Court, would, among other things, turn the exercise of the long-recognized right to withhold rent into a forfeiture of tenancy, no matter how justified the tenant's action in withholding rent may be. It would also lead to forfeitures of tenancy in cases where the tenant is confused about the identity of the landlord, as may often be the case when there has been a foreclosure (to which the tenant is not a party).

The Court should not even consider permitting such a drastic change in well-settled law in a case like this one, where it will have absolutely no impact on the rights of these parties in any matter of theirs before the Commission. Although Mr. Mitchell prevailed before the Office of Administrative Hearings (OAH) on the question of whether he was a "tenant" for purposes of the Rental Housing Act, he lost on the merits, obtaining no relief. The Bank appealed to the Commission anyway, for the apparent purpose of establishing precedent about whom can enforce "tenant" rights. Even though there was no cross-appeal, the Commission decided the "tenant" question without in any way changing the outcome between the parties. That "tenant" definition for purposes of the Rental Housing Act is the only question presented before the Court in Mr. Mitchell's petition for review. The potential collateral consequences on his "tenant" defenses to a likely follow-on eviction proceeding are apparent. While the outcome of this appeal cannot revive Mitchell's tenant petition dismissed by OAH, it can overturn the Commission's erroneous resolution of a legal issue raised by the foreclosing bank that was not

"aggrieved" by the decision of OAH. Without reversal by this Court, the Commission is likely to adhere to its ruling in future cases.

STATEMENT OF FACTS

On January 22, 1999, Mr. Mitchell entered into a one-year lease with Vasiliki Pappas to rent "the upstairs unit plus one bedroom" of a single family house located at 2507 33rd Street, SE, Washington, D.C. for $200 a month. A 000005. That same month, Matt Banks and Pappas entered into a two-year lease for the basement and common areas. *Id.*[1] Prior to these agreements, Pappas had executed a mortgage on the house with Eastern Savings Bank (ESB). *Id.*

In April 2001, ESB foreclosed on the mortgage and took title in June 2001. In March 2002, the Landlord and Tenant court granted ESB a judgment for possession against Pappas but specifically ruled that the judgment did not apply to the units leased by Mr. Mitchell and Banks. A 000006.

On October 3, 2008, in a separate proceeding, the Landlord and Tenant court found that Banks violated his lease by subletting it to Mr. Mitchell without ESB's consent and that ESB was entitled to possession of the basement unit after Banks failed to remove Mr. Mitchell from the unit following a notice to correct or vacate. Mr. Mitchell's motion to intervene in that litigation was denied. *Id.*

On August 18, 2008, Mr. Mitchell filed a Tenant Petition against ESB, alleging that ESB failed to register his rental unit with the Rental Accommodations Division properly and that the

[1] Third party Banks' tenant claims against this same post-foreclosure landlord in this same single family home were before this Court in *Banks v. Eastern Savings Bank*, 8 A.3d 1239 (D.C. 2010). Banks' status as a "tenant" in this same house was recognized and his "tenant" rights under the Act enforced by this Court. In the current appeal, Mr. Mitchell is likewise a tenant in the same single family home. That he changed rooms within that small home does not change his post-foreclosure right as a preexisting tenant with a lease with the mortgagor at the time of foreclosure.

bank had taken retaliatory action against him. A 000003. In addressing the question of whether ESB was Mr. Mitchell's housing provider under the Rental Housing Act, ALJ Wanda R. Tucker found that the eviction protections in the Act apply to a tenant of a defaulting mortgagor, A 000008 & n.10 (citing *Adm'r of Veterans Affairs v. Valentine*, 490 A.2d 1165, 1166 (D.C. 1985)) and that following ESB's taking of title in 2001, ESB could not evict him from the upstairs unit except as provided by the Act. A 000008. Thus, ESB was Mr. Mitchell's housing provider under the Act from that time through August 2008, when Mr. Mitchell initiated the current litigation. A 000009. The ALJ, having found his tenant status at the time of his petition, held on the merits that Mr. Mitchell failed to meet his burden with respect to the failure-to-register and retaliation claims. A 000009-10.

