

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

SUFFOLK, SS.

CIVIL ACTION NO. 2084CV01334

MITCHELL MATORIN,
Plaintiff

v.

EXECUTIVE OFFICE OF HOUSING &
ECONOMIC DEVELOPMENT and the
COMMONWEALTH OF MASSACHUSETTS,
Defendants

Brief of Amicus Curiae National Housing Law Project, MetroWest Legal Services

I. Introduction

At the time of this writing, the COVID-19 pandemic has taken over 140,000 lives¹ and produced unprecedented numbers of job losses throughout the United States.² The economic disruption alone has left millions of tenants throughout the country delinquent in rent and fearing eviction, and Massachusetts is no exception. Over 2.6 million Massachusetts residents have reported they or a household member has lost employment income since March 13 – almost half of the total Massachusetts workforce of 5.3 million.³ Among renters, over 155,000 households (i.e., over 10% of total rental units) failed to make their last month’s rent payments,⁴ with over

¹ Centers for Disease Control & Prevention, Coronavirus Disease 2019, online at: <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>, last visited Jul. 21, 2020

² Economic Opportunity Institute, “COVID-19 Pandemic Means Unprecedented Job Losses, but Impact Isn’t Uniform” (Jul 16, 2020), online at: <http://www.opportunityinstitute.org/research/post/covid-19-pandemic-means-unprecedented-job-losses-but-impact-isnt-uniform/>

³ U.S. Census Bureau, Week 10 Household Pulse Survey, Employment Table 1 (Jul. 15, 2020), online at: <https://www.census.gov/data/tables/2020/demo/hhp/hhp10.html>.

⁴ U.S. Census Bureau, Week 10 Household Pulse Survey, Housing Table 1b (Jul. 15, 2020), online at: <https://www.census.gov/data/tables/2020/demo/hhp/hhp10.html>.

280,000 households having slight to no confidence in their ability to make the next rent payment.⁵

These mounting rent defaults threaten hundreds of thousands of Massachusetts renters and families with eviction, meaning profound consequences for both themselves as well as their employers, schools, neighborhoods, and communities. Such mass evictions would be devastating at any time; allowing mass evictions to occur during a raging pandemic, when public health imperatives require concerted social distancing and vigilant hygiene, would be terrifying. And the overwhelming numbers of at-risk tenants, coupled with the public service reductions, shifts to online judicial processes, and other pandemic-related circumstances, raise new obstacles to notice and fairness in the judicial proceedings through which these evictions would be conducted.

As a short-term response to this looming eviction avalanche, Massachusetts has imposed a temporary moratorium on “non-essential” evictions.⁶ This Court should uphold that moratorium as a rational and well-grounded response to the mass evictions emergency.

II. Identity & Interest of Amici Curiae NHLP and MWLS

The National Housing Law Project (NHLP) is a nonprofit organization that advances housing justice for poor people and communities, primarily through technical assistance and training to legal aid attorneys and by co-counseling on important litigation. NHLP works with organizers and other advocacy and service organizations to strengthen and enforce tenants’ rights, increase housing opportunities for underserved communities, and preserve and expand the nation’s supply of safe and affordable homes. NHLP coordinates the Housing Justice Network, a

⁵ U.S. Census Bureau, Week 10 Household Pulse Survey, Housing Table 2b (Jul. 15, 2020), online at: <https://www.census.gov/data/tables/2020/demo/hhp/hhp10.html>.

⁶ See Acts of 2020, Ch. 65 (hereafter “the Act” or “the moratorium”).

collection of more than 1,600 legal services attorneys, advocates, and organizers from around the country. The network has actively shared resources and collaborated on significant housing law issues for over 40 years, including through a dynamic listserv, working groups, and a periodic national conference. Since 1981 NHLP has published *HUD Housing Programs: Tenants' Rights*; commonly known as the “Greenbook,” this resource is known as the seminal authority on the rights of HUD tenants and program participants and is regularly used by tenant advocates and other housing professionals throughout the country.

