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Bringing Order to Chaos: Reviving Uniformity and Balance Within Nebraska's Rental Housing Laws

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I. INTRODUCTION

In 1973, the Nebraska Legislature was presented with the opportunity to adopt the Uniform Residential Landlord & Tenant Act (Uniform Act).[1] The Uniform Act sought to "simplify, clarify, modernize, and revise the law governing rental of dwelling units and the rights and obligations of landlords and tenants" as well as improve the quality of housing, and make housing laws more uniform.[2] The Unicameral delayed adoption for a year, and in the interim, that thoughtfully-crafted, balanced, and uniform set of proposed laws was eviscerated through one-sided amendments pushed through by landlord and real estate lobby groups (Real Estate Lobby).[3] The final product (Nebraska's Act) bore some modest resemblance to the Uniform Act but retained almost none of its stated intent. The amendments were so disjointed and haphazard that the legislature likely could have generated a better product had it simply drafted the laws from whole cloth.

A recent critique of Nebraska's Act (Critique) provides a comprehensive review and analysis of the legislative history that led to the Frankenstein-esque compilation of laws that Nebraska unabashedly

1. See generally UNIF. RESIDENTIAL LANDLORD & TENANT ACT (UNIF. L. COMM'N 1972); L.B. 293, 83d Leg., 1st Reg. Sess. (Neb. Jan. 25, 1973) (as introduced).

2. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.102 (UNIF. L. COMM'N 1972).

3. *See* Ryan P. Sullivan, *Nebraska's Anything-But-Uniform Residential Landlord and Tenant Act*, 100 NEB. L. REV. 831, 837–41 (2021) (detailing the multitude of landlord-favorable amendments to the bill after introduced); *Hearing on L.B. 293 Before the Comm. on the Judiciary*, 83d Leg., 1st Sess. 68–70 (Neb. 1973) [hereinafter *L.B. 293 Judiciary Comm. Hearing*] (statement of Arlen Beam) (testifying on behalf of the Nebraska State Homebuilder's Association and proposing a series of amendments to L.B. 293 that were presumably incorporated into the Committee Amendment later proposed and adopted); *see also infra* note 68 (discussing the "flurry of amendments made post-introduction," ninety-four individual amendments in total).

refers to as a "uniform act."[4] The Critique described how the legislature amended or struck thirty of the forty-three sections of the Uniform Act before adoption and passed a laundry list of other landlord-favorable amendments in the decades that followed.[5] The Critique also examined the series of recent amendments adopted by the modern Legislature in an effort to rectify the missteps of the 1974 legislation, and urged the Nebraska Legislature to continue these efforts to bring uniformity, balance, and some semblance of fairness to an otherwise disjointed, lopsided, and unjust conglomeration of laws.[6]

In the role of a sequel, this Article picks up where the Critique left off, shifting the focus from scrutinizing the Act to proposing solutions to mend it. This Article contains a series of proposals aimed to revive the original intent of the Uniform Act, and to account for the legal, societal, and economic evolutions and revolutions that have occurred in the fifty years since the Uniform Act was promulgated by the Uniform Law Commission. In the mid-1970s, lack of affordable housing was not the crisis it is today, where so many Americans find themselves perpetually susceptible to eviction because baseline wages have not kept up with the cost of housing.[7] Exacerbating the issue is the current shortage of affordable housing, both in Nebraska and nationally.[8] These shifts in the rental housing environment necessitate reflection not only on Nebraska's existing laws, but also on the uniform laws proposed in the 1970s, which—although perhaps suitable then—seem out of touch today. In fact, in 2015, the Uniform Law Commis-

4. *See generally* Sullivan, *supra* note 3. Reviewing the Critique prior to or concurrent with this Article is recommended, as the Critique supplements and provides additional detail and discussion on many of the arguments offered herein as support for the proposals outlined below.
5. *See id.*
6. *See id.*
7. Between 1960 and 2016, the percentage of rent-burdened households—those spending over thirty percent of their income on rent—rose from less than twenty-five percent to nearly fifty percent. INGRID GOULD ELLEN ET AL., LINCOLN INST. OF LAND POL'Y, THROUGH THE ROOF: WHAT COMMUNITIES CAN DO ABOUT THE HIGH COST OF RENTAL HOUSING IN AMERICA 3 (2021). During that same period, the portion of households that were severely rent-burdened, "paying more than half of their income on rent—rose from 13 to 26 percent." *Id. See also* Emily Benfer, *The American Eviction Crisis, Explained*, THE APPEAL (Mar. 3, 2021), https://theappeal.org/the-lab/explainers/the-american-eviction-crisis-explained/ [https://perma.cc/97HH-E3WK] ("Between 1979 and 2013, the wages among middle-wage workers remained totally flat, and wages among low-wage workers fell 5 percent. Yet, . . . [o]ver the last decade, every region of the country experienced a surge in rent, with apartment rental prices increasing by 150 percent.").
8. *See* ANDREW AURAND ET AL., NAT'L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES 2 (2020), https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2020.pdf [https://perma.cc/4G9A-WTCM] (estimating a shortage of 3.6 million affordable rental homes in the United States). In Nebraska, there are only thirty-seven affordable rental units available for every one hundred families in need of affordable housing. *Id.* at 8.

sion (ULC) developed a revised Uniform Residential Landlord and Tenant Act (Revised Act) aimed at addressing some of the oversights in the prior set of laws, and to modernize certain provisions to better suit the current rental housing ecosystem.[9]

Set forth below are a series of proposals aimed at recalibrating Nebraska's Act to realize a level of fairness more aligned with Nebraska values, and more attentive to the economic realities faced by tenants and landlords.

II. PROPOSALS

The following policy objectives should guide Nebraska lawmakers as they address the shortcoming of Nebraska's current Act: reducing preventable evictions and thereby limiting homelessness, promoting equity and fairness in the landlord-tenant relationship, and improving housing conditions for Nebraska's renters. To carry out these policies, lawmakers will need to tackle the myriad of issues within Nebraska's housing laws discussed in-depth in the Critique and further described herein.[10] Set forth below are a series of proposals aimed to improve the state of Nebraska's laws pertaining to each of these policy objectives, as well as some suggestions for improving clarity in the law.

A. Reducing Homelessness

Homelessness is an epidemic, an affliction that is exacerbated by Nebraska's landlord-favoring housing laws. The impacts of eviction-caused homelessness extend far beyond the family that is made homeless through the eviction. Homelessness leads to increased interactions with law enforcement,[11] drug use,[12] and adverse health and

9. *See* REV. UNIF. RESIDENTIAL LANDLORD & TENANT ACT (UNIF. L. COMM'N 2015).

10. Note that the proposals in this Article, even if each were to be adopted, would not wholly carry out the aforementioned policies. In addition to these amendments, other important steps will need to be taken to effectuate these policies, such as acknowledging and responding to the lack of affordable housing, ensuring Nebraskans have opportunities to earn a living wage, broadening protections against housing discrimination, and fully funding programs that prevent homelessness and promote economic advancement for all Nebraskans.

11. Multiple studies have found that being unhoused is independently associated with higher levels of interaction with the criminal justice system. *See, e.g.*, Milad Parpouchi et al., *Multivariable Modelling of Factors Associated with Criminal Convictions Among People Experiencing Homelessness and Serious Mental Illness: A Multi-Year Study*, 11 SCI. REPS. 1, 1 (2021). However, the majority of crimes committed by people experiencing homelessness are non-violent and "directly related to poverty and homelessness itself (e.g., visibility, survival, and subsistence needs)." *Id.* at 9. Notably, another study has found that unhoused people were victims of violent crimes at a rate approximately twenty-five times the general population. *See* Molly Meinbresse et al., *Exploring the Experiences of Violence Among Individuals Who Are Homeless Using a Consumer-Led Approach*, 29 VIOLENCE VICT. 122 (2014).

educational outcomes[13]—particularly for children experiencing homelessness.[14] Moreover, homelessness is expensive, and the bill is primarily footed by taxpayers and non-profit organizations.[15] Nebraska's current residential housing laws provide for an expedited eviction pro-

12. *See* NAT'L COAL. FOR THE HOMELESS, SUBSTANCE ABUSE AND HOMELESSNESS 1 (2017), https://www.va.gov/HOMELESS/nchav/resources/docs/mental-health/substance-abuse/Substance-Abuse-and-Homelessness-508.pdf [https://perma.cc/WB66-MB6C] ("Although a high percentage of homeless people do struggle with substance abuse, addictions should be viewed as illnesses and require treatment, counseling and support to overcome. Substance abuse can cause homelessness, but it often arises after people lose their housing.").

13. *See* Robert Collinson & Davin Reed, The Effects of Eviction on Low-Income Households 25–26 (Dec. 2018) (unpublished manuscript), https://www.law.nyu.edu/sites/default/files/upload_documents/evictions_collinson_reed.pdf [https://perma.cc/G5UJ-DPP9] (finding that, in New York eviction cases, tenants losing their housing "increase[d] the number of emergency room visits" in the two years after filing by over 70 percent compared to non-evicted households and resulted in an overall decline in health); Victor Pearse Haley Jr., The Impact of Evictions on Student Displacement: An Atlanta Study 18–23 (2020) (unpublished manuscript) https://smartech.gatech.edu/bitstream/handle/1853/62919/Haley%2C%20Victor.pdf?sequence=1&isAllowed=Y [https://perma.cc/86VM-KYMT] (reporting on the impacts of eviction on the educational performance of school-aged children); Matthew Desmond et al., *Evicting Children*, 92 SOC. FORCES 320 (2013) ("Compared with their peers, homeless students and those with high rates of residential instability perform worse on standardized tests, have lower school achievement and delayed literacy skills, are more likely to be truant, and are more likely to drop out.").

14. *See* Laura E. Gultekin et al., *Health Risks and Outcomes of Homelessness in School-Age Children and Youth: A Scoping Review of the Literature*, 36 J. SCH. NURSING 10, 10–11 (2020) (noting that disruptions caused by being unhoused are "especially impactful for school-age children, who are moving through stages of growth and development," and reviewing various studies that found adverse impacts caused by homelessness ranging from higher rates of malnutrition and obesity, to increased behavioral and developmental issues).

15. *See* Stephen Averill Sherman & Carlos Villegas, *Update: Evictions Cost Harris County over $240 Million a year—That Was Before COVID-19*, KINDER INST., (Sept. 16, 2020), https://kinder.rice.edu/urbanedge/2020/09/16/evictions-cost-harris-county-over-315-million-each-year-housing-crisis-COVID-19 [https://perma.cc/C7XG-HL32] (reporting that researchers found that "the public and private sectors spend $241.4 million per year addressing" Harris County, Texas' "mass-eviction crisis"); Judith Fox, *The High Cost of Eviction: Struggling to Contain A Growing Social Problem*, 41 MITCHELL HAMLINE L. J. OF PUB. POL'Y & PRAC. 167, 170 (2020) (citing *Ending Chronic Homelessness Saves Taxpayers Money,* NAT'L ALL. TO END HOMELESSNESS (Feb. 17, 2017), https://endhomelessness.org/wp-content/uploads/2017/06/Cost-Savings-from-PSH.pdf [https://perma.cc/6FMD-9NFJ] (finding "eviction costs are not just born by those being evicted, they are spread out into society as increased medical costs and increased needs for emergency services, including emergency shelter.")); U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, ENDING CHRONIC HOMELESSNESS IN 2017 (2016), https://www.usich.gov/resources/uploads/asset_library/Ending_Chronic_Homelessness_in_2017.pdf [https://perma.cc/GP5E-XQ45] (noting studies have found that each chronically unhoused individual can cost taxpayers as much as $30,000 to $50,000 annually).

cess that often results in avoidable homelessness.[16] As they currently exist, these laws prioritize the landlord's business interests without considering the collateral costs of eviction that fall on society at large, virtually none of which are shouldered by the evicting landlord. Nebraska taxpayers functionally subsidize landlord business interests by covering the societal costs of eviction-caused homelessness—effectively resulting in a form of welfare for landlords.[17] While there are circumstances in which proceeding with an eviction appropriate, many evictions can and should be avoided. Minor and reasonable adjustments to the law can limit the frequency in which evictions are necessary and reduce the likelihood they will lead to homelessness, all with minimal impact on landlord profits. In no particular order, set forth below are four proposals for achieving this objective.

16. *See* Sullivan, *supra* note 3, at 863–71 (describing how a family can be made homeless within days of falling behind on rent); NEB. REV. STAT. §§ 76-1440 to -1446 (Reissue 2018 & Supp. 2021).

17. *See supra* note 15. *See also Cost of Eviction Calculator*, UNIV. OF ARIZ. JAMES E. ROGERS COLL. OF L., https://uarizona.neotalogic.com/a/costofevictioncalculator [https://perma.cc/ZX8P-T7WN] (last visited Dec. 28, 2021) (report for Nebraska on file with author) (estimating that in Nebraska alone, the costs of eviction-caused use of specific social and governmental services—including emergency shelter, medical care, foster care, and juvenile delinquency—is $48,120,352 per year, borne by Nebraska taxpayers); *c.f.* BOS. BAR ASSOC., INVESTING IN FAIRNESS, JUSTICE, AND HOUSING STABILITY: ASSESSING THE BENEFIT OF FULL LEGAL REPRESENTATION IN EVICTION CASES IN MASSACHUSETTS (2020), (finding that providing legal counsel to eligible tenants facing eviction would save the city at least $63.02 million by preventing costs associated with evictions, including costs related to the shelter system, health care, foster care, school educational and behavioral services, as well as law enforcement and corrections); HEIDI SCHULTHEIS & CAITLIN ROONEY, CTR. FOR AM. PROGRESS, A RIGHT TO COUNSEL IS A RIGHT FOR A FIGHTING CHANCE, THE IMPORTANCE OF LEGAL REPRESENTATION IN EVICTION PROCEEDINGS 7 (Oct. 2, 2019), https://www.americanprogress.org/article/right-counsel-right-fighting-chance/ [https://perma.cc/24XS-BGEL] (noting that efforts to prevent evictions in New York City would save the city approximately $320 million each year); Lauren A. Lindsey, *Protecting the Good-Faith Tenant: Enforcing Retaliatory Eviction Laws by Broadening the Residential Tenant's Options in Summary Eviction Courts*, 63 OKLA. L. REV. 101, 112 (2010) (discussing the governmental costs of evictions). A concurrent approach for addressing this landlord-welfare is to require landlords to directly shoulder some of the cost through increased eviction filing fees. Nebraska's filing fee for eviction is one of the cheapest in the nation. *Compare* Filing Fees and Court Costs, Neb. Jud. Branch Sup. Ct. Rules, https://supremecourt.nebraska.gov/rules/administrative-policies-schedules/fees [https://perma.cc/44VP-XCVG] (last visited Jan. 3, 2022) ($85 filing fee for eviction actions), *with* MINN. STAT. § 357.021 (2021) ($285 filing fee for eviction actions). Alternatively, municipalities could require a fee be paid to the city or county for any eviction matter filed in its jurisdiction; these fees collected could be used to supplement the costs of government resources expended as consequence of evictions.

1. Provide for a Right of Redemption

The Uniform Act proposed that tenants be given fourteen days' notice to vacate or become current on rent before an eviction action for non-payment of rent could be initiated.[18] Instead, Nebraska's Legislature opted to provide tenants only three days' notice.[19] The legislature recently amended the law to increase the required notice period to seven days.[20] While seven days is more reasonable than three, it is still arguably insufficient to provide a tenant a fair opportunity to obtain the funds or tap resources that would allow them to become current on rent and stay in their home.[21] Although even the fourteen-day notice period proposed by the ULC may still be inadequate to give a family a reasonable time to get back on their feet, this additional time would nonetheless grant tenants a more realistic timeframe in which to collect another paycheck, obtain unemployment benefits, obtain a loan, or qualify for and receive rental assistance.[22] Of course, from the landlord's perspective there is no guarantee that the tenant will be able to secure the amounts owed, no matter how much time they are given. Understandably, the landlord has a financial interest in proceeding with the eviction as quickly as possible so that the unit can be turned over and relet to a new family.

A functional middle ground between these two interests would be to maintain the current seven-day notice but couple it with a right of redemption. This would allow default evictions to proceed without de-

18. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.201 (UNIF. L. COMM'N 1972). The Revised Uniform Act also proposed fourteen days. *See* REV. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 601(a)(1) (UNIF. L. COMM'N 2015).

19. *See* L.B. 293, 83d Leg., 2d Reg. Sess. § 31 (Neb. 1974) (codified as NEB. REV. STAT. § 76-1431 (Supp. 2021)); Sullivan, *supra* note 3, at 841-45.

20. *See* L.B. 433, 106th Leg., 1st Reg. Sess. (Neb. 2019) (enacted) (this bill, as adopted by the Nebraska Legislature, was amended by A.M. 981 to include portions of L.B. 434).

21. *See, e.g.*, EMERGENCY RENTAL ASSISTANCE (ERA) PROGRAM, OFF. NEB. GOV'T WEBSITE https://coronavirus.nebraska.gov/EmergencyRentalAssistanceProgram [https://perma.cc/2CB2-TJGX] (last visited Feb. 7, 2022) ("[T]he review process may take between 2–3 weeks from the time an application is submitted to reach a funding decision."); *see also* Brittney Myers, *63% of Americans in Metro Areas, 39% of Rural Workers Live Paycheck to Paycheck*, USA TODAY (Sept. 22, 2021, 7:01 AM), https://www.usatoday.com/story/money/economy/2021/09/22/cost-of-living-63-of-urban-americans-live-paycheck-to-paycheck/118830788/ [https://perma.cc/L4EL-PKJ4] (noting that over sixty percent of workers in urban areas live paycheck-to-paycheck, meaning they are "dependent on the next paycheck keeping them off the streets").

22. *See, e.g., Hearing on L.B. 434 Before the Comm. on the Judiciary*, 106th Leg. 1st Sess. 91–93 (Neb. 2019) (statement by Dr. Erin Feichtinger, Dir. of Advoc. and Pol'y, Together Omaha) (noting that an additional seven days would give people facing eviction time to access services, and "allow tenants on fixed incomes, seniors, young families, people with disabilities who receive part or all of their income in the mail from assistance programs room to breathe if that income is late due to circumstances outside of their control.").

lay, but in matters where the tenant is in the process of obtaining the past due rent and such amounts can be paid in full within a prescribed redemption period or before the writ of restitution is executed by the sheriff, an eviction could be avoided. The right of redemption is not novel—at least thirteen other states offer tenants a right of redemption in some form.[23] Notably, an analogous right is made available to those with a mortgage who fall behind on their monthly payments.[24] In fact, a *landlord* with a mortgage who fails to timely make their monthly payments would be given upwards of six months to redeem the property after defaulting.[25] In view of this, providing tenants a few additional days seems quite reasonable.

A right of redemption was proposed in 2019 by Senator Matt Hansen as part of LB 434.[26] The bill proposed increasing the notice period for non-payment of rent from three days to seven and incorporating an additional seven-day period in which the tenant could redeem the tenancy by paying all amounts due.[27] While the proposal was generally opposed by landlords and real estate lobbyists testifying in opposition,[28] from a purely economic perspective, the right to redeem actually benefits landlords as much as it does tenants. There are two fundamental interests at play in the landlord-tenant relationship: the tenant's interest in staying housed and the landlord's interest in collecting rent. Both of these interests align with the public's interests in reducing homelessness and maintaining affordable housing by supporting the financial success of those who provide it. A right of redemption would positively address all such interests.[29] Set forth below

23. *See* Ryan P. Sullivan, *Survey of State Laws Governing Continuances and Stays in Eviction Proceedings*, 24 CITYSCAPE 2, at 242–44, https://www.huduser.gov/portal/periodicals/cityscpe/vol24num2/article17.html [perma.cc/6SYL-UAGM] (2022).

24. 59A C.J.S. *Mortgages* § 1366 (2022) ("A right of redemption is inherent in and essential to every mortgage. A mortgagor has the right to redeem, regardless of whether the mortgagor is aware of that right.").

25. *See* 12 C.F.R. § 1024.41 (2021) (providing that foreclosure proceedings cannot begin until a mortgage payment is more than 120 days delinquent); NEB. REV. STAT. § 76-1006 (Reissue 2018) (providing that, following the 120-day period, a notice of default may be sent providing the mortgagor a full month to cure the default in non-judicial foreclosures in Nebraska); NEB. REV. STAT. § 76-1007 (Reissue 2018) (mandating that, thereafter, a notice of sale must be published for five successive weeks, with the last publication at least ten days before the sale). It is only after all these periods have run that an eviction proceeding may be initiated.

26. *See* L.B. 434, 106th Leg., 1st Reg. Sess. (Neb. Jan. 18, 2019) (as introduced).

27. *See id.*

28. *See, e.g., Hearing on L.B. 434 Before the Comm. on the Judiciary*, 106th Leg. 1st Sess. 101 (Neb. 2019) (statement by John Chatelain, President, Metro Omaha Prop. Owners Ass'n) (testifying that the right of redemption would be an "unfair burden on the landlord"); *id*. at 103 (statement of Scott Hoffman, local landlord) (referring to the right to redemption "like a get out of jail free card").