Although having prevailed on the merits, ESB appealed the ALJ's determination that Mr. Mitchell was a "tenant" under the Act, and the Commission reversed. The Commission based its initial conclusion on a two-pronged analysis supposedly derived from the Act and *Valentine*, reasoning that a post-foreclosure tenant retains the status of "tenant" if he has (1) continuously occupied the rental unit, and (2) continued to pay rent for that unit. A 000030.

On Mr. Mitchell's motion for reconsideration that emphasized, *inter alia,* the legal and practical problems that a vacation, leave of absence, or extended medical absence would pose for any continuous occupancy prong, the Commission issued a second opinion with a changed rationale. The Commission reaffirmed that Mr. Mitchell was not a tenant solely for lack of rent payment, and abandoned the prior continuous occupancy prong of its initial opinion. A 000057-58 n.7 ("[C]ontrary to its determination above in the Decision and Order . . . continuous occupation of a rental unit by a tenant following foreclosure is *not* an essential requirement under *Valentine* to establish tenancy under" the Rental Housing Act) (emphasis in original). In

deeming the payment of rent the "sole critical issue" and narrowing its analysis only to that factor, *id.*, the Commission found Mr. Mitchell had not paid rent to ESB or through the court registry and could not support his contention that ESB had refused to accept his attempted rent payments. A 000057-59. Holding that Mr. Mitchell failed to prove that he continued to pay post-foreclosure rent to ESB (rent payments to the wrong party Banks being excluded from the rent payment analysis), the Commission concluded that he was not a "tenant" under the Act. *Id.*

ARGUMENT

THE COMMISSION ERRED IN CONCLUDING THAT A POST-FORECLOSURE TENANT'S CONTINUOUS PAYMENT OF RENT IS REQUIRED TO ENFORCE "TENANT" RIGHTS UNDER THE RENTAL HOUSING ACT

The Rental Housing Act (RHA) defines a "tenant" as any person who is "entitled to the possession, occupancy, or the benefits of any rental unit owned by another person." D.C. Code § 42-3501.03(36). This Court has held that tenants of defaulting mortgagors who remain in possession of rental units following a foreclosure qualify as "tenants" under the Act and are therefore entitled to its statutory eviction protections. *Adm'r of Veterans Affairs v. Valentine*, 490 A.2d 1165, 1166 (D.C. 1985). Like any other tenants, post-foreclosure tenants may be subject to eviction for failing to pay rent without legal justification, but a lapse in payment does not alter their status as tenants with statutory and regulatory protections.

A. The Court Has Determined That Foreclosure Does Not Eliminate Statutory And Regulatory Protections Of Tenants.

A post-foreclosure tenant is still entitled to the protections of the RHA even though the originally valid lease between the post-foreclosure tenant and the defaulting mortgagor has been extinguished by the foreclosure. *See Crockett v. Deutsche Bank Nat'l Trust*, 16 A.3d 949, 951 n.3 (D.C. 2011); *Banks v. Eastern Sav. Bank*, 8 A.3d 1239, 1243 (D.C. 2010); *Molla v. Sanders*,

981 A.2d 1197, 1201-02 (D.C. 2009). *Molla*, *Banks*, and *Crockett* have each reaffirmed that principle. *See Banks*, 8 A.3d at 1240 (D.C. 2010) (A "foreclosure action extinguishes all subservient leasehold estates. Therefore, pursuant to D.C. Code § 42-522 (2001), [the tenant's] pre-foreclosure lease was vitiated by the foreclosure proceedings [against the original landlord], converting [the tenant] into a tenant at will.")[2]; *Molla*, 981 A.2d at 1201 ("Such tenants do not lose their tenancy, but usually stand as tenants-at-will in relation to the new owner.").