Since the onset of the COVID-19 emergency, NHLP has been at the forefront of efforts to protect tenants and homeowners against eviction and displacement related to the pandemic and its economic fallout. NHLP staff have directly advocated at the federal level and in multiple states for eviction moratoria, mortgage forbearances, and other housing protections, as well as for federal funding to support both tenants and landlords and to reduce evictions and homelessness. NHLP created resources for tenants, homeowners, and advocates to help them learn about and exercise rights and protections, supplied training to a broad constellation of advocates, officials, and stakeholders, and provided leadership through national workgroups and calls, communications, and media. Advocating for the imposition and extension of simple, broad, and effective eviction moratoria have been at the center of this advocacy throughout the pandemic.

MetroWest Legal Services (MWLS) provides free civil legal aid to low-income people and victims of crime who would be denied justice without its help. MWLS serves 45 towns and cities in the MetroWest region of Massachusetts just west of the Greater Boston area. MWLS's priority practice areas include: Housing, Homeless Advocacy, Family Law, Government Benefits (including Social Security), Education, Elder Law, and Immigration. The Housing Unit

at MWLS assists low-income families and individuals with affordable housing matters. Tenants who live in low-income housing and those with housing subsidies are given priority. This type of housing is difficult to obtain and its loss often results in homelessness. We provide representation in areas including eviction defense, administrative appeal matters for applicants who have been denied admission into subsidized housing programs or for participants whose housing benefits have been terminated, and homeowners facing foreclosure. The Housing Project also runs a free *pro se* Housing Clinic one per week to help tenants facing eviction prepare for their own court cases. MWLS has 16 attorneys handling a large range of legal issues. Even those attorneys who are not dedicated to housing issues are sensitive to the fact that different practice areas often intersect and overlap. In short, housing matters can touch the lives of all MWLS clients.

In response to the COVID-19 emergency, MWLS advocated to help enact the eviction moratorium in Massachusetts, which has been of immeasurable benefit to its clients as the economic fallout from the pandemic has wracked the Commonwealth. Its attorneys have engaged in Zoom court hearings for evictions and foreclosures that were deemed “essential” in spite of the moratorium, and they have continued to advise clients of their rights in light of the moratorium. Some of MWLS’s clients fall into a grey area between “essential” and “non-essential” evictions, and MWLS has continued to advocate for the rights of those individuals and keep them informed as the housing landscape continues to shift. Whatever status or stage of eviction or foreclosure that MWLS’s clients fall into, many of them stand to suffer immediate and irreparable harm if the eviction moratorium is struck down prematurely. Across the board, tenants searching for housing are rarely able to find it because landlords and realtors are not

showing apartments. With the COVID-19 pandemic ongoing, granting the Plaintiffs' motion would subject our clients to a homelessness epidemic at the worst possible time.

This brief is submitted pursuant in response to the Court's July 9, 2020, Order Inviting Amicus Briefs, and is accompanied by a motion for leave to file this brief.

III. Certifications

Amicus NHLP makes the following certifications based on Massachusetts Rule of Appellate Procedure 17(c)(5):

1. No party authored this brief in whole or in part.
2. No party's counsel authored this brief in whole or in part.
3. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief.
4. No person or entity other than Amicus NHLP, its staff, and its counsel contributed money that was intended to fund the preparation or submission of this brief.
5. Neither NHLP nor its counsel represents or has represented any of the parties to the present action in another proceeding involving similar issues.
6. Neither NHLP nor its counsel was a party or represented a party in a proceeding or legal transaction that is at issue in the present action.

Amicus MWLS makes the following certifications based on Massachusetts Rule of Appellate Procedure 17(c)(5):

1. No party authored this brief in whole or in part.
2. No party's counsel authored this brief in whole or in part.
3. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief.

4. No person or entity other than Amicus MWLS, its staff, and its counsel contributed money that was intended to fund the preparation or submission of this brief.
5. Neither MWLS nor its counsel represents or has represented any of the parties to the present action in another proceeding involving similar issues.
6. Neither MWLS nor its counsel was a party or represented a party in a proceeding or legal transaction that is at issue in the present action.

IV. Argument

Faced with an extreme crisis of mass evictions, Massachusetts – as well as many other states and the federal government – has imposed a temporary moratorium on “non-essential” evictions. *See* Acts of 2020, Ch. 65. The measure raises no serious constitutional question of its own, and assures the state will not evict tenants in violation of the 14th Amendment Due Process Clause during a time when full and fair access to the judicial system cannot be consistently assured.