29. *See id*. at 94 (statement of Leigha Wichelt, Tenants' Rights Project at the Univ. of Neb. Coll. of L.) ("LB434 will ensure tenants have the opportunity to come current on their rental obligations and avoid eviction. It is a win-win for both te-

is a variation of what was proposed within LB 434, revised to address certain concerns expressed by stakeholders:

> Section 76-1431
>
> . . . .
>
> (2)(a) If rent is unpaid when due and the tenant fails to pay rent within seven days after written notice by the landlord for nonpayment and his or her intention to terminate the rental agreement if the rent is not paid within that period of time, the landlord may terminate the rental agreement.
>
> (b) If, within seven days subsequent to the termination of the rental agreement under subdivision 2(a) of this section, the tenant tenders payment in full, including all rent, a reasonable late fee, and court costs due and reasonable attorney's fees incurred if an action for possession was filed, the landlord shall accept such payment, reinstate the original rental agreement, and terminate any proceedings brought pursuant to 76-1440 to 76-1447. Attorney's fees payable under this subsection shall not exceed $150.
>
> (c) The right of redemption authorized under subdivision 2(b) of this section may be used by a tenant only once during any consecutive twelve-month period.[30]
>
> (d) Written notice provided by a landlord pursuant to subdivision (2)(a) shall be deemed invalid unless such notice includes, in a conspicuous manner and under the heading of "Right to Redeem," the entirety of subsection (2) of this section.[31]

This proposal would permit the landlord to initiate the eviction process immediately after the expiration of the seven-day notice period, and thus the process would not be delayed any longer than necessary in matters that are uncontested or where a tenant is unable to redeem. It also allows the landlord to be made whole by recouping not only past due rent, but also a reasonable late fee,[32] court costs, and reasonable attorney's fees incurred. For the tenant, it would give them an opportunity to stay housed if they can come up with the funds within the redemption period; if they cannot, the eviction would move forward without any delay. Pursuant to section 76-1446 as it currently exists, the eviction trial could not take place until at least ten days after the expiration of the first seven-day period, so the redemption period will have come and gone before the scheduled trial date could

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nants and landlords. More landlords get paid and fewer tenants are forced into homelessness.").

30. This language is intended to quash the contention that this right of redemption could be used repeatedly by tenants to avoid timely paying rent each month without repercussion.

31. It is not uncommon to require information regarding rights to be included in notices provided by one party to another, particularly where one party tends to be significantly more sophisticated and versed in the law than the other. For example, creditors are required to include notice of certain rights in their notices to debtors. *See* NEB. REV. STAT. § 25-1011 (Reissue 2016). It is crucial that the bill incorporate some sort of "notice of rights" requirement in order for it to be effective.

32. *See infra* note 122 (discussing the potential conflict between the right of redemption proposal and late fee limitation proposal and offering solutions for resolving the conflict).

even occur.[33] For example, if the seven-day notice is delivered on the second day of the month, and the landlord files the eviction action on the tenth (after providing the tenant seven days to get current), the eviction trial could occur no sooner than the twentieth, and the tenant's right of redemption period would have expired on the sixteenth. The right of redemption therefore would cause no financial harm to the landlord;[34] the only reasons remaining for a landlord wanting to proceed with the eviction despite being presented with payment in full are reasons that should not be supported by policy.[35] If the landlord

33. *See* NEB. REV. STAT. § 76-1446 (Reissue 2018) ("Trial of the action for possession shall be held not less than ten nor more than fourteen days after the issuance of the summons."). The summons cannot be issued until the complaint is filed, and the complaint cannot be filed until after the expiration of the seven-day notice period. *See id.* §§ 76-1431(2) (Supp. 2021), 76-1441 (Supp. 2021), 76-1442 (Reissue 2018).

34. Any arguable financial harm incurred by the landlord as a result of the late payment could be recouped with the charging of a late fee that is reasonably related to the damage sustained. *See, e.g.*, Berens & Tate, P.C. v. Iron Mountain Info. Mgmt., Inc., 275 Neb. 425, 430, 747 N.W.2d 383, 387 (2008) (citations omitted). The court noted that liquidated damage provisions are permissible

> [O]nly (1) where the damages which the parties might reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty and (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach or is reasonably proportionate to the damages which have actually been caused by the breach.

Id. Moreover, by retaining the tenant in the unit rather than evicting them, the landlord will presumably benefit (rather than suffer) financially, as it will avoid entirely the typical costs associated with turnover, including the costs of cleaning and making repairs, leasing fees paid to a property manager, advertising costs, and the lost rent during the period when the unit is vacant. *Breaking Down Turnover Costs*, NAT'L APARTMENT ASS'N, https://www.naahq.org/read/partner-perspectives/breaking-down-turnover-costs [https://perma.cc/2ZAQ-XRDF] (last visited Jan. 30, 2022) ("The cost of a single turn including rent loss generally starts in the range of $1,000 and can easily grow to a range of $2,500 to $5,000.").

35. It is not uncommon for landlords to use the failure to pay timely rent as an excuse to eject the tenant from the apartment for other, unrelated reasons. Such reasons include a tenant's protected status (such as race, age, disability, having children), or because the landlord simply wants to replace the current tenant with someone new who will pay higher rent or won't complain about the housing conditions. *See* Deena Greenberg et al., *Discrimination in Evictions: Empirical Evidence and Legal Challenges*, 51 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 115, 141–42 (2016) ("With respect to eviction, however, identifying discrimination is much more difficult, since landlords often have a facially non-discriminatory reason for wanting the tenant out, whether it is nonpayment of rent or another violation of a rental agreement."); Online Interview with Mindy Rush Chipman, Dir., Lincoln Comm'n on Hum. Rts., Supervisor, Tenant Assist. Project outreach program (Nov. 15, 2021) (reporting that in her work evaluating housing discrimination claims, landlords frequently used non-payment of rent as an excuse to evict a tenant for reasons based in discrimination); Telephone Interview with Gary L. Fischer, former Gen. Counsel, Family Hous. Advisory Servs. (Mar. 28, 2022) (reporting that in his work in Douglas County, Nebraska, it was quite common for evictions brought for non-payment of rent to be motivated by discriminatory factors, or because the

wishes to terminate the tenancy despite the presentment of payment in full, the landlord can still exercise its right to issue a proper notice of its intent not to renew the tenancy when it expires.[36] It is improper to use the expedited eviction process related to failure to pay rent as a pretext to dispossess a tenant for some other reason.

The need for the right to redemption was highlighted during the COVID-19 pandemic when an abundance of rental assistance funds were made available but Nebraska's eviction process moved so quickly it was nearly impossible for a tenant to apply for and receive rental assistance before the seven-day period expired and their tenancy was terminated.[37] When the process was slowed as the result of eviction moratoriums, not only were fewer evictions necessary,[38] landlords received millions of dollars in rent that otherwise would have gone un-

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tenant had complained about substandard housing conditions); Telephone Interview with Scott Mertz, Hous. Just. Project Managing Att'y, Legal Aid of Neb. (Mar. 29, 2022) (describing landlords using non-payment to eject tenants with support animals from "no pets allowed" properties, or "if the tenant is one to complain about the quality of the housing, or had any grievances."); Telephone Interview with Erin Feichtinger, Dir. of Pol'y and Advoc., Together Omaha (Mar. 29, 2022) (describing multiple instances of landlords refusing to accept past due rent from single mothers, and describing the trend of using minor late-payment infractions to evict a family and replace them with a new tenant who the landlord could charge higher rent).

36. It is common in evictions cases for the tenant to be subject to a month-to-month lease, which permits the landlord to terminate the tenancy at any time by providing thirty days' written notice. *See* Interview with Haley Huson, Rsch. Assistant, Tenant Assistance Project (Apr. 3, 2022) (reporting that in reviewing over 2,000 leases within eviction filings brought in Lancaster County, Nebraska from 2019 through 2022, the vast majority were either month-to-month leases or term leases that had expired and were converted to month-to-month tenancies).

37. *See supra* text accompanying note 21. *See also* SARAH ABDELHADI & RANYA AHMED, LEGAL SERVS. CORP., FAST & CHEAP: THE SPEED AND COST OF EVICTING TENANTS FOR NONPAYMENT OF RENT, 9 (2021), https://www.lsctracker.org/fast-and-cheap [https://perma.cc/8N8Z-YNK2] (describing how evictions have become so fast and cheap that many landlords have determined it is more cost effective to utilize the court system than to make an effort to work with the tenant to resolve the underlying issue).

> The convenience and affordability of filing eviction cases has had the adverse effect of encouraging landlords to use eviction as a standard rent collection tool. . . . For landlords trying to recover unpaid rent, it is often more cost effective to file an eviction than to work with tenants to pursue alternative options like rental assistance funds or rent payment plans.

Id. (citations omitted).

38. *See* Ryan Sullivan, *Examination of Eviction Filings in Lancaster County, Nebraska, 2019-2021*, SSRN, Apr. 28, 2022, at tbl.III, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4093257 [https://perma.cc/8JHW-2J9G] (finding a significant decrease in evictions during periods when an effective moratorium was in place and during the period when emergency rental assistance funds were made abundantly available to families in need).

collected.[39] In fact, the more time provided, the more likely the eviction could be avoided entirely.[40]

As a variation to the above proposal, instead of limiting the redemption period to seven days, the Nebraska Legislature could provide the tenant the ability to redeem the property at any time before the execution of the judgment. If the Legislature wanted to explore this option, proposed subsection (b) above could be revised to state:

> (b) If, at any time before the execution of the writ of restitution authorized by 76-1446, the tenant tenders payment in full, including all rent, a reasonable late fee, and court costs due and reasonable attorney's fees incurred if an action for possession was filed, the landlord shall accept such payment, reinstate the original rental agreement, terminate any proceedings brought pursuant to 76-1440 to 76-1447, and move to vacate any judgment for restitution ordered, if one was entered. Attorney's fees payable under this subsection shall not exceed $150.

Other states have taken this approach.[41] Further, this approach aligns with the rights provided to mortgagors who can redeem property at any time prior to the completion of the action on foreclosure.[42] It also alleviates any confusion as to timing.[43] Importantly, it results in additional time for the tenant to become current on rent, which ben-

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39. In 2020 and 2021, the City of Lincoln distributed over $16.5 million in rental assistance to landlords. Over $9 million of these funds were distributed as a direct result of the Tenant Assistance Project, a program operating on site at the Lancaster County Courthouse providing free legal representation and rental assistance application services. *See* E-mail from Mindy Rush Chipman, Dir., Lincoln Comm'n on Hum. Rts. (Jan. 4, 2022, 5:22 P.M. CST) (on file with author). According to Mindy Rush Chipman, who oversees the rental assistance program for the City, "if it wasn't for the on-site presence of volunteer attorneys and rental assistance case workers who helped to slow the eviction process down to allow families to remain housed and landlords to get paid, nearly every one of these matters would have instead resulted in immediate eviction, and the landlords would have received nothing." *See* Telephone Interview with Mindy Rush Chipman, Dir., Lincoln Comm'n on Hum. Rts. (Feb. 17, 2022).

40. *See* SULLIVAN, *supra* note 38, at 21–26 (describing how the longer the matter was continued, the more likely the tenant was able to remain housed and the more likely the landlord would be made whole).

41. For example, in Delaware, tenants who have had a final judgment entered against them can stay an execution of the judgment by filing an assurance that they will pay all rent owed when the judgment was entered, as well as costs, within ten days from the final judgment. If the tenant pays and files proof of such payment with the court, the judgment is reversed. DEL. CODE ANN. tit. 25, § 5716 (2020). Similarly, under Minnesota law, renters can redeem their tenancy at any time before possession has been transferred by paying the landlord—or bringing to court—the amount they owe in rent, with interest, court costs, and attorney's fees not exceeding five dollars. MINN. STAT. § 504B.291(1)(a) (2020).

42. *See supra* note 25 and accompanying text.

43. *See, e.g., Hearing on L.B. 434 Before the Comm. on the Judiciary*, 106th Leg., 1st Reg. Sess. 103–04 (Neb. 2019) (statement of Scott Hoffman, landlord) (expressing confusion over how the seven-day right of redemption functioned).

efits both parties, and will not result in any additional delay in the eviction proceedings.[44]

2. Narrow the Scope of § 76-1431(4) – Evictions for Criminal Activity

Section 76-1431(4) provides a basis for an eviction action in instances involving violent criminal activity, drug distribution, or threatened harm to others or the property.[45] The law, enacted in 2016,[46] permits a landlord to issue a five-day notice to vacate, with no opportunity to cure the alleged violation.[47] As discussed in the Critique, although this basis for bringing an eviction serves a vital purpose, the law is written and applied more broadly and harshly than is necessary to accomplish the underlying objective.[48] Namely, the section provides for incurable grounds for eviction based not only on the conduct of the tenant, but on the conduct of a guest as well.[49] Where certain conduct of the *tenant* may arguably justify the near immediate expulsion from the property afforded under section 76 - 1431(4), the conduct of an *invited guest* should perhaps be treated differently.[50] A

44. In the same vein as the concept of a right of redemption, the legislature (or even local municipalities) should consider enacting a law requiring eviction proceedings for nonpayment of rent to be stayed where the tenant has applied and received approval for rental assistance, and the tenancy be reinstated upon the landlord's receipt of the rental assistance payment.
45. NEB. REV. STAT. § 76-1431(4) (Supp. 2021).
46. L.B. 221, 104th Legis., 2d Reg. Sess. (Neb. 2016).
47. NEB. REV. STAT. § 76-1431(4) (Supp. 2021).
48. *See* Sullivan, *supra* note 3, at 874–77.
49. For example, a tenant can be evicted if a guest, or someone who is merely "present upon the premises with the tenant's consent," threatens to damage the property in some way. NEB. REV. STAT. § 76-1431(4) (Supp. 2021). The only way the tenant can avoid these incredibly harsh results is if they seek a protection order or report the guest to law enforcement for criminal investigation. *Id.* § 76-1431(5)(a)(i)–(ii). Even if the tenant forced the guest to leave and prohibited them from returning, this is not enough under the current law to prevent the landlord from proceeding with an eviction against the tenant.
50. *See* Michelle Y. Ewert, *One Strike and You're Out of Public Housing: How the Intersection of the War on Drugs and Federal Housing Policy Violates Due Process and Fair Housing Principles*, 32 HARV. J. RACIAL & ETHNIC JUST. 57, 75 (2016) (generally discussing the problematic nature of the United States Department of Housing and Urban Development's (HUD's) now-relaxed "one strike you're out" policy, under which tenants could be evicted if their guests or household members committed a criminal offense on the premises, regardless of the tenant's actual knowledge of the conduct); Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51,560–01, 51,566 (Oct. 11, 1991) (to be codified at 24 C.F.R. pt. 966) (discussing comments submitted by advocates regarding the proposed rules, including that a "tenant should not be responsible if the criminal activity is beyond the tenant's control, if the tenant did not know or have reason to foresee the criminal conduct, if the tenant did not participate, give consent or approve the criminal activity, or if the tenant has done everything 'reasonable' to control the criminal activity"). In 2015, largely in response to the backlash from the Supreme

tenant cannot with any reasonable precision predict in advance the conduct of an invited guest, and therefore should not be subject to homelessness solely on that guest's unanticipated conduct.[51]

As a result of amendments in 2021,[52] the law now incorporates a few critical restrictions on when a landlord can bring an action under subsection four. Specifically, the law provides that a landlord cannot proceed against the tenant if the unlawful actions were performed by someone other than the tenant, *and* the tenant sought a protective order, reported the activity to law enforcement, or the activity was an act of domestic violence, and the tenant reported the conduct to a qualified third party.[53] While these exceptions lessened the rigidity of the law as it pertains to certain conduct, it nonetheless remains unnecessarily inflexible and would benefit from further revision.

The Revised Uniform Act contains a ground for eviction similar to what is provided in section 76-1431(4), but incorporates an affirmative defense when the facts allege criminal activity of *an immediate family member or invited guest* of the tenant.[54] The Revised Uniform Act provides that the lease shall not terminate so long as the tenant neither knew nor should have known the act was going to be committed, and also took reasonable steps to ensure there would not be a repeated criminal act on the premises by the immediate family member or

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Court ruling in *Rucker*, HUD relaxed its one strike policy—a policy akin to Nebraska's § 76-1431(4) (Supp. 2021)—as it related to the conduct of invited guests. *See* U.S. DEP'T OF HOUS. & URB. DEV., NOTICE PIH 2015-19 at 6–7 (2015), http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf [https://perma.cc/QA7Q-8XCB]. HUD also encouraged Public Housing Agencies to exercise discretion when deciding whether to evict tenants for drug-related or other criminal activity of household members or guests and, in effect, shifted the policy to something more akin to Nebraska's § 76-1431(1), which incorporates an opportunity to cure the default. *See id.*

51. *See* Ewert, *supra* note 50, at 78:

> It is unreasonable to conclude that public housing residents should assume the risk of all illegal behavior by all of these third parties. Indeed, it is irrational to think that tenants might be able to foresee every criminal act in which every household member, guest, or other person might possibly engage before deciding whether to invite them into their homes. Notably, for years, courts declined to evict innocent tenants for the criminal activity of household members or guests, especially if the offending household member had subsequently been removed from the unit.

Under Nebraska's Act, a landlord is deemed not liable to an incoming tenant for the conduct of a former tenant who has failed to vacate the premises upon the termination of the lease, so long as the landlord "made reasonable efforts" to control their conduct. *See* NEB. REV. STAT. § 76-1418 (Reissue 2018). Perhaps tenants should be given similar grace in responding to the unanticipated conduct of an invited guest. *See also* NEB. REV. STAT. §§ 76-1425, 76-1427 (Reissue 2018) (providing that the landlord is not to be held liable for "circumstances beyond his or her control").

52. *See* L.B. 320, 107th Legis., 1st Reg. Sess. (Neb. 2021) (enacted).
53. See NEB. REV. STAT. § 76-1431(5) (Supp. 2021).
54. REV. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 601 (UNIF. L. COMM'N 2015).

guest.[55] Nebraska should incorporate this affirmative defense into section 76-1431(4) to protect the innocent tenant.[56]

Nebraska's current broadly written law also gratuitously captures curable violations that are better suited for the remedy made available under section 76-1431(1). Subsection one requires a landlord to provide a tenant fourteen days' notice of an alleged violation, and an opportunity to cure that violation. Failure to cure the violation provides the landlord grounds for eviction. An example of a curable violation better suited for subsection one is drug possession. Although drug *sales and distribution* may reasonably fit within the type of crimes contemplated by subsection four, drug *use or possession*—a victimless crime—is better suited for subsection one.[57] This notion can even be found within the foundational text of the law itself. At its core, the aim of subsection four is to promote safety by removing from the premises: those who engage in violent criminal activity, the illegal sale of controlled substances, and other activity that threatens the health and safety of other tenants, the landlord or staff.[58] The statute then goes on to give examples—presumably falling under the catchall "other activity that threatens the health and safety"—including physical assault or threat of physical assault, illegal use of a firearm, or possession of a controlled substance; then, circularly, adds another catchall category nearly identical to the catchall that the series of examples was intended to define.[59] The examples are superfluous at best, and at worst overly broad, as they expand rather than define the objectives of the statute. It is unclear how "possession of a controlled substance" made its way into the list of example activities that "threaten the health and safety" of others,[60] particularly where the

55. *Id.*

56. For a detailed discussion of the innocent tenant concern, as captured in the context of rules governing public housing, see Ewert, *supra* note 50.

57. Placing this type of conduct within subsection one (where it resided prior to the addition of subsection four in 2016) does not serve to permit or condone such behavior, it merely gives the tenant an opportunity to take corrective action and avoid eviction.

58. *See* NEB. REV. STAT. § 76-1431(4) (Supp. 2021).

59. The first stated list of activities that can justify grounds for eviction under the statute finishes with "or any other activity that threatens the health or safety of other tenants, the landlord, or the landlord's employees or agents." *Id.* Then, as an example of such an activity, the statute circularly states "or . . . any other activity or threatened activity which would otherwise threaten the health or safety of any person or involving threatened, imminent, or actual damage to the property." *Id.* § 76-1431(4)(d).

60. When compared to the other items listed (physical assault, illegal use of a firearm, and threatening the health and safety of another person), this activity does not appear to fit. This is corroborated by the legislative history, where it is made clear that the focus in adopting this law was to provide landlords with the authority to eradicate serous criminal activity from the premises, such as meth labs and discharging weapons, not to force a family into homelessness because a member

intent of the statute was focused on drug *distribution*, not drug *possession*.[61]

A cleaner statute and better policy could be realized by removing the examples, or at the very least, removing from the list item (c)—possession of a controlled substance. A tenant found to have possessed a controlled substance, or a tenant's guest or family member found to be in possession of a controlled substance, should not result in the extremely harsh penalty of the termination of their tenancy and the near immediate expulsion from their home. The landlord certainly has a right to prohibit drugs on the premises, but the landlord already has a remedy to enforce this right under subsection one.

3. Provide Tenants a Reasonable Opportunity to Vacate the Premises Following Judgment

As introduced, Nebraska's Act provided that when a judgment for restitution was entered, a tenant would be given *at least* ten days to peacefully vacate the premises.[62] As enacted, however, rather than a guarantee of at least ten days to relocate—and perhaps more if the court in its reasonable discretion deemed additional time was justified—Nebraska's Eighty-Third Legislature guaranteed tenants *zero* days to vacate, and *at most* seven days[63] (later increased to ten)[64]—meaning tenants can be ordered to vacate the premises the same day as the hearing. In fact, in Lancaster County, Nebraska, although the current law permits the court to grant the tenant up to ten days to

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of the family or a guest was in possession of recreational drugs. *See, e.g.*, *Hearing on L.B. 385 Before the Comm. on the Judiciary*, 104th Leg., 1st Reg. Sess. 4–5 (Neb. 2015) (statement of Gene Eckel, Bd. Member, Neb. Ass'n. of Com. Prop. Owners, Apt. Ass'n of Greater Omaha and Lincoln) (stating that "drug-related crimes or violent crimes would be covered, such as if someone discharged a weapon on the premises or shot somebody on the premises," and the intent of the bill was "[t]o keep other tenants safe").

61. *Id.* at 12–13 (statement of John Chatelain, rep., Statewide Prop. Owners Ass'n) ("What I think this [bill] really does is it gets after that tenant who is menacing or threatening other people in the building, and that's where I see it being used. I don't see the landlord ferreting out someone with a small amount of marijuana.").

62. L.B. 293 § 50, 83d Legis., 1st Reg. Sess. (Neb. Jan. 25, 1973) (emphasis added) ("[T]he court shall . . . issue a writ of restitution, directing the constable or sheriff to restore possession of the premises to the plaintiff *on a specified date not less than ten days after entry of judgment*.").

