

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
ASSOCIATE CIRCUIT COURT DIVISION**

Millenia Housing Management Ltd.,

Plaintiff,

v.

Gary Dewey, et al.,

Defendants.

Case No. 2016-CV12874

**BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL  
LIBERTIES UNION OF MISSOURI AS AMICI CURIAE**

The American Civil Liberties Union (ACLU) and the ACLU of Missouri (ACLU-MO) submit this emergency amicus brief because this eviction action poses profound and dangerous constitutional problems.

This Court should not proceed to default, try, or otherwise resolve any eviction case until this Court takes meaningful action to resolve these legal issues. The Court should dismiss all eviction actions and redact the defendants' names and other personally identifiable information from all related court filings where the Court did not provide procedural mechanisms to safeguard tenants' statutory and constitutional rights. The Court should also alert all defendants in eviction actions that legal help may be available through local legal service providers in the community. The Court should further vacate all default judgments issued since the declaration of a state emergency and redact defendants' names and other personally identifiable information from all related court filings.

## INTEREST OF AMICI CURIAE

The **American Civil Liberties Union (ACLU)** is a nationwide, nonpartisan organization of over four million members, activists, and supporters dedicated to preserving the Constitution and protecting civil liberties. The ACLU Women’s Rights Project, co-founded in 1972 by Ruth Bader Ginsburg, has been a leader in efforts to eliminate barriers to women’s full equality in American society. These efforts include challenging housing discrimination experienced by women, with a focus on advancing their rights to obtain and maintain safe and secure housing. The ACLU has engaged in advocacy and litigation related to housing justice across the country and advocated for housing policies at the federal, state, and local levels.

The **American Civil Liberties Union of Missouri (ACLU-MO)** is a statewide, nonprofit, nonpartisan public interest organization dedicated to the preservation and promotion of civil liberties in Missouri. Since its founding, the ACLU of Missouri has frequently appeared before Missouri state and federal courts in cases involving constitutional questions, both as direct counsel and as *amicus curiae*. Unlawful detainer proceedings currently pending in state courts across Missouri raise serious due process problems and complex legal issues—because of the ongoing global pandemic, new federal law establishing an eviction moratorium covering many properties, closed courthouses and complicated remote proceedings, and new and extraordinary court forms and processes. Ensuring due process is guaranteed and protected in this case is, therefore, a matter of significant concern to the ACLU and its members throughout Missouri.

## INTRODUCTION

Since the United States declared a national emergency, the COVID-19 pandemic has inflicted widespread health and economic harms for millions of Americans. More than 47.3 million workers across the country have filed for unemployment benefits since March. Eli Rosenberg & Abha Bhattarai, *Another 1.48 million workers are newly unemployed*, Wash. Post (June 25, 2020), <https://www.washingtonpost.com/us-policy/2020/06/25/june-unemployment-insurance/>. In Missouri, the unemployment rate has climbed to an alarming 10.1 percent, with more than 667,300 initial claims filed in the fourteen weeks since Governor Parson declared a state of emergency. Missouri Dep't of Labor & Industrial Relations, *Data and Statistics* (June 20, 2020), <https://labor.mo.gov/data>. Nearly 21,000 Missourians have contracted COVID-19, and more than 1,000 have died. Sarah Fentem, *Missouri's COVID-19 Death Tally Reaches 1,000*, St. Louis Public Radio (June 26, 2020), <https://news.stlpublicradio.org/post/missouris-covid-19-death-tally-reaches-1000#stream/0>. Despite these staggering numbers and ongoing economic fallout, Missouri remains one of only nine states in the nation that has not issued a statewide eviction moratorium to protect tenants from being kicked out of their homes during a global health pandemic. Jessica Lussenhop, *Coronavirus: Why US is expecting an 'avalanche' of evictions*, BBC (June 19, 2020), <https://www.bbc.com/news/world-us-canada-53088352>.

The impending flood of evictions threatens to destabilize the lives of Missourians even more: Evictions will not only undoubtedly risk further spread of COVID-19 throughout the state, but also set off a chain of devastating hardships for many families, including physical and mental health issues, chronic joblessness, financial loss, and homelessness. Matthew Desmond & Rachel T. Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, Soc. Forces 1–30 (2015), [https://scholar.harvard.edu/files/mdesmond/files/desmondkimbro.evictions.fallout.sf2015\\_2.pdf](https://scholar.harvard.edu/files/mdesmond/files/desmondkimbro.evictions.fallout.sf2015_2.pdf).