For instance, under the RHA, certain core protections—such as the right to withhold rent or demand repairs because of housing code violations and the landlord's warranty of habitability to the tenant—are protected by statute even in the absence of a lease between the tenant of the defaulting mortgagor and the post-foreclosure landlord. *See Crockett*, 16 A.3d at 951 n.3 ("[T]he situation of a mortgagor who holds over after foreclosure should be distinguished from that of a tenant of the mortgagor who holds over after foreclosure, as the latter may be entitled to a number of statutory protections under the Rental Housing Act."). But the Court should also clarify what obligations exist for the tenant if the lease is extinguished by the foreclosure.[3] For example, it would not be possible for the tenant to "continue[] to pay the rent to which the

---

[2] Following the Court's decision in *Banks*, *amicus* argued (with other *amici*) in support of a petition for rehearing that the tenant, though prevailing in the case, was more appropriately considered a "tenant at sufferance" rather than a "tenant at will." For present purposes, *amicus* merely notes the confusing terminology of "at will" in this context where the Act's protections apply and do not make the tenancy "at will" in any common sense of the word or as used in all other contexts.

[3] Moreover, the Court's use of the term "tenant at will" may produce confusion when read alongside the absolute black letter law in statements in other cases of "tenants at will" who lack such protections. That the RHA protects tenancies at will is perhaps not self-evident enough from this Court's precedents, as demonstrated by the Commission's decision in this case. Even though *Banks* demonstrates that the RHA and the housing regulations apply to post-foreclosure tenancies at will, *see* 8 A.2d at 1242-43 (applying 14 DCMR § 4300.1 to post-foreclosure tenancy), the Court has occasionally used the term "tenant at will" in other contexts that might suggest that tenancies at will are beyond the protections of the RHA. *E.g.*, *Crockett*, 16 A.3d at 951 ("Our law defines a 'squatter' . . . as a 'tenant at will'"); *Snowden v. Benning Heights Cooperative, Inc.*, 557 A.2d 151, 156 (D.C. 1989) (tenants after foreclosure were considered "tenants-at-will and, consequently, were not entitled to the protections afforded renters from evictions by their landlords") (citing *Simpson v. Jack Spicer Real Estate, Inc.*, 396 A.2d 212, 214-15 (D.C. 1978) (per curiam); *Simpson*, 396 A.2d at 214-15 (finding "tenants at will" were not entitled to statutory protections afforded to renters from evictions under the RHA). Such an interpretation would be inconsistent with *Molla, Banks*, *Crockett*, and the RHA itself, but the Court should nevertheless use this case to clarify again that post-foreclosure tenancies at will are protected by the RHA and that the correct procedure for eviction is § 42-3505.01.

housing provider is entitled," *see* D.C. Code § 42-3505.01, unless at least some terms of the lease (*e.g.*, the amount of the rent) are extended to the post-foreclosure landlord and tenant, yet *Molla* holds that the terms of the extinguished lease, including the rent, may not be binding on the parties after foreclosure. 981 A.2d at 1201-02.[4]

In *Banks v. Eastern Savings Bank*, a case involving a different tenant but the same foreclosed property, the Court reiterated that, "the law affords protection to tenants who had enjoyed possession of the property pursuant to a valid lease with a prior owner, although they may no longer have a lawful claim to continue to be in possession pursuant to a lease the law will not enforce." 8 A.3d at 1243 (quoting *Molla*, 981 A.2d at 1201). In *Banks*, the Court reversed a judgment for possession in favor of ESB because it failed to provide timely notice to the Rent Administrator, implicitly concluding that Banks was—notwithstanding the foreclosure—a "tenant" for purposes of District of Columbia housing regulations, specifically 14 DCMR § 4300.1. *Banks*, 8 A.3d at 1242. The Court also ruled that Banks could not be evicted for violating a lease provision forbidding subleasing, because "his pre-existing rental agreement with Pappas was effectively extinguished at that juncture." *Id.* at 1243.