63. *See* L.B. 293, 83d Leg., 2d Reg. Sess. § 46 (Neb. 1974) (codified as NEB. REV. STAT. § 76-1446) (emphasis added) ("[T]he court shall . . . issue a writ of restitution, directing the constable or sheriff to restore possession of the premises to the plaintiff *on a specified date not more than seven days after entry of judgment*.").

64. *See* L.B. 858, 84th Leg., 2d Reg. Sess. (Neb. 1976) (increasing the maximum from seven days to ten days).

vacate following the entry of the judgment, the most prevalent number of days afforded is zero.[65]

Though the record indicates no tenant groups were involved in the drafting of Nebraska's Act as introduced,[66] the collective of lawmakers and landlord advocates who drafted the bill apparently concluded that a minimum of ten days was necessary and appropriate to accommodate the interests of each effected party.[67] This attempt at fairness was evidently cast aside as part of the flurry of amendments post-introduction.[68] There was no discussion or debate of this amendment on the record.[69] In fact, it was such a subtle change to the text that it is possible few knew it was even made.[70] Though the change was slight, its impact was significant.

Understandably, a landlord desires the period between judgment and restitution to be as short as possible. Each additional day the tenant remains in the property often means an additional day the landlord is unable to enter the property to turn it over and make it available to a new tenant. Conversely, the tenant often desires the period to be as long as possible, as each additional day provides more

65. *See* SULLIVAN, *supra* note 38, at 26. And, in matters where the tenant had no legal representation, the court ordered that the writ be executed immediately in 87.9% of the cases reviewed. *Id.* app. C at xxx. This issue encompasses not only concerns of exacerbated homelessness, but also questions of fairness. As described in the *Critique*, permitting the writ to be executed immediately in effect requires a tenant to contemplate and file an appeal immediately after judgment is entered; by comparison, a traditional civil litigant (and even a landlord in an eviction matter) would be provided thirty days to file an appeal. *See* Sullivan, *supra* note 3, at 871 n. 178.

66. *Hearing on L.B. 293 Before the Comm. on the Jud.*, 83d Leg., 1st Sess. 42 (Neb. 1973) [hereinafter *L.B. 293 Jud. Comm. Hearing*] (statement by Prof. Wallace Rudolph, who assisted Sen. Simpson in the introduction of LB 293 as a Commissioner on Uniform State Laws) ("I talked to landlord groups. I haven't talked to any tenant groups . . . we have been dealing mostly with landlord groups and not tenant groups, as far as conferences on this bill.").

67. L.B. 293 § 50, 83d Legis., 1st Reg. Sess. (Neb. Jan. 25, 1973) (as introduced).

68. In total, through eleven filed amendments, ninety-four individual amendments were made to the bill after its introduction. *See* LEGIS. J., 83d Legis., 1st Reg. Sess., at 1103–05 (Neb. 1973) (eighteen amendments); LEGIS. J., 83d Legis., 2d Reg. Sess., at 350 (Neb. 1974) (seven amendments); *id.* at 444–45 (ten amendments); *id.* at 446 (one amendment); *id* at 512 (ten amendments); *id.* at 592 (one itemized amendment); *id.* at 625 (one amendment); *id.* at 695–97 (thirty-seven amendments); *id.* at 745 (four amendments); *id.* at 930 (four amendments); *id.* at 951 (one amendment).

69. *See* FLOOR DEB. RECS., 83rd Leg., 2d Reg. Sess. 4941–51 (Neb. Jan. 30, 1974).

70. The language within the relevant provision was changed from "not *less* than *ten*" to "not *more* than *seven*"—a shift of merely two words. *See* LEGIS. J., 83d Legis., 1st Reg. Sess., at 1105 (Neb. 1973). Further, this subtle change came at the end of the "voluminous" Judiciary Committee amendments to L.B. 293. *See id*; FLOOR DEB. RECS., 83rd Leg., 2d Reg. Sess. 4941 (Neb. Jan. 30, 1974) (statement of the clerk of the legislature) (referring to the Judiciary Committee Amendments as "voluminous").

time to find replacement housing, pack all of their belongings and complete all the steps requisite for relocating to a new home.[71] One might argue that the tenant already had several days prior to the hearing to prepare to be ejected from the home. Although this may be true, it ignores the reality that the tenant may have reasonably believed they had a viable defense to the eviction, and that success at trial was possible if not probable. As it stands, the law effectively requires a tenant in this situation to—prior to trial—pack up all their belongings and secure a new place for their family to live (including paying a security deposit and entering into a lease for a new residence) just in case they were to lose at trial. If they won at trial and their current tenancy was restored, they would now also be bound to a lease for a different residence. These circumstances were likely contemplated by the drafters of the original language, which provided a tenant a minimum of ten days to vacate post-judgment. Permitting the judgment to be immediately enforceable almost invariably puts tenants in an untenable position likely not contemplated by the legislature when approving this essentially one-word amendment that doubtless went entirely unnoticed by many.

Allowing the writ to be executed immediately also restricts—perhaps unconstitutionally—the tenant from exercising their right to appeal the judgment. As discussed in the Critique,[72] permitting the writ to be executed immediately in effect requires a tenant to contemplate and file an appeal immediately after judgment is entered.[73] By comparison, a traditional civil litigant would be provided thirty days to file an appeal.[74] In fact, a *landlord* dissatisfied with a court's ruling in an eviction matter would be given a full thirty days to appeal; only the

71. Notably, Colorado recently passed a law extending from two days to ten the period between the court's entry of judgment and when the tenant can be forcibly removed from their home. *See* HB 21-1121 § 2, 73d Gen. Assemb., 2021 Reg. Sess. (Colo. 2021) (codified as COLO. REV. STAT. § 13-40-122(1) (2021)). *See also* Andrew Kenney, *Colorado Renters Could See Serious New Rights and Housing Reform This Year. Here's What on the Table*, CPR NEWS (Mar. 11, 2021), https://www.cpr.org/2021/03/11/colorado-renters-rights-housing-reform-evictions-new-bill/ [https://perma.cc/5B8L-4JZ2] (quoting a statement by one of the Bill's sponsors that the additional days would benefit tenants by allowing them more time to determine 'what they're going to do, where [they're] going to store your stuff, where [their] kids are going to school'").

72. *See* Sullivan, *supra* note 3, at 870–71 (discussing how—because of the summary nature of restitution proceedings in Nebraska—tenants must immediately file an appeal in order to stop a writ of restitution from being executed).

73. *See* NEB. REV. STAT. § 76-1447 (Reissue 2018) (providing that to stay the eviction proceedings pending appeal, a defendant-tenant must file the appeal and deposit with the court the amount of the judgment and costs—and must do so before the writ is executed). Since the writ may be executed immediately, the tenant must therefore file the appeal and deposit these funds immediately to preserve that issue on appeal.

74. NEB. REV. STAT. § 25-1912 (Cum. Supp. 2018).

tenant-defendant's rights are limited by the law.[75] Moreover, if the tenant cannot afford the cost of the filing fee for the appeal and must therefore seek a fee waiver from the court, it is possible that the writ would be issued and executed before the notice of appeal is accepted, even if it was *filed* immediately after the judgment was entered.[76]

Ultimately, providing a reasonable amount of time to transition will, at least in theory, reduce a tenant's reliance on government assistance and social services, limit the need for law enforcement involvement to carry out the eviction,[77] allow a tenant to secure safe and reasonable housing for their family,[78] and reduce the chance they will become homeless.[79]

The following proposed amendment to section 76-1446 seeks to strike a balance between a landlord's interest in turning the property over as quickly as possible, the tenant's interest in having sufficient time to safely relocate their family, and the public's interests in a peaceful transition and in limiting reliance on government aid:

> 76-1446. Trial; judgment; limitation; writ of restitution; issuance.
> Trial of the action for possession shall be held not less than ten nor more than fourteen days after the issuance of the summons. ~~The action shall be tried by the court without a jury.~~ If the plaintiff serves the summons in the manner provided in section 76-1442.01, the action shall proceed as other actions for

75. *See* NEB. REV. STAT. § 76-1447 (Reissue 2018) (providing that either party may appeal "as in other civil actions," but that a defendant must deposit the amount of the judgment and costs with the court in order to stay an eviction and, presumably, must do so before the writ is executed).

76. *See, e.g.*, NP Dodge Mgmt. Co. v. Holcomb, No. CI 21-9059 (Douglas Cnty, Neb. Cnty. Ct. filed May 19, 2021) (appeal filed June 22, 2021) (relevant filings on file with author) (during the pendency of an appeal of the order for restitution, the landlord's attorney sought a writ of restitution from the lower court without providing notice to the other party or their attorney; despite knowledge that a notice of appeal had been filed (along with a motion to proceed in forma pauperis), the lower court issued a writ to be executed "forthwith").

77. *See* SULLIVAN, *supra* note 38, at 26 (reporting that the longer the period of time the tenant is given to vacate the premises, the less often law enforcement was necessary to carry out the eviction).

78. A tenant given limited time to find a new home is unlikely to find something that is suitable for their family, e.g., near public transportation that would allow them to get to work, within their children's current school district, offered at a fair price, and in a clean, safe and habitable condition. Rather, they may be forced to take the first option available to them, regardless of the needs of their family. This may lead to preventable unemployment, health issues and instability in their children's school and social lives. *See, e.g.*, Desmond, *supra* note 13, at 320 ("[F]amilies, desperate to find new housing, [often] relocate to dwellings with severe housing problems . . . Eviction can push families deeper into the slum, relocating them to more disadvantaged neighborhoods, neighborhoods that can have detrimental effects on children's health, development and wellbeing.").

79. A few days (and sometimes only a few hours) is an insufficient amount of time for a tenant to find and transition into adequate replacement housing; a tenant in this position is thus limited to the options of living in their car, on the couch of a friend or relative, or in a shelter.

> possession except that a money judgment shall not be granted for the plaintiff. If judgment is rendered against the defendant for the restitution of the premises, the court shall declare the forfeiture of the rental agreement, and shall, at the request of the plaintiff or his or her attorney, issue a writ of restitution, directing the constable or sheriff to restore possession of the premises to the plaintiff on a specified date not more than seven ~~ten~~ days after entry of judgment ~~issuance of the writ of restitution.~~ Unless additional time is requested by a defendant by notifying the court prior to the issuance of the writ, the writ may be issued immediately after entry of judgment. If additional time is requested by a defendant prior to the issuance of the writ, then the writ may be issued not less than ten nor greater than thirty days after entry of the judgment. The defendant will remain liable for any rent that accrues or damage that occurs until the premises are restored to the plaintiff. The plaintiff shall comply with the Disposition of Personal Property Landlord and Tenant Act and subsection (5) of section 76-1414 in the removal of personal property remaining on the premises at the time possession of the premises is restored.

The above proposal suggests leaving at zero the minimum number of days in which a writ of restitution could be executed and reducing the default maximum to seven days in cases where the tenant has likely vacated or otherwise does not request additional time, but increasing the minimum number of days in which a writ of restitution could be executed to ten and the maximum number of days to thirty in cases where the tenant affirmatively seeks additional time. This permits landlords to take possession of the property more quickly in cases where there is no dispute or the tenant has already vacated the premises,[80] while also guaranteeing the family a more realistic amount of time to transition and granting the court discretion to provide additional time when justified and appropriate. The proposal also makes clear that the tenant will remain liable for any rent that accrues, and any damages caused, until the property is turned back over to the landlord. These modifications will provide families with a more reasonable opportunity to find replacement housing and relocate in a manner that is less likely to result in homelessness and strain government resources. Further, the changes will help reduce dangerous confrontations with law enforcement,[81] and foster a more peaceful

80. On occasion, a tenant will vacate the premises but not formally notify the landlord or turn in the keys. In this situation, the landlord may feel compelled to proceed in obtaining the order of restitution as a way to avoid any potential claim by the tenant of abuse of access or unlawful ouster.

81. *See supra* note 77 and accompanying text. *See* JESSICA PISHKO, JUST. COLLAB. INST., SHERIFF DISCRETION AND EVICTIONS 5 (2020) ("Those subject to evictions by law enforcement face a traumatic departure from their home as well as the loss of their belongings. Further, the presence of increasingly militarized law enforcement can increase chances of injuries, violence, or related arrests for resisting."). *See also* Marti Glaser, *"I Didn't Sign Up for this Part": Local Law Enforcement Officers Struggle with Eviction Cases*, SPECTRUM NEWS (Sept. 8, 2021), https://spectrumnews1.com/wi/milwaukee/news/2021/09/08/evictions—and—wisconsin-law-enforcement-[https://perma.cc/PZN7-UBWC] ("[Racine County, Wisconsin Sheriff Deputy] Hipper said he's had multiple cases where the renters refused to move out and threatened to shoot at anyone who came to their home."); Omar

moveout that is less likely to result in destruction of property. The portion of section 76-1446 eliminating the right to a jury trial is stricken because that provision is likely to be found unconstitutional if challenged.[82]

Additional language could be included to account for situations involving circumstances resulting in an eviction brought under section 76-1431(4) where the landlord produced evidence at trial that any delay in the execution of the writ would result in significant harm to the property or to other tenants.

B. Promoting Equity and Fairness

As discussed at length in the Critique, Nebraska's current rental housing laws are profoundly inequitable. Below are a series of proposals for remediating certain sections where current law results in outcomes that are not only unfair but were also most likely unintended—or unanticipated—by the legislature when they were promulgated.

1. Strengthen and Expand Prohibition of Unlawful Lease Terms

Unlawful lease provisions in Nebraska are rampant.[83] A review of numerous Nebraska leases, including several standard form leases, revealed dozens of unlawful and unfair lease provisions.[84] To share just a few examples, terms were found in Nebraska leases that required the tenant to:

- Waive their right to a jury trial for any claim arising under the lease.
- Submit to a random drug test at any time requested by the landlord.
- Pay the landlord's attorney's fees.
- Pay a $500 "eviction fee" if eviction proceedings are initiated and a $500 "reinstatement fee" if the eviction action was terminated.
- Provide sixty days' notice of non-renewal of a term lease agreement, where the landlord must provide only thirty days' notice.

Villafranca & Angel Canales, *"I Just Want To Bust Out Crying": Evictions Put Strain on Tenants and Law Enforcement*, CBS NEWS (Aug. 25, 2021), https://www.cbsnews.com/news/evictions-renters-tenants-homeless-shelter-san-antonio/ [https://perma.cc/9F9M-9CXC] (detailing the "sensitive and dangerous" nature of deputies enforcing evictions and removing tenants from their homes).

82. *See* Sullivan, *supra* note 3, at 846 (quoting NEB. CONST. art. I, § 6) (concluding that the right to a jury trial in an action for possession existed at the time of the ratification of the Nebraska Constitution and, therefore, such right "shall remain inviolate" and cannot be vacated by statute).

83. *See* Sullivan, *supra* note 3, at 850–53 (itemizing examples of unlawful lease provisions found in Nebraska leases).

84. *Id.*

- Waive their right to the return of their security deposit.
- Waive their right to receive notice of the landlord's entry into the unit.
- Indemnify the landlord for services performed by the landlord's representatives.
- Waive their right to request the landlord remedy code violations or repair essential services if the tenant is not current on rent.
- Agree to have costs associated with general maintenance deducted from their security deposit.

These violations were not limited to a few rogue, unrepresented landlords; unlawful lease provisions were found in every lease examined.[85] There are likely two primary factors contributing to this phenomenon. First, residential leases are almost never negotiated.[86] It is well settled that a residential tenant is not on the same footing as the landlord in negotiating lease terms, and will thus have little to no leverage in negotiating new or different terms.[87] Instead, leases are provided to tenants as a "take it or leave it" proposition, and tenants are simply forced to accept what's proposed.[88] As recognized by Pro-

85. *See* UNIV. OF NEB. COLL. OF L. CIV. CLINICAL L. PROGRAM, SURVEY OF NEBRASKA LEASE AGREEMENTS (2018) (unpublished survey) (on file with author). An additional fifty leases were reviewed in conducting research for this Article, and each contained at least one unlawful provision, and most contained several.

86. Melissa T. Lonegrass, *A Second Chance for Innovation–Foreign Inspiration for the Revised Uniform Residential Landlord and Tenant Act*, 35 U. ARK. LITTLE ROCK L. REV. 905, 960 (2013) ("Residential leases are overwhelmingly standard form contracts of adhesion, presented to tenants by landlords on a take-it-or-leave-it basis.").

87. *See id.* at 960–61 (describing how tenants are "virtually powerless to negotiate their leases with their landlords," and opining that "[p]erhaps the most significant source of unfairness faced by residential tenants in the United States is their lack of bargaining power relative to landlords"); Barry A. Lindahl, MODERN TORT LAW: LIABILITY AND LITIGATION § 21:12 (2d ed. 2021) (crediting the unequal bargaining power of landlords and tenants as the primary reason that courts "often strike down exculpatory clauses in residential leases"); Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 169–70, 241 n.130 (2005) (observing that disparities in bargaining power can arise because a transaction involves a necessity, citing housing as an example, and noting that many courts have found "tenants have no bargaining power in dealing with prospective landlords and must meekly accept whatever terms the landlord seeks to impose through standard form lease contracts").

88. *See* Marshall Prettyman, *The Landlord Protection Act*, *Arkansas Code § 18 – 17 - 101 et seq.*, 2008 ARK. L. NOTES 71, 73–74 (2008) (generally discussing this issue); Subcom. on the Model Landlord-Tenant Act of Comm. on Leases, *Proposed Uniform Residential Landlord and Tenant Act, Report of Subcommittee on the Model Landlord-Tenant Act of Committee on Leases*, 8 REAL PROP. PROB. & TR. J. 104, 108 (1973) ("Some extremely inequitable situations have resulted from the lease being used as an adhesion contract by the landlord offering the burdensome lease agreement to the tenant on a 'take it or leave it' basis.").

fessor Prettyman, in his article labeling Arkansas's landlord-tenant act "The Landlord Protection Act": "There is an increasing realization that residential leases are not freely negotiated but rather imposed on a take-it-or-leave it basis by the landlord, especially the larger landlords."[89] This problem is reinforced by the common use of standard form lease agreements, which by their nature are not susceptible to negotiation or modification. Thus, whatever the landlord dreams up, the tenant is likely to have no choice but to accept, no matter how grotesque.[90]

Second, although there is a section in the Act specifically devoted to itemizing and describing what cannot be included in a residential rental agreement—section 76-1415—it is utterly ignored because the restrictions are not enforceable. As proposed by the ULC[91] and introduced to the legislature in 1973,[92] the section included a liquidated damages provision that was intended to discourage the inclusion of prohibited terms in lease agreements. Liquidated damages provisions can be found in six sections in the Uniform Act.[93] The 1974 Legisla-

89. Prettyman, *supra* note 88, at 73–74. *See also* Allen R. Bentley, *An Alternative Residential Lease*, 74 COLUM. L. REV. 836, 836 n.1 (1974) (quoting Morbeth Realty Corp. v. Velez, 343 N.Y.S.2d 406, 411 (N.Y. Civ. Ct. 1973) ("The blunt fact is that most people cannot rent apartments in our urban society without signing form leases that are simply grotesque in their one-sidedness."); Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. LEG. ANALYSIS 1, 3 (2017) (examining residential leases—using a sample from the Greater Boston Area—and finding that "[r]esidential leases regularly misinform tenants about their most basic rights and remedies," and sometimes "even flatly contravene the law.").

90. *See* Bentley, *supra* note 89; *see also* Furth-Matzkin, *supra* note 89 (examining residential leases—using a sample from the Greater Boston Area—and finding that "[r]esidential leases regularly misinform tenants about their most basic rights and remedies," and sometimes "even flatly contravene the law").

91. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.403 (UNIF. L. COMM'N 1972).

92. *See* L.B. 293, 83d Leg., 1st Reg. Sess. §§ 40–47 (Neb. 1973) (as introduced).

93. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.403 (UNIF. L. COMM'N 1972). Prohibited Provisions in Rental Agreements ("tenant may recover in addition to his actual damages an amount up to [3] months' periodic rent . . ."); *id.* § 2.101. Security Deposits; Prepaid Rent ("tenant may recover . . . damages in an amount equal to [twice] the amount wrongfully withheld . . ."); *id.* § 4.102. Failure to Deliver Possession ("If a person's failure to deliver possession is willful and not in good faith, an aggrieved person may recover from that person an amount not more than [3] months' periodic rent or [threefold] the actual damages sustained, whichever is greater . . ."); *id.* § 4.107. Tenant's Remedies for Landlord's Unlawful Ouster, Exclusion, or Diminution of Service ("the tenant may recover possession or terminate the rental agreement and, in either case, recover an amount not more than [3] months' periodic rent or [threefold] the actual damages sustained by him, whichever is greater . . ."); *id.* § 4.301. Periodic Tenancy; Holdover Remedies ("if the tenant's holdover is willful and not in good faith the landlord may also recover an amount not more than [3] month's periodic rent or [threefold] the actual damages sustained by him, whichever is greater . . ."); *id.* § 4.302. Landlord and Tenant Remedies for Abuse of Access ("tenant may recover actual dam-

ture removed two that favored tenants, including the one applicable here, which would have been included in section 76 - 1415 to create consequences for including unlawful lease provisions. Since then, the modern legislature has reinserted the liquidated damages language into one of those two sections where it had been removed,[94] and for similar reasons the language should be reinserted into section 76-1415 as well.