Moreover, the aftermath of eviction persists for decades, as tenants with prior eviction records are indefinitely shut out of future housing opportunities due to tenant-screening policies that deny housing to anyone with a prior eviction *filing* without regard to the outcome or surrounding circumstances of the eviction action. Kristin Ginger, *Eviction Filings Hurt Tenants, Even If They Win*, ShelterForce (July 30, 2018), <https://shelterforce.org/2018/07/30/eviction-filings-hurt-tenants-even-if-they-win/>.

Critically, the impact of mass evictions in Missouri will overwhelmingly burden tenants of color and, in particular, Black women. Earlier this year, the ACLU Women’s Rights Project and Data Analytics team found that, on average, Black women renters had evictions filed against them by landlords at double the rate of white renters (or higher) in 17 of 36 states, including Missouri. Sophie Beiers, et al., *Clearing the Record: How Eviction Sealing Laws Can Advance Housing Access for Women of Color*, ACLU News & Commentary (Jan. 10, 2020), <https://www.aclu.org/news/racial-justice/clearing-the-record-how-eviction-sealing-laws-can-advance-housing-access-for-women-of-color/>. The stark race and gender disparities in eviction in Missouri are particularly alarming. The ACLU Data Analytics team found that, from 2012 to 2016, Black women renters in Cass County were nearly 2.4 times more likely to have an eviction filed against them than white renters.<sup>1</sup> Similarly, Black renters in Jackson and St. Louis counties

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<sup>1</sup> Data were drawn from LexisNexis eviction court records and compiled by the Eviction Lab of Princeton University. The ACLU Data Analytics team performed the race and gender analysis of eviction court records from 2012 until 2016, but some counties had data available only for a selection of these years. Calculations provided are averages across the years of available data. More details about the ACLU Data Analytics team’s methodology can be found here: Sophie Beiers et al., *Clearing the Record: How Eviction Sealing Laws Can Advance Housing Access for Women of Color*, ACLU News & Commentary (Jan. 10, 2020), <https://www.aclu.org/news/racial-justice/clearing-the-record-how-eviction-sealing-laws-can-advance-housing-access-for-women-of-color/>.

were nearly twice as likely to have an eviction filed against them as white renters. *See id.*

Allowing evictions to proceed in the face of significant constitutional concerns will further harm Black women and other tenants of color—worsening the existing racial disparities that have emerged in the impact of the COVID-19 pandemic.

To combat these economic consequences and an impending housing crisis, Congress enacted the CARES Act’s federal eviction moratorium to offer some safeguards for tenants. *See* Coronavirus Aid, Relief, and Economic Security Act, § 4024 *et seq.* The CARES Act prohibits landlords from filing new eviction actions against tenants living in a wide range of properties that receive certain types of federal assistance, tax credits, and federally backed mortgage loans. *See id.* Determining whether a property is covered by the CARES Act, however, is an onerous and sometimes impossible task for tenants and even their advocates. *See* Nat’l Hous. Law Project, *Enforcing Eviction Moratoria: Guidance for Advocates* (Apr. 3, 2020), at 3, <https://nlihc.org/sites/default/files/Enforcing-Eviction-Moratoria-1.pdf>. Moreover, there remains several unanswered legal questions as to the scope of the CARES Act. *See id.* at 2–3.

Against the backdrop of the ongoing pandemic and its devastating fallout, Missouri courts have begun hearing eviction cases without providing effective mechanisms to ensure that tenants’ constitutional and statutory rights are protected. Although some courts require landlords to submit check-box forms indicating compliance with the CARES Act, these measures are implemented inconsistently and fail to provide tenants with any notice or opportunity to respond to the landlords’ assertions prior to the filing of an eviction case. Moreover, remote and in-person eviction proceedings in Missouri have already raised numerous due process concerns, leaving many tenants unable to participate in their defense and at risk of unfairly receiving a default judgment. Absent swift action to address these legal concerns, this Court should halt all

stages of eviction actions unless and until mechanisms are in place to protect tenants' due process and statutory rights.

## **ARGUMENT**

This Court should immediately halt all stages of eviction cases and act swiftly to address the egregious violations of tenants' constitutional and statutory rights arising from these proceedings. This emergency amicus brief focuses on two legal issues that warrant this Court's immediate action. First, the federal CARES Act raises complex factual and legal issues that require a meaningful procedural mechanism for determining whether a property is covered by the Act's protections prior to the filing of an eviction action. Second, the remote and in-person proceedings taking place in Missouri violate the due process rights of tenants and should not continue until all constitutional defects are resolved.