Banks leaves some uncertainty about the precise terms of a post-foreclosure tenancy; it would be difficult, for example, to decide whether a tenant "continues" to pay rent, as *Valentine* contemplates, unless the rent set in the pre-foreclosure lease carries over. Thus, *Valentine* seems to assume that certain core aspects of the landlord-tenant relationship persist through foreclosure. In *Molla*, the Court did not decide whether (or how much) an owner who had purchased a property in a foreclosure sale could increase the rent. 981 A.2d at 1201-02. A subsequent decision involving the same parties, *Sanders v. Molla*, upheld the trial court's ruling that the

[4] By analogy, a defaulting mortgagor who holds over after his property has been foreclosed upon is not obligated to pay rent but is liable for the "use and occupation value" of the unit following foreclosure, as a tenant at will. *See Nicholas v. Howard*, 459 A.2d 1039, 1040-41 (D.C. 1983) (internal quotations omitted).

post-foreclosure landlord was not obligated to renew at the same rent, based on its interpretation of the renewal term in the *pre-foreclosure lease*. 985 A.2d 439, 442-43 (D.C. 2009).[5]

Taken together, *Valentine*, *Molla*, *Sanders*, and *Banks*, establish that whatever may happen to particular extinguished contractual provisions upon foreclosure, nothing happens to the regulatory and statutory protection of tenants.

B. Tenants Do Not Lose Their Status And Legal Protections By Nonpayment Of Rent.

While a tenant who fails to pay rent without just cause is subject to eviction under the Act, that is a matter to be determined in a Landlord and Tenant proceeding, not by the Commission. A lapse in rent payment for just cause does not extinguish a post-foreclosure tenancy and the concomitant statutory and regulatory protections for that reason any more than it would absent a foreclosure.

Under long-settled law, a tenant may withhold rent to induce the landlord to correct violations of the housing code and the implied warranty of habitability. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1076-77 (D.C. Cir. 1970). Such rent withholding does not affect whether the person is a tenant "entitled to the possession" of the housing unit, because the law permits such withholding. Indeed, the tenant in *Valentine* withheld rent, 490 A.2d at 1166 n.3, without losing RHA protection. The Commission's contrary decision that any nonpayment of rent amounts to a forfeiture of statutory protection is incorrect, and should be vacated.

ALJ Tucker and the Commission both applied this Court's controlling decision in *Valentine* and reached different conclusions. The Commission's conclusion—that the Act and

[5] In an appropriate case, the Court should explicitly hold that the core elements of the landlord-tenant relationship survive foreclosure (just as they do any other transfer of ownership). Such a ruling would avoid confusion about such matters as: (a) the amount of rent due; (b) the date the rent is due (including any consequences of late payment); and (c) the duration of any agreement with respect to the amount of the rent. Those issues are not presented here.

this Court's interpretation in *Valentine* require post-foreclosure tenants to pay rent continuously to maintain status as a "tenant," even when the tenant has legally permissible reasons for *not* continuously paying rent—was wrong.

The leading case in this jurisdiction on the status of tenants after a foreclosure is *Valentine*. In that case, the tenant, Valentine, initially rented an apartment on a one-year lease. After the lease expired, she continued to live in the apartment and paid rent to successive owners of the building. *Id.* at 1166. After the owner of the property defaulted on mortgage payments, the property was ultimately conveyed to the Veterans Administration (the "VA"), which had insured the mortgage. *Id.* Sometime later, the VA sent Valentine a 30-day notice to quit, instructing her to vacate the premises. When she did not, the VA filed a complaint for possession. The trial court dismissed the complaint because the VA had failed to allege any of the enumerated valid grounds for eviction in the Rental Housing Act, then codified as D.C. Code § 45-1561 (1981)[6]. *Id.*

In addressing whether the eviction protections in the RHA shielded Valentine—a tenant of a defaulting mortgagor who remained in her unit following a foreclosure and a change in ownership—the Court held that they did. *Id.* The VA had argued that the tenant was similar to the defaulting mortgagor in *Simpson v. Jack Spicer Real Estate, Inc.*, 396 A.2d 212 (D.C. 1978) (*per curiam*), whom the Court had held was not protected by the precursor statute to the RHA. *See Valentine*, 490 A.2d at 1167-68.