In light of the breadth of grotesquely unbalanced and unfair terms found in lease agreements across the state, and in recognition of the reality that tenants have virtually no ability to negotiate lease terms on their own behalf, the legislature should expand and elaborate on what cannot be included in a lease agreement. To encourage landlords to draft lease terms in compliance with the law, to promote more fairness in lease agreements, and to protect vulnerable tenants from abusive conduct, the following amendments to section 76-1415 are proposed:

(1) No rental agreement may provide that the tenant:
  (a) Agrees to waive or to forego rights or remedies under the Uniform Residential Landlord and Tenant Act *or any other applicable law*;
  (b) Authorizes any person to confess judgment on a claim arising out of the rental agreement;
  (c) Agrees to pay the landlord's or tenant's attorney's fees *or any fee associated with the hiring of an attorney, however denominated*; or
  (d) Agrees to the exculpation or limitation of any liability of the landlord arising due to active and actionable negligence of the landlord or to indemnify the landlord for that liability arising due to active and actionable negligence or the costs connected therewith.*;*
  (e) *Agrees to perform a duty imposed on the landlord by Section 76-1419; or*
  (f) *Agrees to pay a predetermined amount for cleaning or damages to the dwelling unit upon termination of the rental agreement or agrees that such amount or any other fees or charges may be automatically deducted from the security deposit, except those specifically permitted under the Uniform Residential Landlord and Tenant Act.*
(2) A provision prohibited by subsection (1) of this section included in a rental agreement is unenforceable. If a landlord deliberately uses a rental agreement containing *prohibited* provisions known by him or her to be prohibited, the tenant may recover actual damages *not less than an amount equal to one month's rent* sustained by him or her and reasonable attorney's fees. *If a landlord purposefully and knowingly uses a prohibited term in a rental agreement, such conduct shall be deemed not in good faith for purposes of the application of section 1411.*

The addition to subsection (a) is intended to make clear that a lease cannot require a tenant to give up a right or remedy available

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ages [not less than an amount equal to [1] month's rent] and reasonable attorney's fees.").

94. *See* L.B. 433, 106th Leg., 1st Reg. Sess. (Neb. 2019) (enacted) (amending § 76-1416 to provide for liquidated damages where a landlord's refusal to return the security deposit was willful and not in good faith).

under Nebraska's housing laws or any other applicable laws. This would encompass, for example, those leases found that required a tenant to submit to random drug testing or to waive their right to a jury trial. The modification to subsection (c) is in response to a series of leases discovered where tenants were agreeing to pay a legal fee disguised as a "reinstatement fee" or an "administrative fee." Subsection (e) was added to prevent a landlord from including in the fine print of a lease a delegation to the tenant of the landlord's duties under the Act.[95]

The modifications to paragraph two are necessary for enforceability. First, a tenant should not be burdened with proving the landlord's state of mind when drafting the lease terms; rather, "the risk of including improper terms should be placed on the landlord, through the adoption of rules imposing absolute liability for prohibited clauses."[96] As the party drafting the lease, it is the landlord who has the duty to know whether the lease terms included are lawful.[97] Next, to deter the type of unfair and unconscionable lease provisions found throughout the leases examined, landlords who include unlawful lease provisions should be made financially liable, and should be prohibited from accessing the special remedies provided under the Act, including the right to a summary eviction proceeding. Landlords operating in good faith and in compliance with the law would be unaffected by these amendments.

These amendments may dampen the worst effects of the landlord's superior bargaining position over the tenant, but the legislature should consider broadening the protections further by both expanding the itemized list of prohibited provisions[98] and mandating the inclusion of certain provisions.[99] For inspiration and guidance on the for-

95. The Revised Uniform Residential Landlord and Tenant Act, promulgated by the ULC in 2015, proposed a similar addition to the list of prohibited lease terms. *See* REV. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 203(a)(3) (UNIF. L. COMM'N 2015) (prohibiting any requirement that a tenant "perform a duty imposed on the landlord" by the section governing the landlord's obligation to maintain premises' habitability).

96. Lonegrass, *supra* note 86, at 962.

97. Requiring the tenant to prove that their landlord's misconduct was "deliberate" in order to recover is absurd on its face. However, it is even more absurd contrasted with a hypothetical where the standard was reversed: imagine a term that required a landlord to prove that their tenant's misconduct (such as failure to pay rent) was deliberate.

98. *C.f.* Lonegrass, *supra* note 86, at 970 ("[T]he ULC should consider expanding upon URLTA's unconscionability and prohibited terms provisions to provide additional content for the unconscionability standard as it applies to residential leases. While the uniform law currently proscribes a number of terms outright, that list is quite limited in comparison to the litany of terms prohibited or strongly discouraged by French and English law.").

99. *See* Curtis J. Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791, 791 (1974) (proposing that legislatures adopt a "full-disclosure statute" within their

mer, the legislature need only look to the egregious examples described and cited to in this Article and the Critique.[100] As for the latter, landlords could be required to set forth in the lease certain tenant rights, such as the right to reasonable notice before the landlord enters the premises, the right to withhold rent if the landlord fails to provide essential services or is in material breach of the rental agreement, or other rights enumerated in the Act or by law.

2. Require Tenants Be Provided a Copy of the Written Lease

Along with the above revision to strengthen the prohibition against unlawful lease terms, the legislature should consider reviving and perhaps expanding upon section 1.402 of the Uniform Act, which gives

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landlord-tenant laws, requiring the lease to set forth in clear terms the landlord's duties and remedies, the tenant's duties and remedies, and a remedy for the tenant if the lease omits these terms).

100. *See* Sullivan, *supra* note 3, at 850–53. Of particular importance would be the prohibition of lease terms that permit the landlord to automatically deduct from the tenant's security deposit pre-determined fines, fees and damages imposed even where the tenant was in full compliance with the lease. An example is the often found "carpet cleaning fee" that is deducted from the tenant's deposit even if the tenant left the unit in the condition it was delivered, excepting normal wear and tear. *See id.* at 851 n.82. In 2022, Senator Matt Hansen brought a bill that would make explicit that such fees are unlawful. *See Hearing on L.B. 1038 Before the Comm. on the Jud.*, 107th Leg., 2d Sess., at 1 (Feb. 11, 2022) (statement of Sen. Matt Hansen)

> I want to highlight for the committee that this type of charge is currently not authorized in statute and is in fact unlawful if it's automatically deducted from the security deposit. Unfortunately, in practice, it is still common across leases in Nebraska today. Whether it is charged directly to the resident or taken from the security deposit, current law under section 76-1421 states that the tenant's duties to maintain the unit do not include regular maintenance or anything that is deemed to ordinary wear and tear. The tenant's duty is to return the unit in the same condition, understanding that there may be some damage resulting in ordinary wear and tear.

Unfortunately, the bill was not advanced, in large part due to opposition from the Real Estate Lobby. Those testifying in opposition admitted including these unlawful provisions in their leases, but insisted they were an appropriate way to generate additional revenue from a tenant without increasing the rental amount advertised. *See id*. at 6 (statement of Lynn Fisher, Rep., Statewide Prop. Owners Ass'n and Lincoln Real Est. Owners & Managers Ass'n) (testifying "we do have a clause in our lease that says it will automatically charge for a carpet cleaning," and reporting it is "common practice here with our company and with other, other landlords around," but disputing that it was a "ploy to make extra money"). Mr. Fisher went on to state that if they were not able to charge these automatic fees, landlords would raise rents. *Id*. at 8. Also testifying in opposition was Pierce Carpenter, a Nebraska landlord, who appeared to compare carpet cleaning fees to his view of certain fees charged by other businesses in an apparent attempt to deceive customers into relying on an advertised price, stating "that's how business is done." *Id.* at 11. Mr. Carpenter further queried: "[I]f you restrict that one landlord in this way here, do you really think that he's not going to not find some way to beat that tenant out of money one way or the other?" *Id*. at 12.

effect to an unsigned or undelivered rental agreement. In addition to giving the lease effect, language could be included to prevent a landlord from enforcing the terms of a lease when a copy was not provided to the tenant.[101]

Section 1.402 of the Uniform Act provided:

> (a) If the landlord does not sign and deliver a written rental agreement signed and delivered to him by the tenant, acceptance of rent without reservation by the landlord gives the rental agreement the same effect as if it had been signed and delivered by the landlord.
> (b) If the tenant does not sign and deliver a written rental agreement signed and delivered to him by the landlord, acceptance of possession and payment of rent without reservation gives the rental agreement the same effect as if it had been signed and delivered by the tenant.
> (c) If a rental agreement given effect by the operation of this section provides for a term longer than one year, it is effective for only one year.

As discussed in the Critique, this provision was left out of Nebraska's Act to the detriment of tenants.[102] The Legislature should revive this provision and combine it with language penalizing a landlord's refusal to provide a copy to the tenant upon request. Additional language should be included to prohibit a landlord from bringing suit based on a violation of a term in the rental agreement of which it failed to provide the tenant an executed copy. The following additional subsection would accomplish this:

> (d) The landlord shall provide the tenant at the commencement of the tenancy a copy of any written rental agreement or other documents related to the tenancy. If a landlord fails to provide a copy of such written rental agreement and other documents within five days following a written request made by the tenant, the tenant may recover actual damages or liquidated damages equal to one month's periodic rent, whichever is greater, and reasonable attorney's fees.[103] In addition, the terms of any written rental agreement not provided to the tenant shall be unenforceable as against the tenant, and the landlord shall be prohibited from bringing an action for possession against the tenant based on a violation of any said terms that occurred during the period in which the tenant was without a copy of the written lease.

3. Place Reasonable Limits on Late Fees and Clarify Notice Requirements

One area of the landlord tenant relationship not addressed by the Uniform Act nor by Nebraska's Act is the issue of late fees for nonpayment of rent. The only section offering any guidance on this issue

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101. A similar concept is already present in Nebraska's housing laws—Nebraska's Mobile Home Landlord Tenant Act classifies a landlord's failure to provide their tenant a copy of the lease as a material non-compliance. NEB. REV. STAT. § 76 - 1481 (Reissue 2018).

102. *See* Sullivan, *supra* note 3, at 860–62.

103. This language is borrowed from the Revised Uniform Act. *See* REV. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 201(d)–(e) (UNIF. L. COMM'N 2015).

is section 76-1412, discussing "unconscionability."[104] The section provides that no court shall enforce any term in a rental agreement found to be unconscionable. Presumably, then, a late fee in an amount so great that it would be deemed unconscionable should not be enforced.[105] This would mean that any cause of action premised on a tenant's failure to pay an unconscionably large late fee would be invalid. This finding would apply to a cause of action for monetary damages, as well as an action for possession. In the former, the court would simply refuse to enter a judgment for any amount of claimed damages that included a late fee the court deemed unconscionable. For the latter, a cause of action for possession based, in part, on nonpayment of an unconscionable late fee would fail. For instance, suppose a tenant received a notice from their landlord to pay, within seven days of the date of the notice, past due rent totaling $500, plus $250 in late fees or their tenancy would be terminated. An attorney for a tenant could argue that a 50% late penalty for being seven days late on rent, 2,607% when annualized, is unconscionable.[106] If the late fee were to be deemed unconscionable, then the notice should be deemed defective, and therefore the preconditions for filing suit for possession would not have been satisfied.[107] In this instance, the court would have no choice but to dismiss the suit.

Unfortunately, because most evictions are entered on default or where no attorney representation is available for the tenant, the late fee issue is rarely if ever brought to the attention of the court. As a result, reported Nebraska jurisprudence is likely to remain void of caselaw providing clarity on what amount in late fees would rise to the

104. NEB. REV. STAT. § 76-1412 (Reissue 2018).

105. RESTATEMENT OF CONSUMER CONTRACTS § 5 cmt.11 (Am. L. Inst., Discussion Draft 2017) ("[A]n unconscionable contract or term is unenforceable . . . a court [can] choose between not enforcing the unconscionable term or contract in its entirety or merely limiting the application of any unconscionable clause so as to avoid any unconscionable result.").

106. Such a late fee would not only be unconscionable, but also unconstitutional. Civil penalties paid to a private party are impermissible in Nebraska. *See* NEB. CONST. art. VII, § 5. Presumably, any late fee amounting to a penalty is improper under Nebraska law. *See* Kozlik v. Emelco, Inc., 240 Neb. 525, 536–37, 483 N.W.2d 114, 121 (1992) (quoting Growney v. C M H Real Estate Co., 195 Neb. 398, 401, 238 N.W.2d 240, 242–43 (1976)) (discussing the distinction between a lawful liquidated damages provision and an unlawful penalty, and finding the agreed upon sum must be "either a reasonable estimate of the damages which would probably be caused by a breach or [be] reasonably proportionate to the damages which have actually been caused by the breach"); Stanford Motor Co. v. Westman, 151 Neb. 850, 858, 39 N.W.2d 841, 846 (1949) (quoting Yant Constr. Co. v. Vill. of Campbell, 123 Neb. 360, 243 N.W. 77, 79 (1932) ("[I]f the amount stipulated is more than sufficient to compensate for the breach, it will be regarded as a penalty.").

107. *See* NEB. REV. STAT. § 76-1441(1)(d) (Supp. 2021) (requiring pleading—and presumably proving—requisite compliance with the relevant notice requirements).

level of "unconscionable." Nebraska's failure to provide guidance on this issue has led to extraordinary late fees included in lease agreements,[108] and because tenants almost never have legal representation in these matters, these fees regularly go unchallenged. This issue has only recently been brought to the forefront as a result of the COVID-19 pandemic and the influx of rental assistance being provided by non-profits and government agencies. Extraordinary and indisputably unconscionable late fees demanded by landlords were flagged by these agencies, and some instituted measures to limit the amount that would be paid. For example, the Lincoln Prevention Assistance Common Fund set a limit of ten percent of the total amount owed in past due rent,[109] which is still extraordinarily high comparatively.[110] The obstacle these agencies and non-profits often encountered in objecting to the extremely high fees was that, under the law, the landlord did not have to accept the rental assistance once the eviction proceedings had begun.[111] As a result, the agency at times was forced to pay the

108. *See Hearing on L.B. 205 Before the Comm. on the Jud.*, 107th Leg., 1st Reg. Sess. 78–80 (Neb. 2021). L.B. 205 sought to amend § 76-1431 to place reasonable maximums on how much a landlord could charge in late fees. Proponent testimony described extraordinarily high late fees, sometimes totaling double the amount of monthly rent. *See id.* at 78–79 (testimony of Tessa Lengeling, Student, Univ. Neb. Coll. of L.) ("A sampling of eviction lawsuits reviewed by the UNL Civil Clinic revealed late fees ranging from $300 to over $1,300, while the monthly rental amount in most of these cases was only $500 to $700 range."). Examples collected from filings in Lancaster County, Nebraska revealed late fees totaling over $1,000, often exceeding the amount of rent due. *See also* Wendy Tolson Ross, *Protecting the Unsophisticated Tenant: A Call for A Cap on Late Fees in the Housing Choice Voucher Program*, 34 SETON HALL LEGIS. J. 227, 235 (2010) ("[M]any leases call for an initial lump sum fee for not paying on the date the rent is due and a subsequent fee for each day there remains an outstanding balance. These fees can accumulate quickly and can become quite excessive, therefore resulting in a large sum."); Phone Interview with Mindy Rush Chipman, Dir., Lincoln Comm'n on Hum. Rts. (February 17, 2022) (recounting instances of landlords requesting rental assistance funds and demanding "hundreds of dollars in late fees and other punitive fees, sometimes exceeding the monthly rent due").

109. The Lincoln Prevention Assistance Common Fund is a partnership comprised of the Lincoln Community Foundation, the City Urban Development Department, and the UNL Center for Children, Families and the Law tasked with distributing housing and utility assistance to Lincoln residents in need due to the impacts of COVID-19. *CCFL Helping City of Lincoln Administer Funding Assistance*, UNIV. NEB. LINCOLN, COLL. OF ARTS & SCIS., (July 8, 2020, 1:54 PM), https://cas.unl.edu/ccfl-helping-city-lincoln-administer-funding-assistance [https://perma.cc/K8NN-S6TW].

110. See Ryan P. Sullivan, *Survey of State Laws Governing Fees Associated With Late Payment of Rent*, 24 CITYSCAPE 2, at 270–72 (2022), https://www.huduser.gov/portal/periodicals/cityscpe/vol24num2/article18.html [https://perma.cc/QB35-QC5T]. Among the ten states with laws limiting late fees that may be charged for past due rent, the average maximum limit is 7.7% of the monthly rental amount. *Id.* at 2.

111. *See* discussion *supra* Subsection II.A.1 for an in-depth examination of the redemption period.

amount demanded, because the alternative was immediate homelessness for the tenant. The absence of a right to redeem the tenancy by paying rent, coupled with the unregulated imposition of late fees and other charges related to late payment of rent, results in scenarios that bear a striking resemblance to what in other settings would be deemed extortion.

A statutory limit also recognizes the imbalance in bargaining positions between the tenant and the landlord. Although a tenant may have "agreed" to the late fee, it can hardly be said that it was bargained for.[112] The term in a lease covering late fees is presumably never negotiated in a residential setting; in fact, aside from the tenant's name and the specific rental amount for that unit, terms in a lease agreement are most often pre-printed, "take it or leave it" terms.[113] A statutory limit on what can be charged for a late fee, both on a per diem basis and total amount, is needed to bring a level of balance and fairness in this area.

A related section of the Act ripe for improvement is the section containing the notice requirements a landlord must satisfy before bringing an action for possession for non-payment of rent, i.e., section 76-1431(2).[114] At present, the relevant language provides:

> (2) If rent is unpaid when due and the tenant fails to pay rent within seven calendar days after written notice by the landlord of nonpayment and his or her intention to terminate the rental agreement if the rent is not paid within that period of time, the landlord may terminate the rental agreement.

It is unclear from this statute exactly what must be contained in the notice to be effective. As an illustration, of twenty random notices examined, each issued by different landlords, no two were identical in form.[115] Some indicated that the lease would terminate upon the expiration of seven days, while some did not. Some included inaccurate or unclear amounts of rent claimed to be past due. Some included arguably unconscionable late fees or attorney's fees, and several were un-

112. *See supra* notes 86–90 and accompanying text.

113. *See Hearing on L.B. 268 Before the Comm. on the Jud.*, 107th Leg., 1st Reg. Sess. 78 (Neb. 2021) (statement of Tessa Lengeling) ("There is a stark imbalance in negotiating power between a landlord and a tenant, which often leads to extraordinarily high late fees and penalties written into pre-drafted, landlord-generated lease agreements. Tenants are put in a difficult situation without the power to negotiate on these types of terms."); Ross, *supra* note 108, at 977 (quoting Benjamin J. Lambiotte, *Comment, Defensively Pleading Commercial Landlords' Breaches in Summary Actions for Possession: A Retrospective and Proposal*, 37 CATH. U. L. REV. 705, 726 (1988)) ("Typical residential leases 'involve[ ] gross inequality of bargaining power between landlord and tenant, making the lease a virtual adhesion contract.'").

114. *See* NEB. REV. STAT. § 76-1431 (Supp. 2021).

115. Twenty notices were selected at random from eviction filings in 2020 and 2021 in Lancaster County and Douglas County courts.

clear as to when the seven-day period began and ended. Considering what is at stake, and in light of the apparent lack of clarity in the current law as demonstrated by the hodgepodge of notices examined, both tenants and landlords could benefit from clear statutory guidance in this area.

A bill was introduced in 2021 that would have addressed both the late fee and the notice clarity issues.[116] As proposed, the bill provided unambiguous instruction on what must be included in the seven-day notice a landlord must serve on a tenant as a prerequisite for bringing an eviction action based on non-payment of rent.[117] The late fee component of the bill set a limit of one percent per day of the periodic rent amount due, and capped late fees at no more than $100 or five percent in total, whichever is less.[118] The bill would have also made clear that a landlord could not both collect a late fee and proceed with eviction.[119] The theory is that once an eviction action is commenced, the rent is no longer deemed *late*, but rather *unpaid*. The remedy for late rent is a late fee, and the remedy for unpaid rent is an action for possession. It is not unreasonable to require a party to elect one remedy.[120] The language in the bill also aimed to prevent a tenant from being evicted for the sole reason that they had not paid a late fee.

While LB 205 was relatively straightforward, considering the testimony in opposition,[121] together with informal feedback from the Judiciary Committee, perhaps an alternate, even simpler approach to addressing these two issues would be more acceptable to all:

> 76-1415. Prohibited provisions in rental agreements.
>
> (1) No rental agreement may provide that the tenant:
>
> (a) Agrees to waive or to forego rights or remedies under the Uniform Residential Landlord and Tenant Act;

116. *See* L.B. 205, 107th Leg., 1st Reg. Sess. (Neb. 2021) (as introduced).
117. *Id*. § 2(a).
118. *Id*. § 2(b).
119. *Id*.
120. *See* Brooks v. United States, 337 U.S. 49, 53 (1949) (discussing election of remedies under several statutory schemes, such as the Federal Employees' Compensation Act and the Federal Tort Claims Act); Genetti v. Caterpillar, Inc., 261 Neb. 98, 119, 621 N.W.2d 529, 545 (2001) (holding that a plaintiff could not recover under both Nebraska's Warranty Act and its codification of the U.C.C. for claims against a truck engine manufacturer). *But see* deNourie & Yost Homes, LLC v. Frost, 295 Neb. 912, 929–30, 893 N.W.2d 669, 682–83 (2017) (holding that the election of remedies doctrine does not bar a plaintiff from seeking damages for both breach of contract and fraudulent inducement claims as to the same contract).
121. *See, e.g.*, *Hearing on L.B. 205 Before the Comm. on the Jud.*, 107th Leg., 1st Reg. Sess. 82–84 (Neb. 2021) (statement of Lynn Fisher, President, Real Estate Owners & Managers Ass'n) (opposing LB 205); *id.* at 84–87 (statement of Gene Eckel, Board Member, Neb. Ass'n of Com. Prop.) (opposing LB 205); *id.* at 90–91 (statement of Dennis Tierney, Board Member, Metro. Omaha Prop. Owners Ass'n) (opposing LB 205).

(b) Authorizes any person to confess judgment on a claim arising out of the rental agreement;
(c) Agrees to pay the landlord's or tenant's attorney's fees *or any fee associated with the hiring of an attorney, however denominated*; or
(d) Agrees to the exculpation or limitation of any liability of the landlord arising due to active and actionable negligence of the landlord or to indemnify the landlord for that liability arising due to active and actionable negligence or the costs connected therewith.*; or*
(e) *Agrees to pay a late fee exceeding the amount permitted under section 76-1415.01.*

(2) A provision prohibited by subsection (1) of this section included in a rental agreement is unenforceable. If a landlord deliberately uses a rental agreement containing provisions known by him or her to be prohibited, the tenant may recover actual damages sustained by him or her and reasonable attorney's fees.