A. Massachusetts has a compelling interest in preventing mass evictions.

Of the many harmful economic impacts from the COVID-19 pandemic, perhaps none is more potentially devastating than the threat of mass evictions arising from pandemic-related rent arrearages. A single eviction may inflict serious and long-term consequences on a household: not only depriving a family of its home (and often much or almost all of its personal belongings) but also disrupting employment and child care arrangements, impacting children’s education, threatening or resulting in family separation, causing toxic stress and other health effects, and routinely delivering persons and families into extreme housing insecurity or homelessness – frequently for prolonged periods of time.⁷ These and other consequences of eviction provoke

⁷ *See* Dyvonne Body et al., “A Glimpse into the Eviction Crisis: Why Housing Stability Deserves Greater Attention,” Aspen Institute (July 24, 2019), online at: <https://www.aspeninstitute.org/blog-posts/a-glimpse-into-the-eviction-crisis-why-housing-stability-deserves-greater-attention/>

ripple effects that radiate harms and impose costs on the surrounding communities in which those evictions occur.⁸

In typical year, approximately 1 million of the roughly 43 million U.S. renter-occupied households experience a judicial eviction and its crushing consequences.⁹ But with the COVID-19 pandemic generating widespread unemployment, the U.S. could see evictions on an incomprehensible scale. A recent Aspen Institute study predicted between 19-23 million U.S. households could be evicted by Sept. 30, 2020, unless action is taken to curb them.¹⁰ The U.S. Census Bureau’s household pulse survey reported on July 1, 2020, that almost 9 million households had no confidence in being able to make their next rent payment, with another 32.7 million reporting only “slight confidence” or “moderate confidence.”¹¹ A calculator developed by the global consulting firm Stout estimates over 43% of U.S. renter households at risk of eviction for nonpayment of rent—with nearly 12 million eviction filings anticipated within the next four months.¹²

In Massachusetts, over 90,000 renter households reported no confidence in being able to make their next monthly rent payment, with over 190,000 more reporting “slight” confidence.¹³

⁸ See Rilwan Babajide et al., Effects of Eviction on Individuals and Communities in Middlesex County” (May 12, 2016), online at: https://www.pschohousing.org/sites/default/files/2016_EvictionStudyFinalDraft.pdf

⁹ See Eviction Lab, “National Estimates: Eviction in America” (May 11, 2018), online at: <https://evictionlab.org/national-estimates/>

¹⁰ See Katherine Lucas McKay, Zach Neumann & Sam Gilman, “20 Million Renters Are at Risk of Eviction; Policymakers Must Act Now to Mitigate Widespread Hardship,” The Aspen Institute (Jun. 19, 2020) (predicting 19-23 million U.S. evictions by Sept. 30, 2020), online at: <https://www.aspeninstitute.org/blog-posts/20-million-renters-are-at-risk-of-eviction/>

¹¹ See U.S. Census Bureau, Week 10 Household Pulse Survey, Housing Table 2b (Jul. 15, 2020), online at: <https://www.census.gov/data/tables/2020/demo/hhp/hhp10.html>

¹² See Stout, Estimation of Households Facing Rent Shortfall and Facing Eviction, online at: <https://app.powerbi.com/view?r=eyJrIjoiNzRhYjg2NzAtMGE1MC00NmNjLTIOTM0tYjM2NjFmOTA4ZjMyIiwidCI6Ijc5MGJmNjk2LTE3NDYtNGE4OS1hZjI0LTc4ZGE5Y2RhZGE2MSIsImMiOiN9>, last visited Jul. 24, 2020

¹³ U.S. Census Bureau, Week 10 Household Pulse Survey, Housing Table 2b (Jul. 15, 2020), online at: <https://www.census.gov/data/tables/2020/demo/hhp/hhp10.html>

More than 257,000 additional households reported “moderate” confidence.¹⁴ The Stout calculator estimates 362,000 Massachusetts renters (38.32%) at risk of eviction, with 244,000 eviction filings anticipated within four months.¹⁵ These alarming numbers mean Massachusetts, like the rest of the United States, faces a looming eviction crisis almost beyond description. Between 15,000 and 20,000 evictions typically take place in Massachusetts throughout an entire year;¹⁶ left unchecked, Massachusetts could see a wave of evictions sweep more than ten times as many families out of their homes just this fall.¹⁷