The Court rejected that argument, holding that the RHA continued to protect a tenant notwithstanding the legal ineffectiveness of the tenant's lease. The lack of a contractual relationship between the tenant and post-foreclosure landlord did not remove the tenant from the

[6] Now codified at D.C. Code § 42-3505.01.

protections of the RHA. *Id.* at 1168. In a critical footnote, the Court stated that Valentine had not paid rent continuously yet still retained tenancy status. *Id.* at 1166 n.3 ("At the time of the foreclosure Valentine *had been withholding rent payments* because of alleged housing code violations. Neither party argues that her withholding affects our decision, *nor do we find that it does.*") (emphases added). Thus, *Valentine* also recognized that a tenant may have permissible reasons for withholding rent following the foreclosure.

It is true that *Valentine* interprets the RHA as prohibiting eviction, even where the lease or agreement has expired, "so long as the tenant continues to pay the rent to which the [housing provider] is entitled for such rental unit." 490 A.2d at 1169-70 (quoting the equivalent of D.C. Code § 42-3505.01). But the Court ruled that Valentine remained a protected tenant, even though she had withheld rent. So the word "continues" must refer in this context to the tenant's continued payment of rent after foreclosure in general, not to the absence of any legally justified interruption or gap in payment. Read this way, the case distinguishes a tenant who has continued to act as a "tenant" after foreclosure from one who has abandoned the essential terms of the pre-foreclosure relationship. Additionally, the statutory text "the rent to which the housing provider is entitled," D.C. Code § 42-3505.01 becomes indefinite and, absent a new agreement, incapable of calculation without judicial intervention because the foreclosure makes the lease a nullity in this Court's precedents as the tenant becomes a tenant at will with an obligation to pay reasonable "value" for the occupancy–whatever that is and however calculated. Thus, the statutory text in this unique post-foreclosure context presupposes that the rent to which the post-foreclosure owner is "entitled" is a matter of judicial determination, especially when the lease is extinguished. *See Molla*, 981 A.2d at 1201-02 (tenant of a defaulting mortgagor is protected by the RHA, but the terms of the lease—including the amount of rent—may not be binding on the

tenant and new owner). It would be inconsistent with *Molla* to extinguish "tenant" status and rights if the rent amount is still to be decided.

C. This Court Need Not Defer To A Commission Decision That Contravenes The Rental Housing Act And This Court's Precedents.

This Court has never held that a tenant of a defaulting mortgagor is not a "tenant" under the RHA simply because he withheld rent prior to a judicial interpretation of his rights and obligations under that statute. Its precedents are to the contrary, consistent with the liberal purposes of the Act to promote statutory protections for tenants. While the Commission is the administrative agency tasked with interpreting and applying certain provisions of the RHA, *Valentine*, 490 A.2d at 1167, the Commission is entitled to no deference here because its holding "is plainly erroneous or inconsistent with the statute." *Id.* (quoting *Totz v. Rental Accommodations Comm'n*, 412 A.2d 44, 46 (D.C. 1980)). Moreover, some provisions of the RHA, including provisions depending on status as a tenant, are administered solely by the Superior Court, weakening arguable deference as to such provisions. Even when the Commission has actually been delegated the authority to implement the RHA, when the agency's interpretation "contravene[s] plain statutory language or clear legislative history," this Court has "not hesitated to reverse even when the agency has special expertise that would usually cause [it] to defer." *United States Parole Comm'n v. Noble*, 693 A.2d 1084, 1097-98 (D.C. 1997). In the context of housing regulations, for example, the Court has reversed the Commission's statutory interpretation of hardship increases in rent, *see James Parreco & Son v. District of Columbia Hous. Comm'n*, 567 A.2d 43, 48-49 (D.C. 1989) and its interpretation of "aggrieved party" under D.C. Code § 45-1652(g) (Supp. 1978), *DeLevay v. District of Columbia Rental Accommodations Comm'n*, 411 A.2d 354, 359 (D.C. 1980). Most recently, and in a different context, this Court recognized that, even with the "considerable deference ordinarily owed to an agency's

interpretation," the Court "is the proper arbiter of the meaning of statutory language" in cases where "the special competence of the agency [is] not required." *District of Columbia Office of Human Rights v. District of Columbia Dep't of Corr.*, 40 A.3d 917, 928 (D.C. 2012).