### **I. The CARES Act Raises Complex Factual and Legal Issues that Require Meaningful Procedural Mechanisms to Protect Tenants' Statutory Rights.**

The CARES Act provides broad and sweeping statutory protections for many tenants who are unable to pay rent due to the pandemic. Enacted on March 27, 2020, the CARES Act imposes a 120-day federal moratorium on the filing of new eviction actions and "charg[ing] fees, penalties, or other charges . . . related to [] nonpayment of rent" against tenants living in a wide range of properties that receive certain types of federal assistance, tax credits, and federally backed mortgage loans. *See* CARES Act, § 4024(a)-(b). These protections are critical to preventing tenants from being kicked out of their home and potentially facing homelessness during the global pandemic.

The scope of the properties covered by the Act's eviction moratorium is varied and vast. The CARES Act's protections extend to any property that either: (1) participates in a "covered housing program," as defined by the Violence Against Women Act ("VAWA") (as amended

through the 2013 reauthorization); (2) participates in the “rural housing voucher program, under section 542 of the Housing Act of 1949;” (3) has a federally backed mortgage loan; or (4) has a federally backed multifamily mortgage loan. *See id.* § 4024(a)(2). Housing programs covered by VAWA include a whole panoply of federal subsidy and tax credit programs, including any property that participates in a HUD-subsidized low-income housing program and project-based assistance, public housing, Section 202 and 811 homes for the elderly and people with disabilities, the HOME program, the Low-Income Housing Tax Credit program, and Rural Development Section 514/516, 515, 533, and 538 programs.<sup>2</sup> The CARES Act also covers properties with a federally backed mortgage “made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by [HUD] or a housing or related program administered by any other such officer or agency, or is purchased or securitized by the Federal Home Loan Mortgage Corporation [Freddie Mac] or the Federal National Mortgage Association [Fannie Mae].” *Id.* § 4024(a)(4).

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<sup>2</sup> The VAWA-covered housing programs include: any property that participates in public housing (42 U.S.C. § 1437d), the Section 8 Housing Choice Voucher program and project-based housing (42 U.S.C. § 1437f), Section 202 housing for the elderly (12 U.S.C. § 1701q), Section 811 housing for people with disabilities (42 U.S.C. § 8013), Section 221(d)(3) Below Market Interest Rate housing (12 U.S.C. § 17151(d)), Section 236 multifamily rental housing (12 U.S.C. § 1715z-1), the HOME program (42 U.S.C. § 12741 et seq.), Housing Opportunities for Persons with AIDS (HOPWA) (42 U.S.C. § 12901 et seq.), McKinney-Vento Act homelessness programs (42 U.S.C. § 11360 et seq.), Section 515 Rural Rental Housing (42 U.S.C. § 1485), Sections 514 and 516 Farm Labor Housing (42 U.S.C. §§ 1484, 1486), Section 533 Housing Preservation Grants (42 U.S.C. § 1490m), Section 538 multifamily rental housing (42 U.S.C. § 1490p-2), Section 515 Rural Rental Housing (42 U.S.C. § 1485), Sections 514 and 516 Farm Labor Housing (42 U.S.C. §§ 1484, 1486), Section 533 Housing Preservation Grants (42 U.S.C. § 1490m), Section 538 multifamily rental housing (42 U.S.C. § 1490p-2), and the Low-Income Housing Tax Credit (LIHTC) program (26 U.S.C. § 42).

Determining whether a property is covered by the CARES Act is far from a simple task. Although tenants may be able to determine if a property participates in housing subsidy or low-income tax credit programs, tenants do not have ready access to land records or, in many cases, Internet records that are necessary to discern whether the property has a federally backed mortgage loan, received Rural Development voucher subsidies on behalf of other residents, or participates in other VAWA-covered programs that the tenant does not know about. Testing a landlord's representations about its property may require thorough document and other fact discovery, including subpoenas and depositions. Based on any relevant facts the landlord asserts about CARES Act coverage, plus facts and records the tenant gathers through investigation and discovery, the Court may still be presented with novel and difficult legal issues in construing the Act's meaning and application.