Allowing evictions in such large numbers at any time would produce a truly unfathomable level of human suffering and economic ruin. In addition to the effects on individual families, evictions on such a grand scale could destabilize entire neighborhoods and communities. Multiple studies into the circa-2008 foreclosure crisis found high concentrations of foreclosures caused adverse effects not only on the displaced homeowners, but also their surrounding neighborhoods. For example, the Urban Institute found that significant numbers of foreclosures can inflict a range of harms on a community, including “declining property values and physical deterioration; crime, social disorder, and population turnover; and local government fiscal stress and deterioration of services.”¹⁸ A federal Department of Justice study in five U.S.

¹⁴ U.S. Census Bureau, Week 10 Household Pulse Survey, Housing Table 2b (Jul. 15, 2020), online at: <https://www.census.gov/data/tables/2020/demo/hhp/hhp10.html>

¹⁵ Stout, Estimation of Households Facing Rent Shortfall and Facing Eviction, online at: <https://app.powerbi.com/view?r=eyJrIjoiNzRhYjg2NzAtMGE1MC00NmNjLTllOTMtYjM2NjFmOTA4ZjMyIiwidCI6Ijc5MGJmNjk2LTE3NDYtNGE4OS1hZjI0LTc4ZGE5Y2RhZGE2MSIsImMiOiN9> last visited Jul. 24, 2020

¹⁶ See Eviction Lab, Massachusetts spreadsheet, online at: <https://evictionlab.org/map/#/2016?geography=states&bounds=-190.672,11.324,-44.648,66.289&type=er&locations=25,-70.048,41.318>

¹⁷ See Katherine Lucas Mckay, Zach Neumann & Sam Gilman, “20 Million Renters Are at Risk of Eviction; Policymakers Must Act Now to Mitigate Widespread Hardship,” The Aspen Institute (Jun. 19, 2020) (predicting 19-23 million U.S. evictions by Sept. 30, 2020), online at: <https://www.aspeninstitute.org/blog-posts/20-million-renters-are-at-risk-of-eviction/>

¹⁸ G. Thomas Kingsley, Robin Smith, and David Price, “The Impacts of Foreclosures on Families and Communities,” Urban Institute, p. 13 (May 2009), online at:

cities (Atlanta, Chicago, Miami, New York City, and Philadelphia) observed that “[i]n addition to detrimental effects on property values, housing formation, and educational outcomes for children ... heightened foreclosure activity increases crime (especially violent and public order crime) in the micro-neighborhoods immediately surrounding the property in foreclosure.”¹⁹

Both the size and speed of the eviction tsunami suggests it could produce even worse neighborhood effects in areas where evictions are concentrated. Compared with the nearly 7.8 million U.S. homeowners who lost their properties to foreclosure over the ten-year period between 2007-2016,²⁰ the eviction crisis threatens to displace roughly three times as many households in just the next ten weeks. Schools, businesses, and other community organizations cannot realistically be expected to weather the shock and chaos of such enormous and sudden involuntary displacement of their students, workers, customers, or members.

Allowing 150,000 or more sudden evictions could also result in a significant increase in homelessness. One pre-COVID-19 study found that an eviction increases a person’s likelihood of applying to a homeless shelter by 14%,²¹ while a recent (COVID-era) UCLA study predicted that about 120,000 families – including 184,000 children – could become homeless through evictions in Los Angeles County alone.²² Even an increase only a small fraction of that size

<https://www.urban.org/sites/default/files/publication/30426/411909-The-Impacts-of-Foreclosures-on-Families-and-Communities.PDF>

¹⁹ Ingrid Gould Ellen, Ph.D., and Johanna Lacoë, “The Impact of Foreclosures on Neighborhood Crime,” p. 6 (Feb. 2015), online at: <https://www.ncjrs.gov/pdffiles1/nij/grants/248653.pdf>

²⁰ See Corelogic, “United States Residential Foreclosure Crisis: Ten Years Later,” p. 3 (Mar. 2017), online at: <https://www.corelogic.com/research/foreclosure-report/national-foreclosure-report-10-year.pdf>