In this case, the Commission misinterpreted the meaning of "tenant" in the RHA altogether, applying an interpretation that "is not compelled by any statute or controlling case." *See id.* The statute defines a "tenant" as any person "entitled to the possession, occupancy, or the benefits of any rental unit owned by another person." D.C. Code § 42-3501.03(36). *Valentine* establishes that a post-foreclosure tenant who rented from the foreclosed-upon mortgagor remains a "tenant" in relation to the post-foreclosure owner, even if the lease is technically extinguished. *See Banks*, 8 A.3d at 1243. While it is true that the Act also states that "no tenant shall be evicted from a rental unit . . . so long as the tenant continues to pay the rent to which the housing provider is entitled" and that the tenant may be evicted from the unit for nonpayment without written notice to vacate, D.C. Code § 42-3505.01(a), those provisions do not eliminate the person's status as a "tenant" under the Act.

D. Across-The-Board Application Of The Commission's Ruling Would Conflict With *Valentine* And Weaken Important Tenant Protections.

A tenant of a defaulting mortgagor is *not* in the same position as the defaulting mortgagor, *Valentine*, 490 A.2d at 1166, and although the tenant of the defaulting mortgagor is deemed a "tenant at will," he retains the statutory rights and protections of a tenant. *Crockett v. Deutsche Bank Nat'l Trust*, 16 A.3d 949, 951 n.3 (D.C. 2011); *Banks*, 8 A.3d at 1243; *Molla*, 981 A.2d at 1201-02. Whether the tenant of a defaulting mortgagor has continuously paid rent has no bearing on his status as a "tenant" under the Act.

A post-foreclosure tenant may withhold rent due to housing code violations, as demonstrated by *Valentine*. 490 A.2d at 1166 n.3. There are other common reasons for missed

rent payments for a period of time, often lengthy following the foreclosure. In the experience of *amicus*, if a bank takes ownership through foreclosure, there is typically an extended period before the bank notifies the tenant that it is the tenant's new landlord or begins to assume the responsibilities of a landlord. The tenant may also try to pay rent and the bank may reject the payment, as Mr. Mitchell alleged in this case. A 000058. Nothing in the Act or its history demonstrates or even suggests that these circumstances void the statutory protections of the tenant. Yet, that is just the sort of outcome that would occur if the Court permitted the Commission's *per se* "failure to pay rent" rule. Post-foreclosure tenants would have no opportunity to offer any of these defenses in an eviction proceeding under the RHA.[7] Post-foreclosure tenants, in these times of increasing foreclosures, desperately need the full protections of the Act. The Commission's ruling creates a huge exception to those protections at the time when they are needed most.

1. The Commission's ruling wrongfully calls into question the right of post-foreclosure tenants to withhold rent, even in Landlord and Tenant proceedings not subject to the Commission's jurisdiction.

A post-foreclosure tenant may withhold rent payments specifically because of alleged housing code violations and continue to maintain her post-foreclosure tenancy. *Valentine*, 490 A.2d at 1166 n.3 (D.C. 1985). A post-foreclosure tenant's ability to assert a defense of housing code violations requires that he be viewed as a residential "tenant" under the RHA. *See* 14

[7] Even individuals who are possessing property as holdover tenants or "squatters" have a right to some judicial process under the forcible entry and detainer statute, D.C. Code § 16-1501 (2001), or an action in ejectment, D.C. Code § 42-3210 (2001). *Hinton v. Sealander Brokerage Co.*, 917 A.2d 95, 111 n. 33 (D.C. 2007); *see Harkins v. WIN Corp.*, 771 A.2d 1025, 1028 (D.C. 2001) ("[A] tenant has a right not to have his or her possession interfered with except by lawful process.") (internal quotations omitted). Moreover, the District may also allow a cause of action for wrongful eviction for individuals who have "something less than some sort of tenancy." *See Sarete, Inc. v. 1344 U St. Ltd. P'ship*, 871 A.2d 480, 494-95 (D.C. 2005) (commercial rental); *Wilson v. Hart*, 829 A.2d 511, 515 n. 9 (D.C. 2003) (residential rental). Thus, because landlords in the District may not use self-help to evict a tenant, *Mendes v. Johnson*, 389 A.2d 781 (D.C. 1978) (en banc), judicial process is available in these types of cases as well.