The complex issues raised by the CARES Act are underscored by the experience of an ACLU-MO law clerk, who spent many hours attempting to determine whether certain Missouri properties that are subject to current eviction actions are covered dwellings, as defined by the Act. The law clerk was not the owner of these properties and used Internet resources to make her determinations. She called the Recorder of Deeds and was told there are not currently public access terminals available to view documents and the public is not currently allowed to view microfilm versions of older documents. The only in-person option appears to be requesting a copy from a clerk. To determine whether a property was covered by the CARES Act, the law clerk primarily consulted a database maintained by ProPublica of covered properties, the Jackson County Property Search lookup, the Jackson County Recorder of Deeds Web Access Portal, Missouri CaseNet, the Fannie Mae Rental Resource Finder, and the Freddie Mac Rental Property Look Up. *See* Al Shaw et al., *Can I Be Evicted During Coronavirus?*, ProPublica (May 18,



2020), <https://projects.propublica.org/covid-evictions/> (last updated June 22, 2020); *Property Search*, Jackson County Missouri, <https://ascendweb.jacksongov.org/ascend/>; *Recorder of Deeds Web Access*, Jackson County Missouri, <http://aumentumweb.jacksongov.org/>; *Missouri Case.net*, Missouri Courts, <https://www.courts.mo.gov/casenet/>; *Fannie Mae Renters Resource Finder*, Fannie Mae, <https://www.knowyouroptions.com/rentersresourcefinder/>; *Rental Property Lookup*, Freddie Mac, <https://myhome.freddiemac.com/renting/lookup.html>.

The law clerk's methodology included checking for the property address in the ProPublica, Fannie Mae, and Freddie Mac databases. She also attempted to find the property's parcel number in the Jackson County Property Search and used the legal description to find deeds of trust, assignments, warranties, or other legal documents that may include an indication that the property was connected to a federal program. Often, these indications were found in footers, headers, and title pages. Many of the instruments were confusing as to what they signified, leading her to conduct research on different types of property documents. An attorney also provided instruction on the meaning of some of these instruments.

In one case, the law clerk tried to determine whether the CARES Act covered a property located at 6014 East 40th Terrace, Kansas City, which is implicated in an ongoing rent and possession case. *River Park Townhouses, Inc. v. Powell*, No. 2016-CV12564 (Mo. Cir. Ct. filed June 3, 2020). The property address did not show up in the Fannie Mae, Freddie Mac, or ProPublica databases. However, the ProPublica database lists a nearby property—River Park Townhouses at 3999A Topping—as an FHA-covered dwelling. The law clerk then went to the website for River Park Townhouses, which lists its address as 3999A Topping, but she was unable to find a description of which properties were included in the complex. *See River Park Townhouses* (June 26, 2020), <http://www.riverparktownhouses.com/RPT/Home.html>.

The law clerk also struggled to look up the property by address in the Jackson County Property Search. She tried several variations of the property address, including: 6014 East 40th Terrace, 6014 E 40th Terrace, 6014 E 40 Terrace, and 6014 40th Terrace. Jackson County Property Search (search “6014 \*East 40th Terrace\*”) (last accessed June 26, 2020); *Id.* (search “6014 \*E 40th Terrace\*”) (last accessed June 26, 2020); *Id.* (search “6014 \*E 40 Terrace\*”) (last accessed June 26, 2020); *Id.* (search “6014 \*40th Terrace\*”) (last accessed June 26, 2020). A search for 6014 E 40th or 6014 E 40th Ter only provided the personal property taxes, but not the physical parcel. The law clerk instead used the Jackson County Interactive Parcel Viewer Map to find the parcel number. *Jackson County Parcel Viewer 2020*, Jackson County Missouri, <https://jcgis.jacksongov.org/apps/parcelviewer/WebMap1.aspx> (last accessed June 25, 2020) (search “6014 E 40<sup>th</sup> Ter, Kansas City, 64129”). The parcel number for 6014 East 40th Terrace is listed for a parcel addressed as 3999A Topping Ave. Jackson County Property Search (search “31-130-05-02-01-0-00-000”) (last accessed June 25, 2020).