²¹ See Robert Collinson* and Davin Reed, “The Effects of Evictions on Low-Income Households,” p. _ (Dec. 2018), online at: https://www.law.nyu.edu/sites/default/files/upload_documents/evictions_collinson_reed.pdf

²² See Gary Blasi, “UD Day: Impending Evictions and Homelessness in Los Angeles,” Luskin Center on Inequality and Democracy, pp. 18-20 (May 28, 2020), online at: <https://escholarship.org/uc/item/2gz6c8cv>

would be dramatic in Massachusetts, where an estimated 3,400 families were experiencing homelessness in March 2020.²³

B. The Massachusetts eviction moratorium is a necessary and measured response to the threat of mass evictions.

In the civil context, restrictions on court access generally require only a rational basis. *See U.S. v. Kras*, 409 U.S. 434, 445 (1973) (upholding, on rational basis standard, fees that impeded indigent debtor from filing bankruptcy petition). The challenged law need only have a “substantial relation to the public health, safety, morals, or some other phase of the general welfare.” *See Chelsea Collaborative, Inc. v. Secretary*, 480 Mass. 27, 40; 100 N.E.3d 326, 336 (2018). The burden on a challenger is to prove the absence of any rational connection between the regulation and the public interest to be achieved. *See RYO Cigar Ass'n, Inc. v. Bos. Pub. Health Comm'n*, 79 Mass. App. Ct. 822, 827; 950 N.E.2d 889, 894 (2011).

The Massachusetts eviction moratorium easily survives this standard. The moratorium directly prevents, at least for a time, the forthcoming wave of residential evictions – staving off the strife and chaos of mass displacement, and potentially enabling Massachusetts to avoid mass evictions altogether if federal relief funds are made available.²⁴ At the very least, the moratorium buys time to enable unavoidable displacements to occur over a longer period, enabling both tenants facing eviction and affected community services to better prepare and plan for the disruptions. The moratorium also serves public health interests, giving health officials more time

²³ *See* Mica Kanner-Mascolo, “Family homelessness rises faster in Mass. than any other state,” Spare Change News (Mar. 9, 2020), online at: <http://sparechangenews.net/2020/03/family-homelessness-rises-faster-in-mass-than-any-other-state/>

²⁴ Note the federal HEROES Act (H.R. 6800, Health and Economic Recovery Omnibus Emergency Solutions Act), which has passed the U.S. House of Representatives and is awaiting consideration in the U.S. Senate, would (among other things) fund \$100 billion in rental assistance to help struggling tenants pay their landlords.

to potentially bring the spread of COVID-19 under control, and for researchers to make progress on vaccines or treatments.

The rational basis standard does not require Massachusetts to tailor its moratorium so as to minimize its adverse effects on landlords; rather, such heightened constitutional scrutiny applies only where a judicial proceeding constitutes the exclusive means of protecting a fundamental right. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 382 (1971) (conditioning indigent person’s access to divorce proceeding upon payment of court fees violated due process clause). Residential eviction lawsuits do not approach this standard. Such cases do not implicate fundamental rights, and judicial eviction is not the sole means of addressing lease violations such as nonpayment of rent. As the U.S. Supreme Court held in *Kras*, that private parties always have at least the theoretical ability to resolve disputes over debts or contracts through negotiation makes them fundamentally distinct from matters such as one’s marital status, which cannot be altered through purely private agreements. *See Kras* at 445 (“The utter exclusiveness of court access and court remedy . . . was a potent factor in *Boddie*. But [w]ithout a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts.”).