76-1415.01. Late Fees.
After a grace period of at least three calendar days, a landlord may assess a daily late fee in an amount based on actual damages sustained as a result of the tenant's nonpayment of periodic rent, up to one percent per day of the periodic rent amount due. Late fees charged for actual damages sustained shall not exceed in total one hundred dollars or five percent of the periodic rent past due, whichever is less. Notice of the late fee policy shall be in writing and included in the rental agreement. All payments made by the tenant to the landlord shall be applied first to the periodic rent due and second to any late fee incurred as a result of unpaid periodic rent. A late fee may not be assessed if the landlord is in breach of the rental agreement or has terminated the rental agreement.[122] No other fee associated with the late payment of rent, however denominated, including but not limited to, a notice fee, reinstatement fee, processing fee, or administrative fee, may be assessed except as set forth in the Uniform Residential Landlord and Tenant Act.

76-1431. Noncompliance; failure to pay rent; effect.

. . . .

(2) If periodic rent is unpaid when due and the tenant fails to pay the periodic rent within seven calendar days after written notice by the landlord of nonpayment and his or her intention to terminate the rental agreement if the rent is not paid within that period of time, the landlord may terminate the rental

122. If the landlord has chosen to terminate the rental agreement, then any outstanding rent is converted to unpaid rent, as opposed to late rent. Thus, once the landlord selects the remedy of termination, it forgoes the late fee remedy. The landlord can still collect the unpaid rent, even if the tenancy is terminated. As an alternative to "or has terminated the rental agreement," the legislature could instead use "or has initiated an action for possession pursuant to sections 76-1440 to 76-1446." Either would carry out the choice of remedies policy. If the right to redemption proposal described within subsection II.A.1 is adopted in conjunction with this provision, modifications to the language of either or both will be necessary to address the apparent conflict in terms. Stated differently, this provision prohibits late fees if the landlord terminates the tenancy or files an action for possession, where the right of redemption proposal requires the payment of late fees to redeem the tenancy after the termination of tenancy and the filing of an action for possession. One solution would be to remove the late fee requirement from the right of redemption. Another solution would be to revise this provision to state: "*A late fee may not be assessed if the landlord is in breach of the rental agreement or has terminated the rental agreement, except where the tenancy has been redeemed pursuant to section 76-1431(2)(b).*"

> agreement. To be effective, the notice shall include: an accurate statement of the amount of the unpaid periodic rent and the period or periods for which the periodic rent is past due; a statement of the landlord's intention to terminate the rental agreement if the periodic rent is not paid within the seven-calendar-day period; the specific date by which the periodic rent as stated must be received to avoid termination of the rental agreement; the location where the periodic rent may be delivered; and a certification of service by the person serving the notice pursuant to section 76-1413(2)(c).
>
> . . . .

The legislature should also take action to improve section 76-1413 to make obvious that any notice shall be deemed effective upon *receipt*. That is, if hand-delivered, it would be effective immediately, but if mailed by first-class mail, it shall be deemed effective three days from mailing.[123] This ensures a tenant is provided the same amount of notice regardless of how it was served. Although it can be stated that section 76-1413 read as a whole provides for this already,[124] it is nonetheless often observed in practice that the notice period begins to run on the date of *mailing*, at least as it is perceived by some landlords,[125] and applied by some trial courts. When this occurs, a seven-day notice

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123. This is in line with *Nebraska Court Rules of Pleading* § 6-1106(e), which is applicable in civil actions and proceedings:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other document upon the party and the notice or document is served [by first-class mail], three days shall be added to the prescribed period.

The Nebraska Supreme Court has been reluctant to apply this rule outside the context of a civil proceedings. *See* Lyman-Richey Corp. v. Neb. Dep't of Revenue, 22 Neb. App. 412, 418, 855 N.W.2d 814, 818 (2014) (refusing to apply the rule to extend the date of filing a petition in an administrative proceeding). Thus, ensuring this standard applies to actions brought under Nebraska's Landlord-Tenant Act will likely need to be addressed legislatively. A defensible argument could be made for statutorily mandating the three-day extension for responding to *any* notice provided by mail. Not only would this ensure that the individual has fair notice and a reasonable opportunity to respond or "do some act," it will also provide clarity to all parties as to when the notice period begins. The Supreme Court has addressed the issue in the context of the triggering of a statute of limitations period, finding that the "date of mailing rule does not create certainty under the statute of limitations from the claimant's perspective," and that "the employee has the greatest interest in knowing precisely when the statute will start to run." Obermiller v. Peak Int., L.L.C., 277 Neb. 656, 662, 764 N.W.2d 410, 414 (2009). The three-day rule will make clear to all parties that the notice period would begin three days from the postmark on the mailing.

124. *See* Sullivan, *supra* note 3, at 842 n.41.

125. *See supra* note 115 (discussing review of twenty random notices filed). Prevalent among the notices reviewed was a requirement that the relevant action be taken "[x] days from the date of this notice," which was the same date the landlord asserted the notice was mailed. Thus, the only way a tenant receiving such notice would actually be provided the statutorily mandated opportunity to cure would be if the notice was *also* hand-delivered on the same day.

becomes a four-day notice—a result not likely intended by the legislature.[126] Further clarity on this issue is warranted.[127]

To further improve the clarity of the notice, the Nebraska Supreme Court should consider creating and mandating a form that landlords would be required to utilize, and the legislature could require that the completed form, including attestations regarding service of the notice, be filed with the complaint for eviction. This could be required for all statutorily required notices that are prerequisites to filing an eviction action.[128]

4. Repeal or Improve the Section Permitting Constructive Service

Section 76-1442.01 provides landlords a special method of obtaining service of process on tenants in eviction matters: instead of providing actual notice, they can instead post the notice on the front door of the residence and mail a copy to the tenant's last known address, otherwise known as "constructive service." Landlords are not required to obtain court permission to use this alternative form of service, even though permission to do so is required in all other civil mat-

126. *Cf.* JOHN LENICH, 5 NEBRASKA PRACTICE SERIES, CIVIL PROCEDURE § 10:19 n.8 (2022) (in the context of service of summons, averring that the legislature likely did not intend to give tenants served in part by first-class mail a shorter notice period than those served by personal or residential service).

127. For model language, see IOWA CODE §§ 562A.8, 562A.29A (2021), each providing: "Notice served by mail under this section is deemed completed four days after the notice is deposited in the mail and postmarked for delivery, whether or not the recipient signs a receipt for the notice." The Iowa Legislature added this language in 2010 in response to an Iowa Supreme Court ruling a year prior finding the existing statutes (which provided that notice was "received" upon mailing) violated the Due Process Clause of the Iowa Constitution. *See* War Eagle Vill. Apartments v. Plummer, 775 N.W.2d 714, 720, 721–22 (Iowa 2009).

128. A filed notice would enable the trial court to review it in advance to determine whether the notice was proper, and thus, whether the court has jurisdiction over the matter. This review is critical in matters where the tenant does not appear and is therefore unable to bring to the court's attention these deficiencies in the notice. Courts should not be in the practice of entering eviction judgments where the notice requirements have not been satisfied. Requiring that the plaintiff file the notice is also important in cases where the tenant *is* present—with or without representation—as it will give the tenant or their attorney an opportunity to review the notice prior to trial. Because discovery is not permitted, tenants would otherwise have no opportunity to review this evidence until the morning of trial. *See* Sullivan, *supra* note 3, at 865 n. 142 and accompanying text. For similar reasons, landlords should be required to file with the complaint (or at least serve upon the tenant) a copy of any written lease related to the tenancy, and any other evidence they intend to offer at trial. It is common for tenants to have not been provided a copy of their lease upon commencement of the tenancy, or for the tenant to have misplaced it (particularly in those cases where the tenancy has spanned multiple years).

ters.[129] In 2021, a bill was introduced to repeal this law.[130] Testimony in support of the bill confirmed that the fears expressed during the law's enactment[131] were justified and ultimately realized. That is, rather than constructive service being used as an *alternative* form of service in exceptional circumstances, it has become the "go-to" form of service in eviction cases in Nebraska,[132] likely resulting in thousands of tenants over the last three decades having no actual notice of their hearing, and ultimately being evicted by default for having failed to appear and defend the claims against them.[133] The bill to repeal the statute was fiercely opposed by the Real Estate Lobby.[134] The primary argument made was that if the law were to be repealed, tenants could live in the unit rent free in perpetuity by simply dodging service.[135]

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129. *See* NEB. REV. STAT. § 25-517.02 (Reissue 2016) (requiring the plaintiff to obtain permission from the court to utilize constructive service; the plaintiff must first prove to the court that service by traditional means could not be made).

130. *See* L.B. 46, 107th Leg., 1st Reg. Sess. (Neb. 2021) (as introduced).

131. *See Hearing on L.B. 324 Before the Comm. on the Jud.*, 92d Leg., 1st Reg. Sess. 63 (Neb. 1991) (testimony from Senator Hall describing concerns from Professor Roger Kirst with the University of Nebraska College of Law that the law "creates a false appearance that mail and posting could be used only in limited situations.").

132. *See* Sullivan, *supra* note 38, at 12 (constructive service was utilized in 49.2% of the cases during the period examined, compared to only 37.8% served by personal service); *see also Hearing on L.B. 46 Before the Comm. on the Jud.*, 107th Leg., 1st Reg. Sess. 67–70 (Neb. 2021) [hereinafter *Hearing on L.B. 46*] (statement of Robert Amend, a Douglas County Constable) (stating that in his 10 years serving as constable for Douglas County, he has utilized constructive service as the predominant means of affecting service, estimating he serves tenants by personal or residential service only "about 10 percent of the time."); *id*. at 62 (statement of Sam Baue, law student with the Tenant Assistance Project, "In many cases, alternative service is used as the primary form of service, either because it's convenient or. . . in an attempt to deprive the tenant of notice."); *id*. at 62–63 (statement of Abbie Kuntz, attorney with Legal Aid of Nebraska, "As it's been noted, constructive service is supposed to be the alternative. In reality, that is not what ends up happening."). *See* Telephone Interview with Kate Mahern, former Dir., Abrahams Legal Clinic, Creighton Univ. Sch. of L. (Mar. 29, 2022) (noting that constructive service without first obtaining permission from the court historically was rarely utilized, "but in the past 8–9 years it has become commonplace").

133. *See Hearing on L.B. 46 supra* note 132, at 63 (statement of Abbie Kuntz, attorney, Legal Aid of Neb.) (testifying that constructive service "results in tenants being less likely to receive proper notice and turn around, less likely to appear for their hearings where they will eventually get evicted"). *See also* Sullivan, *supra* note 38, at 24.

134. *See Hearing on L.B. 46 supra* note 132, at 59–75.

135. *See, e.g., id.* at 65–66 (statement of Dennis Tierney, Board Member, Metro. Omaha Prop. Owners Ass'n) ("[I]f LB46 passes, it might take several more weeks before the matter could come to trial. This adds up to additional weeks or months that the tenant would be allowed to live rent-free in the property."); *id.* at 69–70 (statement by Scott Hoffman, landlord) (expressing concern about tenants dodging service and landlords losing income).

This and the other concerns espoused by the lobbyists, however, are largely unfounded.[136] If the statute were repealed, landlords could still serve by constructive service through the general substitute service provision found in section 25-517.02, which is available to all civil litigants. As discussed in the Critique,[137] the primary difference is that section 25-517.02 incorporates critical judicial oversight necessary to safeguard due process.

Though the repeal effort failed, a few improvements to the statute were realized.[138] Namely, it was made clear that the notice to be posted at the premises must be left on the front door of the rental unit.[139] There was testimony during the hearing before the Judiciary Committee revealing that it was general practice to leave the notice in a common area in an apartment complex, or on the door of a secured entrance shared with other tenants in the building.[140] The statute was also amended to clarify what must be included in the affidavit to be executed by the person making service.[141] Still, even with these improvements, without judicial oversight, this law will likely continue to result in tenants being evicted without having been given actual notice of their hearing and a fair opportunity to appear. There are two primary concerns stemming from the lack of judicial oversight. First, the virtual absence of any consequence for failing to adhere to the pro-

136. *See id.* at 59–61 (statement by Sen. Matt Hansen, introducer of LB 46) ("[L]andlords will still have the option to serve by alternative means. They would just have to use Nebraska's substitute service statute, which is what all other civil litigants are required to use."); *id.* at 62 (statement of Sam Baue, law student, Tenant Assistance Project) ("LB46 would still give landlords the same opportunities to utilize alternative methods of service as any other litigant in Nebraska. They could use Nebraska's substitute service statute. This statute incorporates judicial oversight, making sure that the situation justifies an intrusion into the tenant's constitutional rights."). Constructive service via § 25-517.02 is intermittently utilized in eviction actions Nebraska, despite the availability of § 76-1442.01. In Lancaster County, Nebraska, it was utilized in 4% of the cases filed during the period examined. *See* Sullivan, *supra* note 38, at 12 n.44. A review of each of these matters revealed that the order granting permission to serve by substitute service was consistently issued within one day of the request being made, and often within hours.

137. *See* Sullivan, *supra* note 3, at 871–74.

138. *See* L.B. 320 § 8, 84th Leg., 1st Reg. Sess. (Neb. 2021) (amending NEB. REV. STAT. § 76-1442.01).

139. *Id*.

140. *See, e.g.*, *Hearing on L.B. 46 supra* note 132, at 62 (Neb. 2021) (statement of Sam Baue, law student, Tenant Assistance Project) ("The process server will often post the summons on a secured entrance door, where it can easily be removed or destroyed before the tenant ever has a chance to see it."). *But see id*. at 70–71 (statement of Brad Greiner, Lancaster County constable) (testifying that "we really go out of our way to get keys, codes, access to the properties," and noting that he and other court-appointed process servers had "really good working relationship[s] with the eviction attorneys, the landlords, and managers in this town").

141. *See* L.B. 320 § 8, 84th Leg., 1st Reg. Sess. (Neb. 2021) (amending NEB. REV. STAT. § 76-1442.01).

cess as prescribed by the law.[142] And second, there is insufficient guidance in the law as to the amount of effort that must be made before one can resort to posting and mailing. Because the empirical evidence demonstrates that the statute is being widely abused, and because courts have been reluctant to require compliance, it should be repealed, and landlords should be required to use the substitute service statute that is available to all civil litigants upon the showing of "reasonable diligence" that service could not be made "by any other method provided by statute."[143]

As an alternative to repeal,[144] the following amendments could address both of the above concerns and further diminish the volume of tenants being evicted for the sole reason they are not made aware of the date, time and location of their hearing:

> 76-1410 (4) Diligent efforts in the service of a summons shall include, at a minimum, attempting to serve the summons in the manner provided in sections 25-505.01 to 25-516.01 at the defendant's last known residential address at least twice, on separate days, with at least one of those attempts occurring after six p.m. In addition, if the landlord has knowledge of the location of the defendant's place of employment or other residence, temporary or otherwise, diligent efforts shall encompass at least one attempt to serve the summons at such location during business hours in the manner provided in sections 25-505.01 to 25-516.01.
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> 76-1442.01. Summons; alternative method of service; affidavit; contents.
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> When authorized by section 76-1442, service of a summons issued under such section may be made by posting a copy on the front door of the dwelling unit and mailing a copy by first-class mail to the defendant's last-known address. ~~The Plaintiff~~ On or before the deadline for filing the return of service, the person making service shall file an affidavit with the court describing the diligent efforts made to serve the summons in the manner provided in sections 25-505.01 to 25-516.01, the reasons why such service was unsuccessful, and that service was made by posting the summons on the front door of the dwelling unit and mailing a copy by first-class mail to the defendant's last-known address. Failure to strictly adhere to the service requirements set forth in

142. *See* Sullivan, *supra* note 38, app. C at xi (in Lancaster County during the examined period, 1023 cases were allowed to proceed to conclusion where the landlord sought to serve by constructive service, but the statutorily required procedures—put in place to safeguard due process—were not followed; 818 of these cases resulted in the tenant being evicted from the home). These service requirements are similarly unenforced in Douglas County, the county in which approximately fifty percent of the evictions in Nebraska are filed each year. *See* Sullivan, *supra* note 3, at 873 n.87 and accompanying text (citing Video Interview with Scott Mertz, Managing Att'y, Hous. Just. Project, Legal Aid of Neb. (Sept. 14, 2021). As long as courts continue to turn a blind eye to these requirements, they will continue to be ignored, and tenants will continue to be evicted without having been properly served with notice of the trial.

143. NEB. REV. STAT. § 25-517.02 (Reissue 2016).

144. Although repeal is the most appropriate measure considering the law is presently not used as intended and there exists a reasonable alternative for effecting service in those rare situations where posting and mailing is necessary, repeal is unlikely when considering the apparent sway of the Real Estate Lobby.

> this section shall deprive the trial court of personal jurisdiction over the defendant or defendants named in the summons.[145]

Where having notice of a hearing is so critical to due process, the legislature should also consider other specific limitations to help ensure tenants are provided actual notice of the proceeding and an opportunity to appear and defend the claim. For example, the legislature could account for those situations where the landlord is aware of facts or circumstances indicating the tenant would not likely see the notice posted on the door. Perhaps something like:

> If the landlord knows or, in the exercise of due diligence, should know that the tenant is temporarily absent from the premises or is otherwise unlikely to see the posting on the front door, and the tenant has not abandoned the premises, this method of service shall not be used.[146]

The legislature could also recognize that in these modern times, there may be other—and more effective—avenues for service that are more likely to result in actual notice than the outdated nail and mail

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145. This same provision should be included in NEB. REV. STAT. § 76-1442 (Reissue 2018) as well to ensure compliance with the requirements within that related service statute.

146. Arguably, this is already implied by the requirement that the landlord exercise diligent efforts to serve the tenant by traditional means before resorting to posting and mailing. *See* Frank Emmet Real Estate, Inc., v. Monroe, 562 A.2d 134, 136–37 (D.C. Ct. App. 1989) (holding that resorting to posting and mailing was improper where the landlord knew the tenant was located outside the district and had actual knowledge of an alternate address where the tenant could be found, and that "the concept of diligent and conscientious effort that permeates the statute as a prerequisite to posting requires more."); S. Hills Ltd. P'ship v. Anderson, 179 A.3d 297, 300 (D.C. Ct. App. 2018) (holding that posting was ineffective in an eviction action where the landlord was aware that the tenant had been arrested for a serious crime and failed to diligently and conscientiously attempt to locate the tenant through information available relating to his criminal arrest); Edelhoff v. Shakespeare Theatre at the Folger Libr., Inc., 884 A.2d 643, 645–46 (D.C. Ct. App. 2005) (finding a landlord did not exercise sufficient diligent efforts to locate the tenant before resorting to posting, where the landlord was aware that the tenant was out of the country and failed to contact the tenant by telephone). Notably, the service statute implicated in these aforementioned holdings does not explicitly require the exercise of diligent efforts, but such prerequisite has been recognized and imposed by courts as the bare minimum effort that must be expended before resorting to less favored methods of service. *See id.* at 645 (citing a series of cases for reiterating that posting is the "least favored" form of service):

> Thus, although the statute does not expressly so require, it is a prerequisite to posting that a "diligent and conscientious effort" be made by the process server to either find the defendant to effect personal service or to leave a copy of the summons with a person "residing on or in possession of the premises."

See also Dolan v. Linnen, 753 N.Y.S.2d 682, 701 (N.Y. Civ. Ct. 2003) (citing 1199 Hous. Corp. v. Griffin, 520 N.Y.S.2d 93, 94–95 (N.Y. Civ. Ct. 1987)) (stating that diligent efforts before resorting to posting and mailing the summons requires "[o]ne attempt at in-hand or substituted service . . . during working hours, between 8:00 a.m. and 6:00 p.m., and a second in the morning between 6:00 and 8:00 a.m. or in the evening between 6:00 and 10:30 p.m.").

measures.[147] Landlords could be required to, in addition to posting and mailing, send a copy of the summons and complaint to the tenant's email on file, and maybe even require the landlord notify them via text message of the date, time, and location of the hearing. Considering the consequences of a tenant not receiving notice, these additional requirements are not unreasonable if constructive service is going to continue as the dominant form of service utilized. Public policy dictates, and our system of justice contemplates, that civil matters should be resolved on the merits. In eviction court, it is a rare case that is resolved on the merits. In fact, the most common eviction is a default eviction.[148]

In addition to revisions to help ensure tenants are notified of the date, time and location of their hearing, the Legislature—or local governments—could require that along with the summons, the tenant be provided information on how to access eviction-related legal services and other resources.[149]

5. Wholly Bifurcate Actions for Possession from Other Causes

A typical eviction matter includes three causes of action. The first is a claim for restitution of the premises. The second two causes are claims for money damages, often referred to as "remaining causes"—one for past due rent, and the other for presumed, speculative damage to the property. The Act specifically permits complaints for restitution to include separate causes: "The complaint may also contain other causes of action relating to the tenancy, but such causes of action shall be answered and tried separately, if requested by either party in writ-

147. *See* John P. Lenich, *Substitute Service by Electronic Means*, 17:4 NEB. LAW. 27, 29 (2014) (discussing the use of alternative means—such as "e-mail, social media, or text message"—to effectuate substitute service). It could also be facilitated by the Supreme Court through the amendment of certain court rules to incorporate additional methods for ensuring parties are aware of pending hearings and deadlines, including text and email reminders similar to what is observed in the private realm (e.g., reminders for medical appointments).

148. *See* Sullivan, *supra* note 38, at 24 (of the 1,379 cases examined resulting in the tenant being ultimately evicted, 729 eviction orders were entered by default). The report also found that tenants were least likely to appear when constructive service was utilized. *Id*. at 20.