To find the underlying mortgage and documentation, the law clerk then accessed the Jackson County Deeds Portal to search for documents under the name “River Park Townhouses.” Jackson County Deeds Portal (search in Party Name for “River Park Townhouses”). She found what she believed is the mortgage for 6014 East 40th Terrace. Deed of Trust, Instrument 2005K0016819 (Mar. 18, 2005), Jackson County Deeds Portal. However, there was uncertainty as to whether this instrument related to 6014 East 40th Terrace. Although the legal description of the land matched the description from the parcel for quarter, township, and range, the details were given in coordinates and measurements across five different tracts—none of which lined up with legal description from the Jackson County Property Lookup. Deed of Trust,

Instrument 2005K0016819 (Mar. 18, 2005), Jackson County Deeds Portal; Jackson County Property Lookup (search “31-130-05-02-01-0-00-000”) (last accessed June 25, 2020).

The law clerk also found a modification form that gave an FHA project number and stated the property “is insured by Secretary of Housing and Urban Development acting by and through the Federal Housing Commissioner.” Modification of Deed of Trust, Instrument 2014E0014154 (Feb. 21, 2014), Jackson County Deeds Portal. The document further confirmed that the deed of trust is Instrument 2005K0016819. *Id.* She found portions of these documents confusing to read and had difficulties determining the standard language and what was particular to federally insured mortgages. Finally, it was still a possibility that River Park Townhouses, Inc. owns properties in this parcel that are not part of the FHA program.

In another case, the law clerk tried to determine whether the CARES Act covered 3710 Wyandotte Street #3, Kansas City, which is also part of an ongoing rent and possession case. *Celtic Prop. Mgmt. Agent for Uptown Court Apartments v. Tabone*, No. 2016-CV12968, (Mo. Cir. Ct. filed June 9, 2020). The law clerk found the parcel number and description in the Jackson County Property Search for 3710 Wyandotte Street #1. *See* Jackson County Property Search (search “3710 \*Wyandotte St\*”) (last accessed June 26, 2020). She then found a mortgage, financing statement, and an assignment for the property, indicating the loan was related to Freddie Mac. *See* Multifamily Deed of Trust, Assignment of Rents and Security Interests at 3, Instrument 2019E0027133 (Apr. 17, 2019), Jackson County Deeds Portal; UCC Financing Statement at 2, Instrument 2019E0027140 (Apr. 17, 2019), Jackson County Deeds Portal; Assignment of Security Interest at 2, Instrument 2019E0027139 (Apr. 17, 2019), Jackson County Deeds Portal. However, there was another assignment that complicated

her understanding of who is the current mortgage holder. *See* UCC Financing Statement Amendment, Instrument 2019E0077272 (Sept. 25, 2019), Jackson County Deeds Portal.

The Fannie Mae Database stated that this property was financed by Fannie Mae. *See* Fannie Mae Database (search “3710 Wyandotte Street”, “3”, “Kansas City”, “Missouri”, “64111”) (last accessed June 26, 2020). The website, however, included a disclaimer below the “Submit” button that stated: “The Renters Resource Finder is provided as a convenience for renters. Fannie Mae makes no representation, warranty, or guarantee regarding the accuracy or completeness of the results. Information that does not match our records exactly may return inaccurate results.” *Id.* The law clerk’s arduous, resource-intensive, and time-consuming process of determining whether a property is covered by the CARES Act reveals the significant risk of violations of tenants’ rights under the CARES Act.

Despite this risk, this Court’s current process does little to protect tenants’ statutory rights. Presently, Missouri courts have no consistent or standardized procedures for reviewing new eviction filings to determine whether they were filed in violation of the CARES Act. While some courts require plaintiffs to file cursory check-box forms certifying compliance with the CARES Act, those forms are far from sufficient. Notably, these check-box forms offer no guidance on what constitutes a “covered dwelling” pursuant to the CARES Act. As a result, these forms allow plaintiff-landlords to summarily certify compliance without demonstrating to the Court that they have separately considered each and every qualifying program and made efforts to investigate and confirm that their properties did not fall within the scope of the Act. The Court’s current process also has failed to block eviction filings even when the violation was clearly evident. In one case, the Court accepted an eviction filing from a plaintiff-landlord who submitted a verification form stating that its property was covered by the Act but that the

eviction matter was initiated prior to March 27, 2020—even when the case was filed on March 30, 2020. *See Plaza Housing, LLC v. Rita Slavens*, 2016-CV10277 (Mo. Cir. Ct. filed Mar. 30, 2020). Moreover, the current process allows a plaintiff-landlord to file an eviction action without any procedural mechanism to provide the tenant with notice and opportunity to respond to the landlord’s assertions that the Act’s protections do not apply. Thus, the defendant-tenant can only raise the CARES Act’s protections after an eviction action is already filed – even though the law blocks the “filing” of these actions in order to prevent the harms that an eviction filing, itself, causes. The filing of an eviction forces tenants to fear loss of their homes and expend time and resources to contest the eviction and potentially seek new housing, at a time when many are grappling with the serious health and financial consequences of COVID-19. Moreover, as stated above, a mere eviction filing often inflicts lasting consequences on a tenant’s ability to access housing for decades, even when the record is subsequently sealed.