DCMR Housing Chs. 1-43 (Dec. 2004).[8] If the Court were to affirm the Commission's reading that rent payment is a threshold prerequisite to satisfy the statutory definition of "tenant" in the Act, and therefore qualify to be protected by the RHA, such tenants would never have the opportunity to demonstrate that they have withheld payment of rent from their post-foreclosure landlords because of housing code violations. Such an interpretation is a direct violation of *Valentine* and its progeny, which uniformly recognize that post-foreclosure tenants are entitled to the eviction protections of the RHA. *Crockett*, 16 A.3d at 951 n.3; *Banks*, 8 A.3d at 1243; *Molla*, 981 A.2d at 1201-02. One such protection is the ability to assert the defense of housing code violations.[9]

The District of Columbia has long recognized a tenant's defense to the enforcement of a residential lease when the landlord fails to maintain the premises according to the District's housing regulations. *See Brown v. Southall Realty*, 237 A.2d 834 (D.C. 1968); *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970). That right is critical to the protection of tenants generally, because of the shortage of public resources to enforce the housing regulations. Importantly for post-foreclosure tenants whose lease is extinguished in the foreclosure, they retain the rights under the housing regulations that may render even a non-extinguished lease or rental agreement void after the beginning of tenancy if (a) the housing code violations did not result from the intentional acts or negligence of the tenant or his invitees, and (b) the violations are not corrected within a notice period (if applicable) or within a reasonable time after the owner knows or reasonably should know about the violations. 14 DCMR § 302.2.

---

[8] More specifically, Chapter 43 of the Housing Code's definition section links to the definitions of Chapter 38. 14 DCMR § 4399. Chapter 38 defines tenant as any person "entitled to the possession, occupancy, or the benefits of any rental unit owned by another person," 14 DCMR § 3899, which is identical to the RHA's definition of "tenant." *See* D.C. Code § 42-3501.03(36).

[9] The RHA also protects tenants from being evicted by landlords in retaliation for requesting that repairs be made to bring the property into compliance with the housing code violations or for legally withholding rent as a result of such violations. *See* D.C. Code § 42-3505.02.

Significantly, although the defenses of a void lease or breach of the implied warranty resulting from housing code violations initially arose from a contractual relationship under a lease, *see Javins*, 428 F.2d at 1072-73, post-foreclosure tenants may still invoke them even if the lease has been extinguished by the foreclosure. *See Taylor v. First Am. Title Co.*, 509 A.2d 96, 97 & n.2 (D.C. 1986). *Taylor* demonstrates why this must be so under *Valentine*. In *Taylor*, the Court found that a post-foreclosure owner had no obligation to correct housing code violations to the former mortgagor-owner following foreclosure. *Id.* at 97. The Court found that, because the former mortgagors became tenants at will following foreclosure, they had no contractual relationship and therefore *Javins* did not apply. *Id.* The Court was careful to distinguish former owners with tenants who rented the property prior to the foreclosure:

> Prior to foreclosure, appellants owned the property and only became tenants at will because appellees did not evict appellants immediately after foreclosure. Their status as the former property owners distinguishes this situation from one in which a landlord's property is foreclosed, and his or her former tenants become tenants of the new landlord.

Id. at 97 n.2 (citing *Valentine*, 490 A.2d 1165).

The Court continues to recognize that "the situation of a mortgagor who holds over after foreclosure should be distinguished from that of a tenant of the mortgagor who holds over after the foreclosure, as the latter may be entitled to a number of statutory protections under the Rental Housing Act." *Crockett*, 16 A.3d at 951 n.3 (citing *Banks*, 8 A.3d 1239).

In finding that Mr. Mitchell was not a "tenant," the Commission was wrong to conclude that nonpayment negates all of a tenant's rights under the Act. In the context of housing code violations, *Valentine* expressly finds that tenancy may continue. The rights and protections under the RHA and the housing regulations follow from that basic premise, and they are absolutely critical to tenants whose rental properties have been foreclosed upon, through no fault of the tenant.