149. Presently, at least six states require such information to be included with the summons. Arizona (ARIZ. REV. STAT. RULES PROC. EVIC. ACT. § 5(a)(5) (2021); *id.* app. A.); Michigan (MICH. CT. R. § 4.201(C)(3)(2021)); Ohio (OHIO REV. CODE ANN. § 1923.06(B) (West 2021)), Oregon (OR. REV. STAT. § 105.113 (2021)); Texas (TEX. PROP. CODE ANN. § 24.0051(d) (West 2021)); and Washington (WASH. REV. CODE § 59.18.365(3) (2021)). A handout could be developed by the Supreme Court that would include legal services and rental assistance resources, as well as information on tenants' rights, and explanations of items that are frequently misunderstood. *See also supra* note 128 (suggesting that the notice and written lease also be included with the summons so that the tenant has advance notice of the exhibits the landlord intends to offer at trial).

ing."[150] Although bringing all causes simultaneously promotes economic and judicial efficiency, the different timelines for proceeding on each claim leads to problems, and to unfair and presumably unintended outcomes.

A number of issues arise when combining a claim that adheres to the timing of a summary proceeding with claims that follow the timeline set out in the traditional rules of civil procedure. First, combining two types of proceedings causes confusion and ambiguity in the summons itself. When a tenant is sued for eviction, a summons is immediately issued, and included in that summons is a trial date on the action for possession set to occur ten to fourteen days from the date the summons was issued. However, the summons *also* states that if there are other causes of action, that "to defend this lawsuit" the defendant has thirty days to respond to the complaint. It may be obvious to an attorney that the trial date is for one cause of action and the response date is for another, but an average non-attorney tenant could be easily misled or confused by these conflicting instructions.[151] One way to read the summons is that if there are no other causes of action, then the trial on the action for possession will occur on the date stated; but if the complaint alleges other causes, then the defendant has thirty days to respond in order to avoid a judgment being entered. The summons is ambiguous as to what is referred to by "this lawsuit"—is it the whole case, or only the claims on the remaining causes? The average tenant is unlikely to understand the concept of two lawsuits operating parallel within a single case.

Perhaps more concerning is the due process issue that arises in scenarios where a tenant does not appear at the trial on the fast-tracked first cause of action (for possession)—either because they were not properly served, they had already vacated the unit and had no reason to appear, their landlord or the landlord's attorney told them they did not need to appear,[152] or they simply chose to or were not

150. NEB. REV. STAT. § 76-1441(1) (Reissue 2018).

151. *See* Telephone Interview with Mindy Rush Chipman, Dir., Lincoln Comm'n on Hum. Rts. (February 17, 2022) (detailing several stories of tenants being confused by the summons, often "mistakenly believing they had thirty days to seek out legal assistance and defend the claim"); Telephone Interview with Kate Mahern, former Dir., Abrahams Legal Clinic, Creighton Univ. Sch. of L. (Mar. 29, 2022) (describing examples of tenants' confusion at the summons stating a trial date scheduled to occur within *ten days*, followed by a line stating they had *thirty days* to respond to the lawsuit).

152. It is not uncommon for a landlord to tell the tenant that "all is well" and that they do not need to appear for their hearing. In some instances, this was intended to deceive the tenant so that tenant would not appear and challenge the eviction. But more often there was no malicious intent, and the landlord did in fact intend to dismiss the action, but failed to communicate this to their attorney, who proceeded with the eviction in the absence of both the tenant and landlord. Also, prior to TAP, it was very common in Lancaster County for the landlord's attorney

able to appear. At that hearing, a judgment for possession will likely be entered by default, and a writ issued to remove the tenant from the premises, most often immediately.[153] Also occurring at that hearing, at which the tenant is not present, is the setting of a trial date for the remaining causes.[154] Because the tenant is not present, they can offer no input on when the trial will be set and, importantly, they are not there to hear the court state the date and time of the trial. Although a written order is thereafter issued setting forth this trial date, it is sent to the address from which the tenant has already vacated or will have been forcibly removed prior to the order being delivered by mail. As a result, the tenant often never receives notice of this trial date, and therefore has no opportunity to appear and defend those claims. In fact, most likely as a result of this lack of notice, fewer than one percent of tenants appear for the hearing on the remaining causes.[155] In each of those cases, a default judgment on the remaining causes is entered against the tenant, typically without any admissible evidence being offered,[156] and without the defendant having any opportunity to defend the claim.

In addition to these due process and procedural issues, it appears that these remaining causes are not even ripe for adjudication when the complaint is filed. As stated, the two damage claims typically included along with a claim for possession are those for past due rent and for damage to the property. The past due rent claim is at least presumptively ripe, even where the rent continues to accrue post-filing and up until possession is restored. However, any claim for damage to the property is purely speculative until the tenant actually

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to pull the tenant from the courtroom prior to the hearing, have them agree to terms that allowed a judgment to be entered against the tenant, and then tell them to leave without having an opportunity to appear at the hearing. The agreement would then be offered, a judgment entered, and a trial date on the remaining causes set without the tenant's knowledge. The order with the notice of trial date would then be sent to the address from which the tenant had just agreed to be evicted, so they would not receive it.

153. *See* Sullivan, *supra* note 38, at 30.

154. Notably, the trial date on these causes is set before the expiration of the thirty-day period within which the tenant has to file a written response to these claims. It would be unheard of in any other civil action for a trial date to be set before the responsive pleading is due.

155. A review of "remaining causes" trials spanning 2019–2021 confirmed few tenants appeared for the hearing, and a default judgment was entered against them in nearly every matter.

156. At a typical default hearing in an action for possession, the primary evidence offered is testimony from the landlord's attorney as to each element of the claim for restitution. This practice presumably violates NEB. REV. STAT. § 76-1444, which requires that, in the absence of the defendant-tenant, "the court shall try the cause as though he were present." Thus, it would appear that traditional default procedures permissible in other civil matters are improper in actions for possession.

vacates the premises. This cause of action is typically pled in boilerplate form. As an example:

> Third Cause
>
> Defendants failed to maintain the premises in the same condition as when received, ordinary wear and tear expected. Plaintiff has not yet had access to the premises to determine the extent of the damage and the amounts required to be expended for repairs.

These claims are made before the property is even restored to the landlord, and notably, before the landlord is even aware of whether there is any damage. Although these claims are not ripe when pled, courts nonetheless allow them to proceed to trial or to default judgment. In fact, no record in Nebraska could be located of a case where one of these claims was dismissed on ripeness grounds.

What is occurring in Nebraska courts are damage trials of which the defendant had no notice, resulting in the entering of default judgments for money damages that go unquestioned and are based on claims that were not ripe when made. To resolve these issues, plaintiff-landlords should be prohibited from bringing both restitution and damage claims in the same suit. Although landlords and real estate lobbyists would argue against bifurcation due to the additional time and costs involved in bringing two actions, such arguments fail to appreciate the fact that landlords already receive the incredible benefit of the summary proceeding for the action for possession, something no other litigants are afforded. It is not unreasonable—in exchange for that benefit—to require landlords to file a separate claim for damages, particularly where the current model consistently deprives tenants of due process and leads to unfair and unjust outcomes.

To accomplish this, the last sentence in section 76-1441(1) could be stricken and replaced with: "Any claims other than those for restitution of premises shall be pled and filed separately after the resolution of the claim for restitution of premises." To avoid the need for a second filing fee, the following additional provision could be included: "A complaint containing other causes relating to the tenancy may be filed within the existing action with no additional filing fee required."

As an alternative to this proposal, the law could be amended to require separate summons be issued after the trial on the action for possession has concluded. The last sentence in section 76-1441(1) could be amended as follows:

> The complaint may also contain other causes of action relating to the tenancy, but such causes of action shall be answered and tried separately, ~~if requested by either party in writing.~~ and if the tenant does not appear at the trial on the action for possession, the tenant shall be served with notice of trial on the related causes in the manner provided in sections 25-505.01 to 25-516.01.

Although this alternate proposal would resolve the due process issue, it would not resolve the ripeness issue. For this, trial courts

would need to take a more active role in policing the complaint to ensure it has jurisdiction over the matter.

At a bare minimum, the Legislature must strike the concluding phrase in the last sentence of section 76-1441(1) indicating that all the matters would be answered and tried together "unless requested by either party in writing." This quoted phrase is in direct conflict with both the Nebraska Rules of Civil Procedure providing the tenant thirty days to respond to a complaint for damages,[157] and the summons issued to the tenant that provides the same. The Legislature made clear that summary proceedings are available only for restitution of premises, not money damages, as is evidenced throughout the text of sections 76-1440 through 76-1447. In fact, section 76-1440 states specifically that the procedures that follow are for "[a]n action for possession." The concluding phrase "unless requested by either party in writing" in section 76-1441 adds nothing but confusion.

C. Improving Housing Conditions

Presumably, Nebraska has an interest in making available to its citizens housing that is clean, safe, and not in disrepair. Regrettably, Nebraska's current housing laws not only fail to carry out this objective, they have created a system that condones and even incentivizes the poor living conditions often observed in low-income housing throughout Nebraska. At present, there are insufficient remedies for tenants whose landlords refuse to make repairs or provide housing that is in compliance with the lease terms and applicable housing codes, and insufficient protections for tenants who notify their landlords of violations of the landlord's duties to maintain the premises in a fit and habitable condition. To promote better housing conditions in Nebraska, tenants need clear and sufficient remedies when a landlord is out of compliance, and they need protections from retaliation for reporting the violations directly to the landlord before engaging a government agency.

1. Improve Tenant Remedies for Landlord Non-Compliance

Under present law, except in certain limited circumstances, if a landlord is in material violation of a lease term, they have no enforceable obligation to come into compliance until a tenant provides notice in writing, and even then, the landlord has a full fourteen days to remedy the default.[158] If the landlord fails to do so within this period, or simply ignores the request, the tenant nonetheless remains obligated

157. *See* NEB. CT. R. PLDG. § 6-1112(a) (Cum. Supp. 2018) ("A defendant shall serve an answer within 30 days after being served with the summons and complaint").

158. *See* NEB. REV. STAT. § 76-1425 (Reissue 2018) (providing remedies for noncompliance by landlord).

to the tenancy until thirty days have passed from the original written notice. Examples of non-compliance run the gamut, ranging from a basement flooded with sewage, to a leaky roof, to unsafe issues with the electrical system, to lack of heat or hot water,[159] to an inoperable appliance, such as a refrigerator or stove, and anything in between impacting the safety, habitability, and usability of the rental unit. This current "14/30" model is impractical to address these situations, as it forces families to live in squalor or without certain necessary amenities for an extended period of time with minimal recourse. Akin to the measure taken by the legislature in 2016 to provide to *landlords* a more expeditious process for addressing certain non-compliance by a tenant,[160] *tenants* should be provided a correspondingly expeditious process for addressing material non-compliance by a landlord. In adopting this landlord-favorable law in 2016, the legislature recognized there were certain actions in default by the tenant (e.g., criminal activity, threatening behavior, distribution of illegal drugs) where an even quicker eviction process was warranted and where the tenant should not be afforded an opportunity to cure the alleged default.[161] For analogous reasons, certain non-compliance by a landlord should provide tenants an opportunity to terminate the lease and vacate on a shorter timeline than is currently provided under the law.

In situations involving a non-compliant landlord, tenants should also be given options for remaining in the home, if they choose. If the tenant prefers to remain in the home or for whatever reason it is not feasible for them to vacate, they should have the option to make the repairs on their own, deduct the expended amount from the rent, and stay in the home through the lease term. To this end, it would be reasonable to include language similar to what the 1974 Nebraska Legislature had removed from the Uniform Act that would have provided tenants an opportunity to make certain repairs themselves and deduct

159. In instances where the landlord "deliberately or negligently" fails to provide heat, hot water, or other essential services, a tenant has certain other remedies available, such as procuring their own services and deducting the cost from the rent. *See* NEB. REV. STAT. § 76-1427 (Reissue 2018). However, even this remedial statute requires the landlord's conduct to be "deliberate or negligent," and that the landlord be notified in writing. *Id.* Even then, the statute contains no mechanism to force the landlord to make the repair—it only provides remedies, each mediocre at best, that permit the tenant to recover some form of damages for the landlord's misconduct.

160. L.B. 221, 104th Leg., 2d Reg. Sess. (Neb. 2016) (enacted) (codified as NEB. REV. STAT. § 76-1431(4) (Reissue 2018)).

161. *See id. See also Hearing on L.B. 385 Before the Comm. on the Jud.*, 104th Leg., 1st Sess., at 1 (Neb. 2015) (statement of Sen. Brett Lindstrom) (introducing the bill, describing the "more time-efficient remedy" it would provide landlords when tenants or their guests engaged in threatening or criminal behavior).

the costs from the amount of rent owed.[162] Furthermore, during any period of material non-compliance, the landlord should be restricted from seeking full rent or bringing an action for possession.[163] Without these necessary changes to the law, not only will the tenant ultimately be displaced as the result of the *landlord's* non-compliance, but the material defects are likely to remain unabated, subjecting the next family to the same issues, and leaving them with the same insufficient remedies when the landlord refuses to remedy the violations.

To provide tenants a reasonable remedy for landlord material non-compliance, section 76-1425 should be modified as follows:[164]

> 76-1425. Noncompliance by landlord.
>
> (1) Except as provided in the Uniform Residential Landlord and Tenant Act, if there is a material noncompliance by the landlord with the rental agreement, a decrease in services or amenities that were available upon the commencement of the tenancy, or a noncompliance with section 76-1419 ~~materially affecting health and safety~~, the tenant ~~may deliver a written~~ provide notice to the landlord specifying the acts and omissions constituting the breach, ~~and that the rental agreement will terminate upon a date not less than thirty days after receipt of the~~

162. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.103 (UNIF. L. COMM'N 1972). An argument could be made that the right should not be limited only to minor repairs, but any repairs necessary to return the home to its condition at the time the premises were leased to the tenant.

163. In 2021, legislation was introduced to limit the remedies available to landlords in § 76-1435 by requiring as a precondition that "the landlord is in compliance with any rental registration ordinances adopted in the city or village in which the dwelling unit is located." L.B. 453 § 2, 107th Leg., 1st Reg. Sess. (Neb. 2021) (as introduced Jan. 15, 2021). The bill was voted out of committee but failed to advance. *See* NEB. LEGIS. J., 107th Legis., 2d Reg. Sess. 50 (Jan. 5, 2022). Such legislation appears necessary to force landlords to comply with registration requirements. *See* DANNI SMITH & ERIN FEICHTINGER, TOGETHER INC., RESIDENTIAL EVICTION PATTERNS & TRENDS: LANCASTER COUNTY, NEBRASKA, 2020, at 13 (2021) (copy on file with author) [hereinafter 2020 LANCASTER COUNTY DATA] ("Among addresses where evictions were filed in 2020, 685 properties were not licensed in accordance with City statutes; these properties accounted for over 75% of applicable rental units from that sample."); DANNI SMITH & ERIN FEICHTINGER, TOGETHER INC., RESIDENTIAL EVICTION PATTERNS & TRENDS: DOUGLAS COUNTY, NEBRASKA, 2020, at 24 (2021) (copy on file with author) [hereinafter 2020 DOUGLAS COUNTY DATA] (reporting 34.5% of the evictions were associated with unregistered properties). While the amendment as proposed will provide some benefit to tenants and to the public in improving the enforcement of building and safety codes, some might say it does not go far enough. *See, e.g.*, *Hearing on L.B. 453 Before the Comm. on the Jud.*, 107th Leg., 1st Reg. Sess. 165–66 (Neb. 2021) (testimony of Scott Mertz, Managing Att'y, Hous. Just. Project, Legal Aid of Neb.) (stating that the bill "would restore some semblance of fairness to rental and eviction process"). One possible improvement to what is proposed by LB 453 would be to require not only compliance with the registration requirement, but compliance with the applicable health and safety codes. It is paradoxical that a landlord would be permitted to bring an eviction action for non-compliance when the landlord themself is not in compliance.

164. As an alternative to the below, § 76-1425 could be repealed, and the operative language could be incorporated into § 76-1427.

~~notice if the breach is not remedied in fourteen days, and the rental agreement shall terminate as provided in the notice subject to the following.~~ If the breach is not remedied within seven days after having been provided notice by the tenant or having had actual notice, the tenant may elect to either a) terminate the rental agreement upon providing notice to the landlord of the date of termination selected by the tenant, or b) cause the work to be done in a workmanlike manner and, after submitting to the landlord an itemized statement, deduct from the rent the actual cost or the fair and reasonable value of the work. Rent shall abate and the landlord shall not be entitled to the remedies available in section 1435 during any period of material noncompliance by the landlord with the rental agreement, a decrease in services or amenities that were available upon the commencement of the tenancy, or noncompliance with section 1419. ~~and that the rental agreement will terminate upon a date not less than thirty days after receipt of the notice if the breach is not remedied in fourteen days, and the rental agreement shall terminate as provided in the notice subject to the following. If the breach is remediable by repairs or the payment of damages or otherwise and the landlord adequately remedies the breach prior to the date specified in the notice, the rental agreement will not terminate.~~ If substantially the same act or omission which constituted a prior noncompliance of which notice was given recurs within six months, the tenant may terminate the rental agreement upon ~~at least fourteen days' written providing~~ notice specifying the breach and the date of termination of the rental agreement selected by the tenant. The tenant may not terminate for a condition caused by the deliberate or negligent act or omission of the tenant, a member of his or her family, or other person on the premises with his or her consent.

Landlords may assert that seven days is an insufficient amount of time to provide them a reasonable opportunity to make the necessary repair and come into compliance; yet landlords argued that seven days was *too long* of a period to provide tenants to get into compliance for non-payment of rent.[165] In fact, some landlord testimony implied that tenants should get *no* notice of such non-compliance on the notion that the tenant already knows they owe rent and have not paid it.[166] That same argument could be applied in the situation of a landlord who should already know they are required to maintain the premises in accordance with health and safety codes and the terms of the lease; so on their own logic, landlords too should need no additional notice. Nonetheless, for the same reasons that tenants should be given a separate notice and a reasonable opportunity to cure, so too should landlords.

165. *See Hearing on L.B. 434 Before the Comm. on the Jud.*, 106th Leg., 1st Reg. Sess. 98–106 (Neb. 2019).

166. *See e.g.*, *id*. at 98 (statement by John Chatelain, President, Metro Omaha Prop. Owners Ass'n) (testifying "the tenant already knows the rent has not been paid."); *id* at 106 (statement of Dana Steffan, a fee-based property manager) ("They say that those extra four days are really going to help him. They knew rent was due on the first. It's due on the first every month of the 12-month contract that they signed.").

Another bewildering provision in section 76-1425 that is ripe for reconsideration is in paragraph two, providing in part: "If the landlord's noncompliance is caused by *conditions or circumstances beyond his or her control*, the tenant may not recover consequential damages, but retains remedies provided in section 76-1427."[167] But then section 76-1427 states "This section is *not intended to cover circumstances beyond the landlord's control*."[168] If one is not yet convinced for whose benefit Nebraska's Act was written, this should remove all doubt.

2. Expand Remedies Available for When Landlord Fails to Supply Running Water, Heat, or other Essential Services

Under Nebraska's Act, if a landlord "fails to supply running water, hot water, or heat, or essential services," the tenant is entitled to certain remedies, but only if the tenant provides the landlord *written* notice of the breach.[169] Thus, if the tenant calls the landlord on the phone to notify them that there is no running water, such notice is not sufficient to permit the tenant to exercise the remedies provided under the law, which include the right to procure such services on their own or find substitute housing. There is no compelling reason why such notice must be in writing. Any notice should be sufficient, including actual notice.[170] The law further limits the tenant's access to remedies by requiring the tenant prove the landlord's failure was either deliberate or negligent.[171] There is no justifiable reason to limit this remedy to only those cases where the landlord's failure was deliberate or negligent. Even when the failure was inadvertent or accidental, the tenant is nonetheless harmed and should have access to a remedy for this harm. Imagine if the remedies provided to a landlord under Nebraska's Act were available only if the tenant's conduct was "deliberate or negligent." For example, imagine if a landlord could bring an action for possession only if the tenant's non-compliance or failure to pay rent was deliberate or negligent. In this context it seems absurd; it is no less absurd in the context of a landlord's failure to provide essential services like heat or running water.

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167. NEB. REV. STAT. § 76-1425(2) (Reissue 2018) (emphasis added).
168. NEB. REV. STAT. § 76-1427(3) (Reissue 2018) (emphasis added).
169. NEB. REV. STAT. § 76-1427 (Reissue 2018). *But see id.* § 76-1413 (Cum. Supp 2018) (providing, at least arguably, that actual notice of a fact could waive the written notice requirement).
170. *Compare* NEB. REV. STAT. § 76-1427 (Reissue 2018) (requiring written notice), *with id.* § 76-1419(b) (Reissue 2018) (requiring written or actual notice). If specified landlord duties under § 76-1419 arise upon actual notice, so too should the tenant's remedies for the landlord's non-compliance with these duties. A landlord with actual notice of its non-compliance should not skirt responsibility on the technicality that such notice was not also provided in writing by the tenant.
171. NEB. REV. STAT. § 76-1427(1) (Reissue 2018).

The statute further provides that during the period of breach, the tenant "may recover the actual and reasonable cost or fair and reasonable value of the substitute housing not in excess of an amount equal to the periodic rent, and in any case under this subsection reasonable attorney's fees."[172] However, this particular remedy is available only if the tenant can prove the landlord's failure was *deliberate*.[173] The tenant should be afforded this remedy also where the landlord's conduct was *negligent*, and the tenant should be afforded *additional* damages when the conduct was *deliberate*.

This section of Nebraska's Act represents another example of the weak language that has permitted and promoted poor living conditions in many rental units in Nebraska. As it stands, the tenant would have no viable remedy under this statute for a landlord's failure to provide heat, unless the landlord received notice in writing *and* its conduct was deliberate or negligent. Also, a tenant could not be reimbursed for the cost of procuring replacement accommodations unless they could prove the landlord *intentionally* deprived the family of one of the enumerated essential services, such as running water or heat, i.e., the tenant must shoulder these costs even where it is proven the absence of essential services was the result of the landlord's negligence.