Nevertheless, the Massachusetts moratorium is careful to mitigate its effects on landlords. The measure was enacted for a short-term period – enduring until the earlier of 120 days after enactment or 45 days after the state’s COVID-19 emergency declaration is lifted, whichever is sooner.²⁵ *See* Acts of 2020, Ch. 65, §§ 6-7. The moratorium prohibits only “non-essential

²⁵ It bears noting that Governor Baker extended the expiration of the eviction moratorium for 60 days on Monday, July 20, 2020. This power is built into the law but restricted in that any delay of the expiration must not occur in an increment of more than 90 days and the new expiration date must not be more than 45 days after the end of the COVID-19 emergency declaration. This feature of the moratorium is a well-tailored means of addressing the uncertain nature of the ever-evolving pandemic while still limiting the Governor’s authority so that any extension of the expiration of the moratorium should be reasonably related to COVID-19 statistics. *See* COVID-19 Daily Dashboard, <https://www.mass.gov/info-details/COVID-19-response-reporting>.

evictions,” meaning those brought without cause, for primarily financial causes, or for minor lease violations – but still allows evictions based on criminal activity or lease violations that may impact the health or safety of others. *See Act*, § 1. And while the moratorium restricts the imposition of late fees for tenants whose ability to pay rent has been disrupted by COVID-19 (and authorizes the application of security deposit funds toward rents), nothing in the moratorium eliminates a landlord’s right to collect that rent or a tenant’s obligation to pay it. *See Act*, §§ 3(f), 4(a-b). These provisions ensure that a tenant whose conduct poses genuine hazards to others may still be removed, and that tenants who remain actually able to pay rent have no incentive to withhold it or fail to pay on time.

Such a profound emergency as COVID-19, combined with the related threat of mass evictions, could potentially justify truly far-reaching, extreme measures to protect the public health and welfare. *See Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (upholding mandatory smallpox vaccinations). A temporary moratorium on some residential evictions, as the Act imposes, does not even approach the outer bound of this latitude.

C. The 14th Amendment Due Process Clause further supports prohibiting evictions during pandemic conditions.

The use of summary proceedings to adjudicate residential eviction cases, which dates back to medieval times if not beyond, has been held to fulfill basic procedural due process requirements under the Fourteenth Amendment. *See Lindsey v. Normet*, 405 U.S. 56, 65(1972); *see also Grant Timber & Mfg. Co. v. Gray*, 236 U. S. 133 (1915) (“It would be a surprising extension of the Fourteenth Amendment if it were held to prohibit the continuance of one of the most universal and best known distinctions of the mediaeval law.”). Massachusetts’ summary process rules, which provide for at least limited discovery, schedule the dispositive hearing no

sooner than 10 days after the case is filed, and allow tenants to plead any available defenses or counterclaims, afford slightly more process than the minimal safeguards held sufficient in *Lindsey*. See Massachusetts Uniform Summary Process Rules 2(c), 3, 7; compare with *Lindsey* at 65-66. Yet *Lindsey* was not decided during a pandemic, and pandemic conditions alter the procedural due process calculus dramatically.

The process due in a particular instance depends on nature and importance of the interest at stake, the risk of erroneous deprivation through the procedures used, the probable value of additional safeguards, the governmental interest, and burdens the additional process would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). During COVID-19, the need for a safe home in which to isolate from others and practice good hygiene and social distancing heightens the importance of the property interest at stake (i.e., housing). Pandemic conditions raise impediments to preparing for, appearing at, and presenting one's defenses in a hearing – thus amplifying the risk of erroneous eviction. And a pandemic introduces overriding public health considerations that militate against the ordinary governmental interest in quickly and efficiently adjudicating the right to possession between a landlord and tenant.

In particular, the risk of infection may chill tenants from appearing in court to contest evictions, or from visiting law offices to seek representation or taking other steps to prepare for court. Closures of businesses and government offices may interfere with the ability to investigate claims and gather evidence to support defenses – a particular problem where formal discovery is limited. Infection hazards may also affect the availability of witnesses, such as by deter fact witnesses from attending hearings or deterring experts from inspecting rental properties. See, e.g., *Davis v. Comerford*, 483 Mass. 164, 181; 137 N.E.3d 341, 357 (2019) (noting the

importance of “whether documentation such as inspection reports or photographs support a preliminary determination regarding [substandard] conditions”).²⁶

The infection risk would be further exacerbated as a deterrent to appearing in court by a large case volume; indeed, social distancing may not even be possible in a crowded court with an extensive docket and large numbers of parties, witnesses, and attorneys filling the courtrooms, hallways, lobbies, and security checkpoints. The Act avoids this problem by allowing courts to hear only the highest-priority eviction cases with few people present. *See Act*, § 1.