Because of the complex factual and legal issues raised by the CARES Act, and given the harmful impact of eviction filings on access to housing opportunities, this Court should halt all stages of eviction actions unless and until it provides a pre-filing procedural mechanism for landlords to demonstrate that the action is not filed in violation of the CARES Act and for tenants to have adequate notice and opportunity to respond to landlords’ assertions. The CARES Act bars “filing” of new eviction actions related to covered properties, § 4024(b), thereby making it necessary for this Court to prevent the filing of eviction actions that are prohibited by federal law.

Before accepting a filing for an unlawful detainer action, this Court should require that the landlord-plaintiff provide a sworn affidavit that they (1) performed a thorough search of their property records and relevant documentation; (2) understand the definition and reach of each

individual program covered by the CARES Act and considered each program separately to confirm that the property at issue is not covered by any of the programs implicated by the CARES Act; and (3) provided the tenant with notice of its intent to file an eviction action, their claim that the property is not covered by the CARES Act, information regarding the tenant's rights under the CARES Act, and a court-approved list of pro bono legal resources. This Court should then provide tenants with a 21-day period to respond to the landlord's assertion that the property is not covered by the CARES Act, which the Court must then review and make a determination as to whether to file the action. If it allows the action to be filed, this Court should notify the tenant and provide a 10-day period for the tenant to appeal the Court's determination. These procedural mechanisms are critical to protecting tenants' statutory and constitutional protections and warrant the stay of all eviction proceedings until such mechanisms are in place. These procedures will enable tenants to seek legal assistance to perform the complicated analysis of whether a property is covered by the CARES Act, as well as prevent this Court from unwittingly accepting eviction petitions that violate federal law. Moreover, without these pre-filing procedures, it is unclear whether a tenant is even allowed to raise the CARES Act as a defense to eviction. *See Phelps v. Phelps*, 299 S.W.3d 707, 709 (Mo. Ct. App. 2009); *see also State ex rel. Deutsche Bank Nat. Tr. Co. v. Chamberlain*, 372 S.W.3d 24, 28 (Mo. Ct. App. 2012).

## **II. The Current In-Person and Remote Proceedings in Missouri Violate Tenants' Constitutional Right to Due Process.**

The overwhelming majority of Missouri courts are proceeding with remote eviction hearings through teleconferencing or video conferencing, as well as in-person hearings in extremely limited circumstances. Telephonic and video proceedings pose significant due process concerns for tenants regarding adequate notice and opportunity to respond, limited or lack of

availability of technology and Internet access, difficulties with attorney-client communications during the proceedings, and the obstructed ability to present evidence, including documentary evidence or witness testimony. In-person hearings, as recognized by the courts, continue to present serious problems as well, given the health risks and inability of many parties, attorneys, and court staff to participate. Accordingly, this Court should stay all eviction matters until it establishes mechanisms that will remedy all constitutional defects in such proceedings.

The United States Constitution, Amend. XIV § 1 (“Due Process Clause”), guarantees that the State of Missouri shall not deprive the defendants in this unlawful detainer action of their home without due process of law. Likewise, the Missouri Constitution provides a nearly identical guarantee. The United States Supreme Court has considered the constitutionality, under the Due Process Clause, of early trial provisions in eviction proceedings similar to those provided for under Missouri State law. *See Lindsey v. Normet*, 405 U.S. 56, 58–65 (1972). In *Lindsey*, the Supreme Court considered the “Forcible Entry and Wrongful Detainer” (“FED”) proceedings provided in Oregon, holding that an early-trial provision and limitation on litigable issues in nonpayment-of-rent eviction cases did not allow unduly short time for trial preparation for defendants because of the simplicity of those cases. *Id.* The Supreme Court reasoned that “the simplicity of the issues in the typical FED action [for failure to pay rent] will usually not require extended trial preparation and litigation,” while warning that the eviction procedures could “be applied so as to deprive a tenant of a proper hearing in specific situations.” *Id.* at 65. In particular, the Supreme Court based its holding on the fact that “[t]enants would appear to have as much access to relevant facts as their landlord” in ordinary nonpayment-of-rent cases. *Id.* at 65. That fact, however, is not so during this pandemic and especially with a new federal law, the CARES Act, imposing a broad 120-day eviction moratorium in many cases involving properties

that are federally supported or financed.