In the experience of *amicus*, the risks that a bank will not maintain or invest in fixing housing code violations or neglect the property are especially great in foreclosed properties; the interests of post-foreclosure servicers in minimizing maintenance expenses are typically much greater than with ordinary landlords, and the post-foreclosure owners are often inaccessible and difficult for post-foreclosure tenants to hold to account.

A tenant also has a number of defenses which would not be available if the person was not considered to have a tenancy relationship with the post-foreclosure landlord. *See* Super. Ct. L&T R. 5(b). The Superior Court Rules of Procedure for the Landlord and Tenant Branch specifically allow a tenant to assert the equitable defenses of recoupment and set-offs or assert a counterclaim for overpayments of rent. *Id.* Recoupment and set-offs allow the tenant to reduce the amount of rent owed to the landlord if he can demonstrate prior housing code violations during some period of the tenancy or that he made repairs to correct those violations. *See Shin v. Portals Confederation Corp.*, 728 A.2d 615, 618 n.5 (D.C. 1999). A counterclaim allows the tenant to obtain money for rent overpayments or rent credits for housing code violations or injunctive relief requiring the landlord to repair unsafe conditions. *See Nuyen v. Luna*, 884 A.2d 650, 651-52 (D.C. 2005).

Once again, it is essential that the post-foreclosure tenant actually be recognized as a "tenant" to have access to the protections of the landlord and tenant court. The Commission's conclusion that a tenant's failure to continuously pay rent makes him something other than a "tenant" would deny him the ability to plead these defenses in court.

2. The Commission's ruling erroneously calls into question the right of post-foreclosure tenants to redeem by payment in full of rent in arrears.

A tenant sued for possession in a nonpayment case has the equitable right of redemption. A tenant may retain possession of a rental unit by tendering all outstanding rent to the landlord,

with interest and costs, at any time prior to actual eviction. *Mullin v. N. St. Follies Ltd. P'ship., 712* A.2d 487, 494 (D.C. 1998) (citing *Trans-Lux v. Service Parking Corp.*, 54 A.2d 144, 146 (D.C. 1947) and recognizing "strong public policy" behind *Trans-Lux* doctrine). The doctrine has been codified in the Superior Court Rules of Procedure for the Landlord and Tenant Branch, which provide that a tenant may redeem the tenancy and avoid eviction *even after* the court has entered a judgment for possession in favor of the landlord. Super. Ct. L&T R. 14-II.

The Commission's decision in this case would completely undermine the *Trans-Lux* doctrine and Rule 14-II for any post-foreclosure tenant like Mr. Mitchell by stripping his status as "tenant" automatically and without process simply because he did not continuously pay rent. The main purpose of *Trans-Lux* is to allow tenants to pay rent that they may have mistakenly withheld in order to avoid eviction. If the Court adopted the Commission's interpretation in this case, the tenancy would terminate automatically, and the post-foreclosure tenant would have no opportunity to determine whether he even owes "rent to which the landlord is entitled," *see Valentine*, 490 A.2d at 1168-69, and then redeem the tenancy by paying any rent that he might owe.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to find that the Commission erred as a matter of law in deciding that a tenant of a defaulting mortgagor automatically loses the protections of tenancy under the RHA upon any failure to pay rent to the post-foreclosure landlord.

Respectfully submitted,

John C. Keeney, Jr. (No. 934302)
Stephen M. Blank (No. 1002849)
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, D.C. 20005
Telephone: (202) 628-1161
Facsimile: (202) 727-2132

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Amicus Brief to be delivered by first class mail postage prepaid this 31st day of January 2013 to each of the following:

Todd S. Kim
Donna Murasky
Office of the Attorney General for the District of Columbia
441 4th St. NW
Suite 600 S
Washington, D.C. 20001

Kenneth C. Crickman
1111 14th Street , N.W. Suite 1000
Washington, D.C. 20005

John C. Keeney, Jr.