The section goes on to provide that a tenant who utilizes the remedies under this statute cannot utilize the remedies under section 76-1425. As described above, section 76-1425 provides the tenant a right to terminate the rental agreement if the landlord has not come into compliance after having been provided notice and an opportunity to remedy the violation. These two remedies should not be made mutually exclusive. If a landlord fails to provide heat, the tenant should be able to simultaneously procure replacement services or substitute housing *and* serve the landlord a notice of the non-compliance and have the right to terminate the lease if the landlord fails to remedy it within the notice period. The current law forces a tenant to choose between being stuck without an essential service or stuck in a lease with a landlord who refuses to provide essential services.

To discourage landlords from permitting their rental units to go into such disrepair and to compel the provision of essential services, and also to adequately compensate tenants who suffer the consequences of a landlord's failure to provide essential services, the following amendments are proposed to Section 76-1427:

> 76-1427. Wrongful failure to supply heat, water, hot water, or essential services.
>
> (1) If contrary to the rental agreement or section 76-1419 the landlord ~~deliberately or negligently~~ fails to supply running water, hot water, or

172. *Id*.
173. *Id.*

heat, or essential services, the tenant may, upon notice to the landlord, written, verbal or actual: ~~give written notice to the landlord specifying the breach and may~~:

(a) Procure reasonable amounts of hot water, running water, heat and essential services during the period of the landlord's noncompliance and deduct their actual and reasonable cost from the rent;

(b) Recover damages based upon the diminution in the fair rental value of the dwelling unit; or

(c) Procure reasonable substitute housing during the period of the landlord's noncompliance, in which case the tenant is excused from paying rent for the period of the landlord's noncompliance.

In addition to the remedy provided in subdivisions (a) and (c), if the failure to supply is negligent ~~deliberate~~, the tenant may recover the actual and reasonable cost or fair and reasonable value of the substitute housing ~~not in excess of an amount equal to the periodic rent;~~ or, if the failure to supply is deliberate, the tenant may recover in addition to the actual and reasonable cost or fair and reasonable value of the substitute housing, actual damages sustained or liquidated damages in an amount not less than three times the periodic rental amount, whichever is greater, and in any case under this subsection reasonable attorney's fees.

~~(2) If the tenant proceeds under this section, he may not proceed under section 76-1425 as to that breach.~~

~~(3)~~ (2) The rights under this section do not arise ~~until the tenant has given written notice to the landlord or~~ if the condition was caused by the deliberate or negligent act or omission of the tenant, a member of his family, or other person on the premises with his consent. ~~This section is not intended to cover circumstances beyond the landlord's control.~~[174]

Additionally, what qualifies as essential services should be expanded to include air conditioning and functional appliances that were present and operational at the commencement of the lease.[175]

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174. This provision should be stricken because the remedies set forth in this section should remain available to a tenant even in circumstances that are beyond the landlord's control. As an example, if there is a natural flood, lightning strike, or utility outage caused by a third party that results in the loss of an essential service, the tenant should still be given the options of procuring these essential services elsewhere and deducting it from rent, recovering damages based on diminution in the value of the dwelling unit, or procuring reasonable substitute housing and be excused from paying rent during that period. As the law stands now, in such a circumstance, the tenant would remain liable for full rent, despite the lack of at least one essential service. Although the cause of the disruption in services may not have been within the landlord's control, the landlord is in the best position to ensure that they are timely restored, and therefore should be incentivized to do so. *Cf.* Martinosky v. Crossroads Coop. Ass'n, 286 Neb. 1, 15, 834 N.W.2d 236, 248 (2013) (discussing workers' compensation laws as grounded in the policy choice that employers are in the best position to be tasked with maintaining workplace safety).

175. Essential services are not defined by Nebraska's Act. *See* NEB. REV. STAT. § 76 - 1410 (Supp. 2021). Essential services should be defined in § 76-1410 to include heat, air conditioning (if available upon commencement of the rental agreement), running water, hot water, sewer services, and appliances present and functioning at the commencement of the lease. *See e.g.,* Burd v. Abrams, 142 N.Y.S.2d 193, 195 (N.Y. Sup. Ct. 1955) (describing "proper refrigerators [and] stoves" as essen-

3. Permit Rent to Abate When Tenant is Deprived of Access or Services at the Commencement or During the Tenancy

The issue of rent abatement was discussed in the case of *Vasquez v. Chi Properties, LLC*.[176] In that case, the tenants brought a complaint against their landlord under Nebraska's Act alleging numerous code violations affecting their health and safety. The facts indicate the violations were present at the time the tenants took possession of the rental premises but were not discovered until a later date.[177] One of several claims asserted against the landlord was brought under sections 76-1418 – Duty to Deliver Possession, and 76-1426 – Failure to Deliver Possession.[178] Section 76-1418 provides that the landlord shall deliver possession in compliance with the rental agreement and in compliance with section 76-1419.[179] Section 76-1426 provides that if the landlord fails to deliver possession in such condition, rent abates until possession is delivered, and further provides that the tenant shall have the right to either terminate the rental agreement by providing a five-day notice of their intent to do so, or demand performance of the rental agreement and bring an action for possession against the person wrongfully in possession.[180] The facts as accepted by the court in *Vasquez* confirmed that possession was not delivered in compliance with section 76-1419, and there is nothing present in the statute indicating the tenant had a limited period of time in which to utilize the remedies provided under section 76-1426.[181] However, the court inexplicably concluded that the possession *was* delivered at the commencement of the lease, seeming to ignore the requirement that such delivery required compliance with section 76-1419. The court ruled that the claims under section 76-1418 and section 76-1446 could

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tial services); Stratford Leasing Corp. v. Gabel, 235 N.Y.S.2d 143, 145–46 (1962), *aff'd*, 13 N.Y.2d 607 (1963) (discussing essential services at length, concluding that the foundational question is "whether the elimination of the service materially reduces the value of the demised premise[s]," and providing numerous examples of what would constitute the removal of an essential service, including the removal of a doorman, removing window screens, failing to fix a broken door on a refrigerator compartment, and the elimination of a clothing line); OR. REV. STAT. § 90.365 (2021) (providing that essential services include an operable cooking appliance and refrigerator when landlord had agreed to supply these services); *Habitability and Essential Services*, CIV. L. SELF-HELP CTR., https://www.civillawselfhelpcenter.org/self-help/evictions-housing/196-habitability-and-essential-services [https://perma.cc/9DPN-A7G9] (last visited Mar. 27, 2022) (describing essential services as "heat, air-conditioning, running water, hot water, electricity, gas, a functioning door lock, and other essential items or services").

176. Vasquez v. Chi Prop., LLC, 302 Neb. 742, 925 N.W.2d 304 (2019).
177. *Id.* at 744, 310, 925 N.W.2d at 310.
178. *Id.* at 752–53, 925 N.W.2d at 314–16.
179. NEB. REV. STAT. §§ 76-1418 to -1419 (Reissue 2018).
180. *Id.* § 76-1426 (Reissue 2018).
181. *Vasquez*, 302 Neb. at 753–54, 925 N.W.2d at 315–16.

not proceed because "a tenant who accepts possession and lives on the property for several months thereafter does not have a claim under section 76-1418, because the duties described in section 76-1418 pertain to the 'commencement' of the lease term."[182] The court's interpretation left the tenant without a viable remedy for the landlord's failure to deliver possession of a habitable home in compliance with section 76-1419.

Modest amendments to the relevant laws could provide clearer guidance on this issue. The statute was intended to compel landlords to deliver the premises in habitable condition; amendments could be made to recognize that the condition of the premise may not be readily apparent upon the commencement of the lease. The law could also acknowledge the reality that once a tenant has moved into the unit, transitioning to a new home upon the discovery of the landlord's failure to deliver in accordance with section 76-1419 is no easy feat.[183] The statute would also recognize that under related statutes, tenants are encouraged to work with the landlord to give it an opportunity to come into compliance before terminating the tenancy.[184] Also, additional modifications are necessary to account for situations where the premises were initially delivered in compliance with the rental agreement and with section 76-1419, but the landlord later deprives the tenant of possession or services that were available at the commencement of the lease. Whether the failure to deliver possession or provide services occurs at the commencement of or during the lease, rent should abate until the tenant is provided possession or the services are restored. This could be accomplished by modifying the introductory paragraph to section 76-1426 as follows:

> If the landlord fails to deliver possession of the dwelling unit to the tenant as provided in section 76-1418, or after delivering possession deprives the tenant of possession or services made available under the lease or at the commencement of the tenancy, rent abates until possession is delivered or the services are restored, and the tenant may ~~shall~~:. . .

If the Nebraska Legislature were to adopt in full the proposed amendments to section 76-1425 outlined above, some of the amendments proposed here to section 76-1426 may not be necessary.

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182. *Id.*

183. A tenant put in this position would have to: find a new place to rent, complete a rental application (including a non-refundable application fee), complete a background check, obtain approval (not guaranteed), pack everything back up, rent a moving truck, find people to help them move (again), and move. Plus, the tenant will need to come up with another deposit and one month's advance rent for the new place, as the current landlord can only be compelled to refund the deposit and prepaid rent by filing a court action. *See* Sullivan, *supra* note 3, at 854–56 (discussing the difficulty faced by tenants in recovering their security deposit).

184. *See* NEB. REV. STAT. § 76-1425 (Reissue 2018) (providing that upon a material noncompliance by the landlord with the rental agreement or § 76-1419, the tenant shall provide the landlord notice and fourteen days to cure the default).

4. Strengthen Protections Against Landlord Retaliation

In 2018, an investigation into the condition of Yale Park Apartments in Omaha, Nebraska, led to the City to issue an order to vacate, declaring the property unfit for human habitation, and forcing all residents of the ninety-unit complex to evacuate and find replacement housing.[185] These conditions likely stemmed, at least in part, from the inadequacies in Nebraska's laws as outlined above, but also the failure in Nebraska's anti-retaliation law to protect tenants who contact their landlord with reasonable requests for repairs. As the law stands, a tenant may achieve some protection from eviction if they file a complaint with a city health inspector,[186] but would receive no protection if the complaint is made directly to the landlord.[187] Low-income and immigrant tenants like those of Yale Park Apartments, with limited housing options, are often faced with a choice between (a) notifying the landlord of an issue affecting their health and safety and risk being retaliatorily evicted, or (b) continue to reside in the unit under unsafe conditions.[188] Even where tenants are not *required* to first communicate the complaint to the landlord, it should nonetheless be *encouraged*. Involving government agencies should be a last resort, not a first resort. But under current law, the first resort is not protected.

Incidents of retaliatory conduct by landlords are commonplace in Nebraska, according to Nebraska housing advocates.[189] The classic re-

185. *See City Finds Horrid Living Conditions at Yale Park Apartments; Residents Evacuated*, KMTV NEWS (Sept. 21, 2018, 11:29 AM), https://www.3newsnow.com/news/local-news/city-to-conduct-full-scale-inspection-of-yale-park-apartments [https://perma.cc/ARQ2-SYG7].

186. Although section 76-1439(1)(a) provides protection from retaliation by the landlord when reporting habitability issues to a government agency, calling the city health inspector could ultimately backfire—if the health inspector finds the unit to be unfit for human habitation, it could issue an order requiring the tenants to vacate within twenty-four hours, possibly leaving them homeless. Erin Feichtinger from Together Omaha, recounts examples of tenants begging to remain in a unit ordered condemned "because it's still better than living out of their car." *See* Telephone Interview with Erin Feichtinger, Dir. of Pol'y and Advoc., Together Omaha (Mar. 29, 2022).

187. *See* NEB. REV. STAT. § 76-1439 (Reissue 2018) (only protecting tenants if their landlord engages in retaliatory conduct in response to the tenant "complain[ing] to a government agency charged with responsibility for enforcement of a minimum building or housing code of a violation applicable to the premises materially affecting health and safety," or for joining or establishing a tenants' union).

188. *See Hearing on L.B. 358 Before the Comm. on the Jud.*, 107th Leg., 1st Reg. Sess. 104 (Neb. 2021) (statement of Caitlin Cedfeldt) ("Because housing is such a precious and sometimes precarious necessity for our clients, Nebraska tenants often are dissuaded from seeking improved housing conditions for fear of retaliation of their landlords.").

189. *See* Phone Interview with Mindy Rush Chipman, Dir., Lincoln Comm'n on Hum. Rts. (February 17, 2022) (reporting that in her work in evaluating housing discrimination claims, it was quite common for landlords to use non-payment of rent

taliatory setting involves a tenant who asks the landlord to make a repair and, in response, the landlord serves them with an eviction notice. It is impossible to know how frequently this occurs because tenants often do not know their rights, and many presumably just vacate the premises before the sheriff arrives to force them out; as a result, few of these cases make their way to housing advocates and legal service providers.[190] Notably, in these retaliatory evictions, the defects to the premises remain unabated after the tenant vacates, and the unit is rented to a new family who may have no awareness of the condition until they move in, at which point they will be faced with the same options as the prior tenant: complain and risk eviction, or live with it.

To remedy these unreasonably prevalent circumstances, the legislature should look to the language within the Revised Uniform Act that prohibits a landlord from retaliating against a tenant who exercised certain basic rights, including the right to make a good faith complaint to their landlord pertaining to a violation of the landlord's duty to maintain the premises.[191] In developing the Revised Uniform Act, the ULC recognized the need to expand the list of protected activity. The Revised Uniform Act retains from the Uniform Act complaining to one's own landlord within the list of protected activities, but adds a few others, including complaining to a government agency responsible for enforcement of laws prohibiting discrimination, exercising a right or remedy under the law, or testifying against the landlord in court or in an administrative proceeding.[192]

Both the original and the revised Uniform Acts provide that if it is established that the landlord's purpose in engaging in the outlined adverse actions against the tenant are retaliatory, the tenant can assert

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as an excuse to evict a tenant for reasons based in discrimination); Telephone Interview with Scott Mertz, Hous. Just. Project Managing Att'y, Legal Aid of Neb. (Marc. 29, 2022) (detailing examples of tenants who received eviction notices shortly after they had contacted city code enforcement regarding habitability issues); Telephone Interview with Erin Feichtinger, Dir. of Pol'y and Advoc., Together Omaha (Mar. 29, 2022) (stating retaliatory evictions are "incredibly common in Nebraska, particularly in low-income housing situations," and that "low-income tenants are afraid of retaliation, so they don't complain, and the conditions only worsen."). *See also* Kent Luetzen, *Omaha Landlord Evicts More Tenants Despite CDC Moratorium*, KMTV NEWS (Mar. 18, 2021, 10:27 AM), https://www.3newsnow.com/news/local-news/omaha-landlord-evicts-more-tenants-despite-cdc-moratorium [https://perma.cc/G7XA-QQU8] (reporting on a landlord who elected to not renew a tenant's lease in response to the tenant's request for necessary repairs to make the unit habitable).

190. *See* Lauren A. Lindsey, *Protecting the Good-Faith Tenant: Enforcing Retaliatory Eviction Laws by Broadening the Residential Tenant's Options in Summary Eviction Courts*, 63 OKLA. L. REV. 101, 106 (2010) (discussing the absence of the reasons for definite statistics on the frequency of retaliatory evictions).

191. REV. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 901 (UNIF. L. COMM'N 2015).

192. *Id*.

the retaliatory conduct as a defense to the eviction.[193] The Revised Act added the right to recover liquidated damages.[194] In addition, both versions of the Act include a rebuttable presumption that the action by the landlord adverse to the tenant was presumed retaliatory if it occurred within one year (Uniform Act)[195] or six months (Revised Uniform Act)[196] of the tenant making a complaint. The Commission likely recognized the difficulty that an unrepresented tenant would face in proving retaliatory conduct, and believed it was reasonable to include the presumption to ensure the policies underpinning the section would be carried out. The default presumption could be rebutted by the landlord with the presentment of evidence that its conduct was not retaliatory.[197]

Nebraska's Act as introduced mirrored in substance the text from the Uniform Act, but following its introduction, the Legislature inexplicitly removed from the list of protected conduct the tenant's right to make a complaint directly to the landlord, and also removed the language setting out the rebuttable presumption. The Legislature also modified the language to permit the landlord to retaliatorily increase the rent or decrease services, as long it was "reasonable." The finished product was symbolic at best and has likely contributed to the deplorable housing conditions often observed in Nebraska.[198]

193. *Id*.; UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 5.101 (UNIF. L. COMM'N 1972).
194. REV. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 901 (UNIF. L. COMM'N 2015) ("the tenant may recover [three times] the periodic rent or [three times] the actual damages, whichever is greater").
195. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 5.101 (UNIF. L. COMM'N 1972).
196. REV. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 903 (UNIF. L. COMM'N 2015).
197. *See* 52B C.J.S. *Landlord & Tenant* § 1558 (2021).
198. *See* Kasey Ogle, Opinion, *Local View: Lincoln Needs Proactive Housing Policy*, LINCOLN J. STAR (July 27, 2021), https://journalstar.com/opinion/columnists/local-view-lincoln-needs-proactive-housing-policy/article_c8ba4be6-1766-5db1-a81e-b619dc1dd0b4.html [https://perma.cc/F68H-JXVL] (pleading for housing reform, Ogle, an attorney and housing advocate, provides examples of the deplorable conditions tenants often endure); *City Officials Shut Down Omaha Apartment, Tenants Being Kicked Out*, WOWT NEWS (Jan. 21, 2022, 10:35 PM), https://www.wowt.com/2022/01/22/city-officials-shut-down-omaha-apartment-tenants-being-kicked-out/ [https://perma.cc/YCH5-CJZB] (reporting on an Omaha apartment that was condemned after a city inspector found lack of electricity, functioning heat, roof leaks and other conditions that made the units uninhabitable); Aaron Hegarty & Jeff Van Sant, *When Tenant Gives Up on Landlord, City Finds 30 Violations*, KMTV NEWS (Feb. 14, 2020, 4:37 PM), https://www.3newsnow.com/news/investigations/when-tenant-gives-up-on-landlord-city-finds-30-violations [https://perma.cc/64V5-JDMV] (detailing the conditions of an Omaha apartment, such as mice falling from a vent in the ceiling and numerous code violations); *Landlord Wants to Keep Deposits After Refugees Evacuated*, ASSOCIATED PRESS (Oct. 19, 2018), https://www.1011now.com/content/news/Landlord-wants-to-keep-deposits-after-refugees-evacuated-498028881.html [https://perma.cc/F53Q-98DH]; Nancy Hicks, *Family Homeless After City Condemns Apartment*, LINCOLN J. STAR (Feb. 1, 2017), https://journalstar.com/news/local/govt-and-politics/family-homeless-after-city-condemns-apartment/arti-

In order to foster a housing environment where tenants feel free to report to their landlords, evidence of defects in the premises affecting health, safety or habitability without fear of being retaliatorily evicted, and to prohibit retaliation in response to certain other conduct worthy of protection, Nebraska Revised Statute section 76-1439(1) should be amended as follows:

76-1439. Retaliatory conduct prohibited.

(1) Except as provided in this section, a landlord may not retaliate by increasing rent or decreasing services or by bringing or threatening to bring an action for possession or failing to renew a rental agreement[199] after:

(a) The tenant has complained to a government agency charged with responsibility for enforcement of a minimum building or housing code of a violation applicable to the premises materially affecting health and safety; ~~or~~

(b) the tenant complained to a governmental agency responsible for enforcement of laws prohibiting discrimination in rental housing;

(c) ~~(b)~~ the tenant has organized or become a member of a tenants' union or similar organization.;

(d) the tenant has made a good faith complaint to the landlord of a violation of a relevant housing code, section 76-1419, or the rental agreement;

(e) the tenant has exercised or attempted to exercise any of the rights or remedies provided by the Uniform Residential Landlord and Tenant Act, or otherwise available at law; or

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cle_2ea0726f-2227-57ee-a0ee-2e686c5e3dbd.html; Telephone Interview with Erin Feichtinger, Dir. of Pol'y and Advoc., Together Omaha (Mar. 29, 2022) ("It is fair to say that the majority of low-income housing on the private market in Omaha is bordering on uninhabitable for humans based on minimum housing codes and what the average person would deem acceptable."). *See also* Omaha Ordinance 410767 (2019) (to combat the deplorable conditions found in many rental units in Omaha, the City enacted a law that would require the inspection of all units at least once every ten years, in addition to random inspections; the ordinance was aggressively opposed by landlord groups); 2020 LANCASTER COUNTY DATA, *supra* note 163, at 12 (revealing that approximately fifty percent of the evictions filed in 2020 involved a rental unit that had a health and safety code violation within the past three years, and in about seventy of these cases, the code violation investigation was still active at the time of the eviction); 2020 DOUGLAS COUNTY DATA, *supra* note 163, at 22 (reporting similar statistics in Douglas County, identifying 126 eviction cases filed associated with properties with code violation matters still pending).

199. The modification to this subparagraph is intended to harmonize this section with the similar anti-retaliation section found within the Mobile Home Residential Landlord and tenant Act. *See* NEB. REV. STAT. § 76-14,106 (Reissue 2018). Although the law as it stands is clear that a landlord cannot bring an action for possession (on any grounds) if the basis for the eviction is retaliatory, this harmonizing language will make it clear that a landlord's decision to not renew a lease cannot be based in retaliation of a tenant's exercise of protective conduct, whether they are renting an apartment or mobile home lot. Harmonization is critical among the two acts because in certain instances both acts could apply. For example, in a mobile home tenancy scenario involving two tenants where one owns the trailer and the other does not, the Mobile Home Act would apply in the case of the former, and the Residential Act would apply in the case of the latter.

(f) the tenant pursued an action or administrative remedy against the landlord or testified against the landlord in court or an administrative proceeding.