Indeed, where issues are not as simple as in typical nonpayment-of-rent eviction actions, due process requirements must change. Due process requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The notice must be calculated to address “unique information” about the particular circumstances in which notice is given to satisfy due process. *Jones v. Flowers*, 547 U.S. 220, 230 (2006). Misleading or defective summons that prejudice the defendant invalidate the summons’s sufficiency. *Osrecovery, Inc. v. One Grp. Int’l, Inc.*, 234 F.R.D. 59, 60 (S.D.N.Y. 2005). Actual notice attempting to cure such defects cannot cure them. *Id.*; see also *Nat’l Dev. Co. v. Triad Holding Corp.*, 930 F.2d 253, 256 (2d Cir. 1991). Moreover, “[t]he fundamental requisite of due process of law is the opportunity to be heard.” *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Importantly, the right to be heard “has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.” *Mullane*, 339 U.S. at 314.

The current eviction proceedings in Missouri raise significant due process concerns for tenant-defendants. As an initial matter, numerous circumstances related to the COVID-19 pandemic itself impede the Court from fulfilling these essential procedural due process requirements. Obviously, tenants who are ill or hospitalized may be unable to respond to complaints, seek legal help, appear in court, or otherwise participate in making their defense. Additionally, tenants and counsel will face significant barriers to investigating claims or obtaining documents to support their defense because many government offices, businesses, and other services are closed or functioning at limited capacity. For example, office closures may



make it difficult for tenants to review land records to determine if their property is covered by the CARES Act or to obtain other documents that would support their defense. Disruptions in staffing or relevant supply chains may produce delays incompatible with eviction case timelines. Moreover, witnesses may be unable to appear at hearings due to infection or fear of exposure to COVID-19, and serving subpoenas may be difficult or impossible. Social distancing guidelines may also limit the ability to interview witnesses in person or to obtain declarations.

Moreover, many tenants do not receive adequate notice that the venue of the eviction proceedings has changed from the physical courthouse to teleconferencing or video conferencing. This may mislead tenants to come to a courthouse only to find that it is closed to the public. In addition to risking infection of themselves or court staff by attempting to enter the courthouse, tenants will be prejudiced by taking the time to travel to the courthouse without the ability to enter and may be forced to call by telephone into the proceeding (if they even have the technological capabilities) from the sidewalk, parking lot, or other public space where they may have a limited ability to hear, understand, and participate in the proceedings. Moreover, the lack of notice may result in scenarios where tenants are late to or miss their scheduled proceedings, thereby facing the risk of receiving a default judgment in their absence. This Court should quash any summons in an unlawful detainer action that does not instruct defendants that all court proceedings are presumptively to be held remotely via phone or video, provide advance information to defendants about how they can participate in the proceeding and present their defense over the phone or by video, and provide instructions and sufficient time to allow tenants to alert the Court if they are unable to participate in remote proceedings for any reason.

In addition to concerns about notice, remote proceedings present difficult and often insurmountable hurdles to meaningfully participating in one's defense. Many tenants, for

example, may not know, understand, or have the capabilities to present documentary evidence or other types of evidence through teleconference or videoconference. Many low-income tenants rely on outdated or damaged mobile devices, lack consistent Internet access, have pay-as-you-go mobile plans or otherwise face significant data limitations, and may endure utility shut-offs or account closures for nonpayment. Low-income individuals also rely on public resources, such as library computers or free WiFi hotspots to access the internet—and those resources may be extremely limited or, in some cases, entirely unavailable during the pandemic. Remote proceedings also may make it impossible or extremely difficult for tenants to speak with their attorneys privately during the course of a hearing. Remote proceedings may be particularly difficult for tenants who require language translation services or have accessibility needs. Absent mechanisms to remedy these constitutional defects, tenants will not have the opportunity to contest or even participate fully in their own eviction proceedings.