Conversely, rules adopted for public health purposes may impede tenants from defending against eviction. For example, currently anyone seeking to enter a court facility must undergo screening, and will be denied entry if they or someone they reside with has tested positive or been diagnosed with COVID-19, had had symptoms such as sore throat, cough, or headache within the preceding three days, are awaiting test results or have been asked to self-quarantine because of possible exposure to COVID-19, or are without mask or face covering. Supreme Judicial Court third updated order regarding court operations under the exigent circumstances created by the COVID-19 (coronavirus) pandemic, ¶ 4 (June 24, 2020). Protocols such as these may lessen fears of appearing in court (though perhaps not for tenants reliant on public transportation or with certain heightened vulnerabilities), but could result in tenants being denied admission to appear for hearings, or having witnesses or attorneys excluded.

Remote video-conference hearings overcome some of these challenges, but raise other difficulties. “Examples of inappropriate situations [for video-conference hearings] include where there are poor connections, a hearing requires reference to multiple documents, the subject

²⁶ Notably, many local boards of health in Massachusetts are not performing such inspections during the COVID-19 pandemic.

matter is complex, or issues of witness credibility are involved.” National Center For State Courts, *Call To Action: Achieving Civil Justice For All*, Appx G, p. 3 (Jul. 15, 2020).²⁷ Remote hearings may also pose particular difficulties for unrepresented tenants who may lack proper devices, reliable internet access, or sufficient technological skills. Many courts have been forced to adopt remote hearing practices in haste, and may not have adequate or accessible procedures for presenting exhibits, obtaining real-time interpretation, ensuring meaningful public access, or meeting other needs that may arise in an eviction case.

Even if courts have adopted new practices and procedures that fully accommodate the pandemic conditions, tenants and other court-users may not have received sufficient notice of these policies and practices. *See Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (notice must be “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”). Form documents created before COVID-19 may become confusing or fail to inform tenants how to defend because of pandemic-related rules or procedures; for instance, the summary process summons and complaint²⁸ required by Massachusetts Uniform Summary Process Rule 2(a) instructs a tenant to appear at a specific date and time and provides the physical address of the court – but does not notify the tenant of alternatives for appearing remotely or of any limitations on courthouse access.

Eviction cases are also more complicated during COVID-19. For example, the federal CARES Act prohibits evictions filed for nonpayment of rent or other charges between March 27 and July 24, 2020, requires 30 days’ written notice to evict a tenant thereafter, and also restricts

²⁷ Online at: https://www.ncsc.org/_data/assets/pdf_file/0022/25726/ncsc-cji-appendices-g.pdf

²⁸ Online at: <https://www.mass.gov/doc/summary-process-eviction-complaint-sample-form/download>

evictions filed by properties receiving forbearances on certain federally-backed mortgage loans throughout the term of the forbearance. *See* 15 U.S.C. §§ 9057-9058. The *Lindsey* court relied heavily on the simplicity of most eviction cases in holding that the rudimentary summary proceeding affords due process: “Tenants would appear to have as much access to relevant facts as their landlord, and they can be expected to know the terms of their lease, whether they have paid their rent, whether they are in possession of the premises, and whether they have received a proper notice to quit, if one is necessary.” *Lindsey* at 65. Yet few tenants would likely be aware of, let alone able to discern the applicability of, CARES Act restrictions or other federal defenses without the assistance of counsel. Allowing such tenants to proceed without representation poses an exceedingly high risk of erroneous evictions, and a moratorium offers a simple and low-cost alternative to the difficulty and expense of appointing counsel for tenants (in what promises to be an unprecedented surge of eviction cases).

V. Conclusion

For all of the foregoing reasons, this action should be dismissed.

[The signature block appears on the next page]

Respectfully submitted this 24th day of July, 2020, by:

/s/ Joseph J. Sherman

Joseph J. Sherman, BBO# 697981

MetroWest Legal Services

63 Fountain Street, Ste. 304

Framingham, Massachusetts 01702

(508) 371-4099

jsherman@mwlegal.org

/s/ Eric Dunn

Eric Dunn, *motion for admission pro hac vice pending*

National Housing Law Project

919 E. Main Street, Ste. 610

Richmond, Virginia 23223

(415) 546-7000

edunn@nhlp.org