Amendments to improve section 76-1439 were attempted in 2019[200] and again in 2021.[201] On both occasions, the legislation was met with strong opposition by the Real Estate Lobby.[202] The majority of the angst expressed stemmed from the language that would have created a presumption of retaliation if the landlord took adverse action within six months of a tenant's protected conduct.[203] There was minimal concern with the inclusion of language similar to what is proposed above for subparagraphs (d) and (e). Presumably, landlords acting in good faith would actually want to encourage the reporting of defects or issues on the property so that the landlord can take immediate action and can limit the damage caused. Notably, the proposed language for (d) and (e) is borrowed from the anti-retaliation section in the Nebraska Mobile Home Landlord and Tenant Act.[204] Proposed subparagraphs (b) and (f) are reasonable additions borrowed from the Revised Uniform Act.[205]

While the presumption language is arguably justified for the same reasons that justify presumptions in other areas of the law,[206] it

200. L.B. 435, 106th Leg., 1st Reg. Sess. (Neb. Jan. 19, 2019) (as introduced).

201. L.B. 358, 107th Leg., 1st Reg. Sess. (Neb. Jan. 13, 2021) (as introduced).

202. *See Hearing on L.B. 435 Before the Comm. on the Jud.*, 106th Leg., 1st Reg. Sess. 116–19 (Neb. 2019); *Hearing on L.B. 358 Before the Comm. on the Jud.*, 107th Leg., 1st Reg. Sess. 113–23 (Neb. 2021).

203. *See, e.g., Hearing on L.B. 358*, at 118–20 (statement of Dennis Tierney, Board Member, Metro. Omaha Prop. Owners Ass'n) ("If LB358 passes, it appears that all the tenant would need to do is to make a complaint of a housing violation every six months and they could never be evicted for any reason."); *Hearing on L.B. 435*, at 116–17 (statement of John Chatelain, Metro. Omaha Prop. Owners Ass'n, Statewide Prop. Owners Ass'n) (stating that his organizations were primarily concerned about "the presumption that would last for six months after a triggering event"); *id*. at 118 (statement of Lynn Fisher, Great Place Properties) ("It's not fair to put the presumption of guilt on the landlord."). Of note, the presumption language is present in both versions of the Uniform Act.

204. *See* NEB. REV. STAT. § 76-14,106(b), (d) (Reissue 2018). For reasons shared above, harmonization of the Mobile Home Act and Nebraska's Act is critical in circumstances that implicate both. Moreover, it would seem plausible that whatever justifications exist for offering those protections to renters of mobile home lots would likewise be applicable to renters of apartments and single-family homes. *See supra* note 199 and accompanying text.

205. *See* REV. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 901(a) (UNIF. L. COMM'N 2015).

206. Mainly, that it is difficult to prove those claims but for the presumption and therefore for policy reasons the presumption is warranted. *See e.g.*, Texas Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 252–54 (1981) (discussing the burden shifting regime used in Title VII disparate treatment claims, including a rebuttable "presumption that the employer unlawfully discriminated against the employee" once the employee has shown "by a preponderance of the evidence that she" faced some adverse employment action "under circumstances which give rise to an in-

would seem that in Nebraska such language is unpalatable.[207] Even without the presumption language, the above proposed amendments alone would amount to a leap forward in protecting vulnerable tenants, promoting the reporting of violations affecting health, safety and habitability, and ensuring incidents like what happened at the Yale Park Apartments and other similar incidents are rare if not eliminated.

D. Clarifying the Law

1. Clean up Section 76-1437 — Termination of Periodic Lease

One factor impeding both tenants and landlords from understanding and exercising their rights under the Act is the confusing and archaic legalese often utilized throughout. One prime example is in Section 76-1437. Subsection two, for instance, provides:

> (2) The landlord or the tenant may terminate a month-to-month tenancy by a written notice given to the other at least thirty days prior to the periodic rental date specified in the notice.

What does this mean? It is well settled among courts and legal scholars that this general language is to be interpreted to mean that a party to the tenancy can terminate a month-to-month agreement by providing the other notice before the next rental period begins, and if they do, that next rental period shall be deemed the final rental period of the tenancy.[208] As an example, if the tenancy renews on the first of each month, a party seeking to terminate the tenancy at the end of

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ference of unlawful discrimination"); Rodriguez v. Monfort, Inc., 262 Neb. 800, 807, 635 N.W.2d 439, 445–46 (2001) (evaluating the rebuttable presumptions established by Nebraska's Worker's Compensation statutes in order to advance the policy "goal of returning the injured employee to gainful employment.").

207. Both bills seeking to amend § 76-1439 included presumption language similar to what was proposed by the ULC, including a lengthy presumption window. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 5.101(b) (UNIF. L. COMM'N 1972); REV. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 903 (UNIF. L. COMM'N 2015). Perhaps a shorter presumption window would be viewed less caustically. Other states with the presumption language have windows ranging from three to twelve months. *See* Major James A. Hughes, *Retaliatory Eviction*, 102 MIL. L. REV. 143, 152 (1983) (surveying state laws prohibiting retaliatory evictions and concluding fifteen states adopted the presumption language from the Uniform Act, with presumption windows of three months (five states), six months (seven states) and twelve months (three states)). Even a thirty- or sixty-day presumption would have value, as one can presume that most actions taken in retaliation of a tenant's conduct would be taken shortly after the conduct. If the legislature was inclined to entertain the inclusion of presumption language, it should look to the Revised Uniform Act where the Commission has fleshed out the presumption effect and how the presumption can be overcome. *See* REV. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 903 (UNIF. L. COMM'N 2015).

208. *See* 86 A.L.R. 1346 (originally published in 1933); *see also e.g.*, T.W.I.W., Inc. v. Rhudy, 630 P.2d 753, 757 (N.M. 1981) (citing cases nationally) (holding "that a notice to quit which is ineffective because it does not give the month-to-month

September must give the other party notice no later than August 31. But that's not very clear in the statute, and in fact many landlords and tenants interpret the statute to mean simply "30 calendar days' notice"—i.e., notice on August 15 of intent to terminate the tenancy will be effective September 15 (rather than September 30, as the law requires). Not only is the provision confusing and overly complex, it also includes undefined terms,[209] superfluous text,[210] and does not account for months that have fewer than or greater than thirty days[211]—amplifying the confusion. It is also unclear whether a mailed notice sent at the end of the month is sufficient to terminate the tenancy at the end of the subsequent month.[212]

One can reasonably presume that the intent of the statute is to ensure each party has a reasonable amount of time to either find new housing and vacate (in the case of the tenant), or to market the home to a prospective tenant (in the case of the landlord). The law assumes the tenant would be moving into their new home on the first of the next month and that the landlord will be installing a replacement tenant on the first as well. In practice, however, this is not how rental turnover works. A survey of leases conducted by the Civil Clinic at the University of Nebraska College of Law found that the majority of tenancies associated with said leases began on dates other than the first of the month. This is likely due to the realities that tenancies will often overlap for a short period as a tenant transitions from one home to the other, and that units will often remain vacant for a few days or weeks following the termination of the tenancy while the landlord

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tenant the requisite thirty days prior to the periodic rental date is nonetheless effective for the next ensuing rental date.").

209. Periodic tenancy is not defined. *See* NEB. REV. STAT. § 76-1410 (Supp. 2021) (defining the Act's key terms). Although one can assume in view of tradition that it is the first of the month, this assumption may be misguided. Many leases begin on a day other than the first of the month, and it is common for the rent to be due on a date later than the first of the month as the result of grace periods spelled out in the contract. What if the lease term is month-to-month, but the tenant pays a portion of the rent each Friday when they get paid—what is the periodic rental date in this instance.

210. It is unclear what is meant by the phrase "specified in the notice." Is it referring to the date of termination or the periodic rental date? What if the notice does not specify a date, but merely states that the tenant has thirty days to vacate? Considering that these questions perplex legal scholars, one can imagine the confusion experienced by the average tenant.

211. Arguably, if notice is given prior to a month with thirty-one days, the tenant would be required to vacate on the thirtieth of that next month, rather than the end of the month. Similarly, if notice is given on January 31, an argument could be made that it would be ineffective to terminate the tenancy effective the end of February, but would instead be effective to terminate the tenancy at the end of March.

212. *See* Sullivan, *supra* note 3, at 842–43 n.41 and accompanying text. *See also supra* notes 123–127 (discussing the issues of the effective date of mailed notice).

makes necessary repairs or upgrades and interviews prospective tenants.

The thirty-day requirement has also been deemed by some to provide insufficient notice from a practical standpoint,[213] particularly from the tenant's perspective who, upon receiving the notice, must: 1) locate a replacement affordable, safe housing suitable for their family, 2) submit their application, 3) obtain approval, 4) pack all of their belongings, 5) transfer utilities, and 6) move to the new home. This is a lot to accomplish in thirty days, even if one assumes tenants are able to quickly locate replacement housing and obtain immediate acceptance. Landlords have apparently recognized that thirty days is an insufficient amount of time from their perspective as well, often including terms in the lease requiring tenants provide sixty days' notice of their intent to terminate the tenancy.[214] However, because it is the landlord who drafts the lease and determines all of its terms, the landlord can simply dictate the tenant provide notice greater than thirty days;[215] a tenant has no ability to demand this.[216] Therefore, if tenants are to be afforded a reasonable opportunity to transition to a new home, it would need to be mandated in statute.

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213. The Uniform Residential Landlord and Tenant Act proposed sixty days' notice for either party to terminate a month-to-month tenancy. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.301(b) (UNIF. L. COMM'N 1972). *But see* REV. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 801(b)(2) (UNIF. L. COMM'N 2015) (providing that a landlord or tenant wishing to terminate a month-to-month tenancy must provide "the other at least [one] month's notice"). Some sources state that renters should begin looking for a new apartment at least thirty to sixty days before their expected move. *See e.g.*, Julie Aiello, *Apartment Hunting Timeline: When Is a Good Time to Start Looking?*, ZUMPER (Feb. 16, 2022), https://www.zumper.com/blog/when-to-start-looking-for-an-apartment/ [https://perma.cc/89XL-GQP3]; Derek Macy, *How Long Does It Take to Move Into an Apartment?*, THINK REAL STATE, https://thinkrealstate.com/how-long-does-it-take-to-move-into-an-apartment/ [https://perma.cc/G33Y-S656] (last visited Mar. 27, 2022). Notably, the thirty-to-sixty-day timeline described within these sources is apartment-focused—a family transitioning from a single-family home is presumably going to require more time to safely transition, as they are likely to have more belongings to pack and move, and will have fewer choices when searching for replacement housing. Those living in a single-family home are also presumably more likely to have children, which will give rise to other time-intensive tasks related to changing schools and childcare providers.

214. *See* UNIV. OF NEB. COLL. OF L. CIV. CLINICAL L. PROGRAM, *supra* note 85 (highlighting that many standard leases require the tenant to provide sixty days' notice if they intend not to renew their term lease). Notably, when the landlord includes this requirement for the tenant, it is often not mutual, i.e., while the tenant must provide sixty days to the landlord, the landlord need only provide thirty days to the tenant (and sometimes less). This represents yet another instance confirming that lease terms are not negotiated and are often grotesquely one-sided.

215. *Id*.

216. *See supra* notes 86–90 and accompanying text (discussing generally how tenants have no leverage to negotiate terms in a residential lease agreement).

To ameliorate all the aforementioned issues stemming from the current confusing language, to grant more flexibility in the date for which a lease is terminated given the reality that few tenancies initiate on the first of the month, and to ensure tenants are provided a reasonable opportunity to transition following a no-cause termination of a tenancy, the legislature should consider the following proposed amendment to section 76-1437:

> (2) The landlord or the tenant may terminate a month-to-month tenancy by a written notice given to the other ~~at least thirty days prior to the periodic rental date specified in the notice.~~; the effective date of termination shall be no earlier than sixty days from the date the notice was hand-delivered or sixty-three days from the date the notice was mailed.

As a lesser alternative, the legislature could at least improve the clarity of the current statute by making the following modifications:

> (2) The landlord or the tenant may terminate a month-to-month tenancy by a written notice given to the other~~; at least thirty days prior to the periodic rental date specified in the notice.~~ the effective date of termination shall be no earlier than the last day of the month following the month in which notice was received.

The first proposal is the better policy option, as it not only improves clarity of the law, but addresses and resolves every issue present in the current statute. Nebraska would not be a trend setter in providing a tenant sixty days' notice.[217] Moreover, this proposal should not be viewed as an increase from thirty days to sixty days; under the current law, a tenant may already be provided nearly sixty days' notice, depending on when during the prior month the notice is given. As an example, if notice is provided on May 5th, the tenant under the current law must be given until June 30 (56 days). The first proposal would provide the most consistency in the application of the law, as the amount of notice would remain constant regardless of when during the month the notice happened to be given.

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217. Delaware and Georgia each guarantee tenants at least sixty days' notice. DEL. CODE ANN. tit. 25, § 5106; GA. CODE ANN. § 44-7-7. Delaware's statute is written similarly to Nebraska's requiring the sixty-day period to begin at the start of the next rental period, and thus in effect providing sixty to ninety days depending on when the notice is given; Georgia's is written similarly to the first listed proposal above, i.e., sixty calendar days regardless of when the notice is given. Several other jurisdictions guarantee notice of greater than thirty days under certain circumstances. District of Columbia and Washington assure renters 120 days' notice if the landlord is terminating in order to convert or remodel the unit. D.C. CODE ANN. § 42-3505.01; WASH. REV. CODE ANN. § 59.18.200. Hawaii guarantees tenants forty-five calendar days' notice of termination. HAW. REV. STAT. §§ 521 - 71, 521-21(d). In New York, if the tenant had occupied the unit for more than one and up to two years, they must be provided sixty days' notice; if the tenant had occupied the unit for more than two years, they must be provided ninety days' notice. N.Y. REAL. PROP. LAW. § 226-C. Similarly, Oregon tenants who have occupied the unit for more than a year must be provided ninety days' notice. OR. REV. STAT. § 90.427.

The legislature could also look at expanding section 76-1437(4) to incorporate language that would require a landlord to provide a tenant at least sixty days' notice of its intent to not renew a term lease; or, include language that would prohibit a landlord from requiring in the lease more notice from the tenant to the landlord than the landlord would be required to provide to the tenant.

2. Clean up Section 1446 – Trial Date

Section 76-1446 provides that a trial on an action for possession must be held no sooner than ten and no later than fourteen days from the issuance of summons. It is ambiguous in this context what is meant by the word "held." Does it mean the trial must be *concluded* within these time limits? Or does it merely mean that the clerk is directed to schedule the trial for a date within these parameters, subject to it being continued for cause? In light of section 76-1443 (providing for a right to a continuance of the trial), particularly its current version as recently amended, it can only mean the latter. Section 76-1443 provides that each party may be granted a continuance for good cause, and that the parties can be granted additional continuances for extraordinary cause or if by agreement. Section 76-1443 could not operate as intended if section 76-1446 required the case be concluded within fourteen days following the issuance of summons. Section 76-1443 contemplates that not only could the trial on the action for possession be continued, it could be continued for extended periods when justified. Section 76-1443, both prior to the recent amendment and at present, includes text pertaining to the payment of rent during the pendency of the litigation; this language would serve no purpose if the matter was required to be concluded within fourteen days. This is because the initial hearing can't take place any sooner than ten days, and thus it is unfathomable to believe that the legislature created and recently expanded a continuance statute that permitted and contemplated multiple continuances that collectively could not postpone the hearing date more than four days from its originally scheduled date, and this assumes it was scheduled on the earliest date possible.[218]

218. *See* State v. Jedlicka, 305 Neb. 52, 57, 938 N.W.2d 854, 858 (2020) ("[W]e do not examine statutes in isolation. All statutes in pari materia must be taken together and construed as if they were one law."); Harvey v. Nebraska Life & Health Ins. Guar. Ass'n, 277 Neb. 757, 764, 765 N.W.2d 206, 211 (2009) ("To determine the legislative intent of a statute, a court generally considers the subject matter of the whole act, as well as the particular topic of the statute containing the questioned language."). Additional support can be found in § 76-1428 (Reissue 2018). This section provides that in an action for possession for non-payment of rent, the tenant may counterclaim for any amount recoverable under the agreement or the Act, and that if such counterclaim exceeds the amount claimed in past due rent, a "judgment shall be entered for the tenant.". The statute contemplates extended continuances by providing "the court from time to time may order the tenant to

Although it is common practice in most jurisdictions to grant requests for continuances—made by both plaintiffs and defendants and jointly—that extend the matter beyond fourteen days from the issuance of summons, some courts interpret section 76-1446 to require the matter be *concluded* within fourteen days and have retained this interpretation even after the amendments to section 76-1443 that allowed the parties to continue the matter for good cause. In these courts, even when the parties jointly request a continuance to allow them time to resolve the matter, it is not uncommon for the court to refuse to grant the continuance and require either a judgment be immediately entered or the matter be dismissed, citing section 76-1446.[219] Although many Nebraska courts have properly concluded that read together the two statutes require only that the *initial trial date* be set for a date ten to fourteen days from the issuance of summons, section 76-1446 could be made clearer with the following minor amendment:

> Unless otherwise ordered by the court, trial ~~Trial~~ of the action for possession shall be held not less than ten nor more than fourteen days after the issuance of the summons.

Alternatively, the language could be modified to more clearly state that the requirement applies only to the initial setting:

> The trial date shall be initially scheduled for a date ~~Trial of the action for possession shall be held~~ not less than ten nor more than fourteen days after the issuance of the summons.

The latter amendment, coupled with section 76-1443, provides well-defined guidance to both the court clerk who schedules the initial hearing, and to the trial judge who must rule on a motion to continue. Either amendment will also address the issue that occurred during the height of the COVID-19 pandemic when the entire court system had essentially halted for a period of time, but eviction trials proceeded unimpeded for the sole reason that courts felt compelled by section 76-1446 to conduct the eviction trials "within fourteen days" regardless of the circumstances of the world.[220]

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pay into court all or part of the rent accrued and thereafter accruing and shall determine the amount due to each party." Granting the court an ability to collect rent "from time to time" makes clear its intent that the trial could take place beyond fourteen days when a continuance was granted. It also appears to indicate that a continuance would be standard procedure in situations where a counterclaim was pled. *See* NEB. CT. R. PLD. § 6-1112(a) (providing that a plaintiff be given thirty days to respond to any counterclaim).

219. *See* Video Interview with Scott Mertz, Managing Att'y, Hous. Just. Project, Legal Aid of Neb. (Sept. 14, 2021) (describing this to be a common occurrence in Douglas County).

220. *See, e.g.*, Administrative Order, Lancaster County Court, Nov. 17, 2020 (suspending cases and delaying most civil and criminal hearings until January 2021, with the exception of a few limited case types that included debt collection mat-

3. Clean up Section 76-1426 – Remedy for Failure to Deliver Possession

Section 76-1426 permits a tenant to terminate the rental agreement and demand the immediate return of any prepaid rents or deposits if the landlord fails to deliver possession of the premises at the commencement of the lease term. However, the language is extremely clunky, particularly subsection one. This subsection states that upon the landlord's failure to deliver possession, the tenant shall "Upon at least five days' written notice to the landlord terminate the rental agreement and upon termination the landlord shall return all prepaid rent and security."[221] The language is not abundantly clear as to the function of the "five days' written notice." A weak argument could be made that it creates a window for the landlord to cure; i.e., the landlord would be given an additional five days to deliver possession. This argument should fail in light of other notice deadlines throughout the Act that clearly denote circumstances where the Legislature intended to provide a right to cure.[222] The more reasonable interpretation is that it provides the tenant a right to issue a notice to the landlord of their intent to terminate the agreement, that the rental agreement will terminate five days after notice, that there is no opportunity to cure, and that the landlord must return the prepaid rent and security immediately upon termination.[223]

There does not appear to be any justification for requiring a five-day delay in the termination of the rental agreement (since rent abates anyway), but it does seem reasonable to permit the landlord a few days to process the transaction for reimbursement of the prepaid rent and deposit. The following proposed language would bring clarity and reasonableness to the provision:

[If landlord fails to deliver possession, tenant shall]:

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ters and evictions; both debt collection and eviction matters have statutorily proscribed deadlines during which certain hearings shall be "held.").

221. NEB. REV. STAT. § 76-1426 (Reissue 2018).

222. *See, e.g.*, NEB. REV. STAT. §§ 76-1425(1) (Reissue 2018), 76-1431(1)–(2) (Supp. 2021).

223. Virginia's landlord-tenant act contains a similar provision but was revised slightly to make the intent of the provision clearer, which was for the tenancy to terminate at the expiration of the notice period. *See* VA. CODE ANN. § 55.1-1234 ("[T]he tenant may (i) terminate the rental agreement upon at least five days' written notice to the landlord, upon which termination the landlord shall return all prepaid rent and security deposits."). Further support for this interpretation can be found in Nebraska's Act at § 76-1425, which contains language similar to that found in § 76-1426 and confirms that such language cannot denote a right to cure. Section 76-1425 provides that upon the occurrence of a subsequent similar violation by a landlord, "the tenant may terminate the rental agreement upon at least fourteen days' written notice specifying the breach and the date of termination of the rental agreement."). *See also* NEB. REV. STAT. 76-1431(1) (Reissue 2018) (containing similar language).

> (1) ~~Upon at least five days' written notice to the landlord~~ Deliver to landlord a written notice of intent to terminate the rental agreement and ~~upon termination~~ within five days of receipt of such notice the landlord shall return all prepaid rent and security; or

The legislature could also consider reducing the period to three days (or even less) to account for the realities likely to exist in these situations. One can envision a family all set to move into a new home, having already vacated their prior residence and having all their belongings in a moving truck, only to learn upon arrival that the landlord was unable or no longer willing to deliver the premises. In this situation, the landlord is likely in possession of the funds the tenant would need to secure different housing for their family; any delay in returning the tenant's deposit and prepaid rent is likely to result in temporary homelessness. One could argue that under these circumstances the immediate return of the funds should be compelled, and any delay should result in liquidated damages payable to the tenant.

III. CONCLUSION

A primary objective of this Article, and the Critique that came before it, was to highlight the inequities and unintended outcomes resulting from the current state of laws governing rental housing in Nebraska. Progress has been made to improve these laws over the last several years, but to have a lasting and significant impact on reducing homelessness, improving housing conditions, and creating more balance in the rental housing dynamic, a significant overhaul of the Act is imperative. The proposals herein are designed to be adopted either individually, or as a whole, but the latter is recommended.