It is clear that the current eviction proceedings in Missouri threaten the due process rights of tenants. To determine whether this Court may force tenant defendants to litigate over possession of their home and shelter in light of the significant legal and factual concerns raised by the COVID-19 pandemic and the CARES Act, the Court must weigh:

[1] the private interest that will be affected by the official action; [2] the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and [3] the Government's interest, including the fiscal and administrative burdens that the additional and substitute procedures would entail.

*Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); *see also Connecticut v. Doehr*, 501 U.S. 1, 11 (1991).

First, the interest of the defendants in eviction cases is grave and substantial: They risk not only losing their shelter, as do all unlawful detainer defendants, but also being homeless and

unsheltered during a global pandemic. Even without a public health crisis, eviction often sets off a chain of devastating hardships, including physical and mental health issues, chronic joblessness, financial loss, and homelessness. Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, Soc. Forces 1–30 (2015), [https://scholar.harvard.edu/files/mdesmond/files/desmondkimbro.evictions.fallout.sf2015\\_2.pdf](https://scholar.harvard.edu/files/mdesmond/files/desmondkimbro.evictions.fallout.sf2015_2.pdf). Moreover, the aftermath of eviction persists for decades, as individuals with prior eviction records are indefinitely shut out of future housing opportunities due to tenant-screening policies that deny housing to anyone with a prior eviction filing—regardless of whether the eviction was ultimately dismissed, occurred many years ago, or filed unlawfully. Matthew Desmond, *Poor Black Women Are Evicted at Alarming Rates, Setting Off a Chain of Hardship*, MacArthur Foundation: How Housing Matters (Mar. 2014), [https://www.macfound.org/media/files/HHM\\_-\\_Poor\\_Black\\_Women\\_Are\\_Evicted\\_at\\_Alarming\\_Rates.pdf](https://www.macfound.org/media/files/HHM_-_Poor_Black_Women_Are_Evicted_at_Alarming_Rates.pdf). Importantly, these consequences fall hardest on tenants of color and, in particular, Black women. As a result, eviction often exacerbates and reproduces conditions of poverty for Black women and communities of color.

*Id.*

Moreover, the risk of erroneous deprivation is significant. Absent judicial mechanisms to properly assess the CARES Act's applicability prior to the filing of eviction cases, tenants have no meaningful opportunity to investigate and respond to a landlord's assertions that their property isn't covered by the federal eviction ban until an eviction case is already filed. For the reasons stated above, an eviction filing on its own inflicts significant and long-term harm on tenants. Additionally, the risk of erroneous deprivation of the defendants' interest during in-person or virtual eviction proceedings is especially great due to the greater complexity of factual and legal issues raised by the CARES Act and the onerous and sometimes insurmountable

hurdles of litigation during a pandemic.

Finally, the government's interest in preserving safe and stable shelter for tenants and preventing displacement of families is far greater than any burden caused by postponing eviction hearings until this Court establishes the necessary procedural mechanisms to protect tenants' constitutional and statutory rights. In addition to threatening the safety and well-being of those facing eviction, allowing eviction proceedings to go forward would pose a public health risk to the greater community by preventing all families to comply with shelter-in-place and/or social distancing guidelines. Moreover, the absence of greater procedural protections will contribute to high numbers of eviction cases and force many evicted tenants to access taxpayer-funded housing and social services to prevent homelessness.

### **CONCLUSION**

Given the absence of procedural protections and complex issues raised by the pandemic and the CARES Act, proceeding in eviction cases today will violate the United States and Missouri constitutions. Moreover, allowing eviction matters to go forward will expose tenants and their families to the risk of homelessness during a global pandemic at a time when it is most critical that the nation stop the spread of COVID-19. These proceedings will also expose the plaintiff-landlord to frustration and liability for proceeding in violation of tenants' rights.

The Court should not proceed to hear or resolve this action today. Instead, it should dismiss all eviction actions and redact the defendants' names and other personally identifiable information from all related court filings where the Court did not provide procedural mechanisms to ensure that landlords complied with the CARES Act prior to the filing of an eviction case, where tenants did not receive adequate notice of date, time, and nature of the proceedings and place this action on the regular civil calendar, and where tenants did not receive

adequate notice and opportunity to respond, investigate, and prepare a defense to the allegations and claims that the CARES Act's protections do not apply. The Court should also alert all defendants in eviction actions that legal help may be available through local legal service providers in the community. The Court should further vacate all default judgments issued since the declaration of a state emergency and redact defendants' names and other personally identifiable information from all related court filings.

Dated: June 30, 2020

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically on June 30, 2020. A copy was also mailed to:

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