**STATE OF ABSOLUTE CHAOS**

**IN THE COURT OF PLEAS FOR SANITY AND REASON**

**Leo Landlord, Plaintiff**

**v.**

**Tia Tenant, Defendant**

**Pro Se Motion for Appointment of Counsel in Eviction Case**

**I. Relief Requested**

Defendant Tia Tenant requests that the court to appoint an attorney to represent her before proceeding further in this pending eviction lawsuit. This relief is appropriate under the U.S. Constitution, Am. XIV, Sec. 1 (providing that no state shall “deprive any person of life, liberty, or property, without due process of law”), as interpreted by *Mathews v. Eldridge,* 424 U.S. 319 (1976).

**II. Relevant Facts**

This is a summary eviction action in which the Plaintiff Leo Landlord seeks to remove Defendant Tia Tenant from her home. If evicted, Defendant Tenant and her family will be displaced from their home and suffer a range of hardships associated with eviction including homelessness, educational and employment disruptions, the loss of personal possessions and other economic losses, significant mental distress, and extreme deprivation of personal security, privacy, and hygiene.[[1]](#footnote-1) The eviction would occur during an infectious disease pandemic, thus further exposing Defendant Tenant and her family to the risk of Covid-19 infection and contributing to the community spread of the disease.[[2]](#footnote-2)

Defendant Tenant wishes to have an attorney represent her in this matter, but she lacks the means with which to retain counsel and has not been able to secure legal representation from a legal aid program or other pro bono provider. Neither Defendant Tenant, nor any member of her household, is an attorney or other person with legal training. Defendant Tenant believes she has defenses to the eviction but lacks sufficient knowledge of the landlord-tenant laws in force in this jurisdiction to determine what those defenses are or gather the evidence with which to prove them. Defendant Tenant also lacks an understanding of the judicial rules and procedures through which any such defense might be preserved or presented.

Without legal representation, Defendant Tenant will be at a serious disadvantage in attempting to defend against this eviction case and thus faces an unacceptably high risk of suffering an improper eviction. Due to the pandemic and associated relief measures taken by federal, state, and local governments, the complexity of landlord-tenant laws governing evictions are significantly more complicated at this time than under pre-pandemic circumstances, as are court procedures (both generally and specifically with respect to evictions). An erroneous eviction would harm both Defendant Tenant as well as the public.

**III. Argument**

The Court should appoint an attorney to represent Tia Tenant in this matter because allowing her to be evicted without legal representation would violate guarantee of procedural due process under the Fourteenth Amendment of the U.S. Constitution.

1. **Eviction cases during a pandemic require legal representation, even if non-pandemic eviction cases may not.**

The right to procedural due process means a person is fundamentally entitled to notice and a meaningful opportunity for a hearing, appropriate to the nature of the case, before being deprived of an interest in liberty or property. *See, e.g.,* *Boddie v. Connecticut,* 401 U.S. 371, 378 (1971). Whether a specific set of legal procedures fulfills due process in a particular situation is evaluated under the classic test set forth in *Mathews v. Eldridge,* 424 U.S. 319 (1976), which balances (i) the nature and importance of the interest at stake, (ii) the risk of erroneous deprivation through the procedures employed, (iii) the probable value of additional safeguards, and (iv) the governmental interest and burdens the additional process would entail.

We are concerned in this case with summary eviction procedures, a type of judicial mechanism the United States Supreme Court last evaluated (generally) under a procedural due process lens in the case of *Lindsey v. Normet,* 405 U.S. 56 (1972). The main due process claim in *Lindsey* was that the Oregon summary eviction statute at the time, under which a tenant could be forced to appear and defend as soon as four days after service, did not provide a meaningful opportunity to be heard. *See Lindsey* at 64. Yet the court disagreed, finding Oregon’s rudimentary eviction procedure was sufficient because it allowed tenants to have counsel *at their own expense*, afforded written—albeit short—notice of the grounds for the eviction, and provided an opportunity to appear and assert defenses before a judge or jury. *See Lindsey* at 65. Though acknowledging that features of the Oregon procedure “could be applied so as to deprive a tenant of a proper hearing in specific situations,” this was insufficient to support a facial challenge—*i.e.,* tenants would not be evictied without due process substantially every time. *See Lindsey* at 65.

*Lindsey* was not decided during a pandemic, however, and pandemic conditions—at least those of Covid-19—modify the procedural due process calculus considerably. The stakes are higher, the risk of erroneous deprivation is greater, and the governmental interest is significantly different. *See generally Mathews* at 344. During a pandemic, a court does not afford procedural due process to tenant in a residential eviction case unless the tenant has legal representation.

**1. Private interest in housing is even greater during a pandemic.**

A person’s right to continued occupancy of her home has long been recognized as a “significant interest in property” in the procedural due process context. *See Greene v. Lindsey,* 456 U.S. 444, 450-451 (1982). Even under ordinary circumstances, the loss of housing tends to be a devastating harm. Eviction frequently leads to homelessness, which in turn can cause incarceration, health issues, job loss, and threats to child custody. Even those who do not experience homelessness may still suffer from some of these secondary consequences (such as employment or child custody issues) due to having to relocate further from their community and support networks. But the importance of housing (as a property interest) is magnified even further during a pandemic, in which the ability to socially distance from others and maintain elevated hygiene may be a matter of life or death. Housing is also necessary to comply with “stay at home” orders that may exist or come into effect in many states or localities when community transmission rates increase.

**2. Risk of erroneous deprivation is heightened during a pandemic.**

Even before Covid-19, landlord-tenant law was a "'patchwork' of legislation that has responded to decades of social, economic and political pressure" and [amounted to] an 'impenetrable thicket confusing not only to laymen but to lawyers.’” *See, e.g., La Guardia v. Cavanaugh*, 423 N.E.2d 9, 10 (N.Y. 1981). But during the Covid-19 pandemic, this impenetrable thicket has become a solid brick wall, as a bewildering array of federal, state, and local court procedures, emergency laws, judicial decisions, rent relief programs, and related developments have amplified the complexity of eviction law immeasurably.

At only the federal level, for example, many tenants can claim protection against eviction under an eviction halt order issued by the Centers for Disease Control and Prevention. See 86 Fed.Reg. 43244 (Aug. 6, 2021). Yet to invoke the protection, tenants must sign and deliver a sworn declaration to their landlords, which calls for the tenant to make complicated certifications such as “[t]he individual resides in a U.S. county experiencing substantial or high rates of community transmission levels of SARS-CoV-2 as defined by CDC.” 86 Fed.Reg. at 43245. Without legal assistance many tenants who qualify for the protection are likely to forego it for failure to understand or comply with the declaration requirement.

Even though a tenant who invokes protection under the CDC order cannot be “evicted,” which the order defines as taking “any action … to remove or cause the removal of a covered person from a residential property,” 86 Fed.Reg. at 43245-46, local courts have differed widely on what the order actually does.[[3]](#footnote-3) While some courts have stayed or dismissed evictions of covered tenants altogether, others have allowed landlords even to obtain eviction writs (with the order simply restraining physical execution). *See, e.g., KC Tenants v. Byrn*, \_\_ F.Supp.3d \_\_, No. 20-000784-CV-W-HFS, 2020 WL 7063361, at \*2 (W.D. Mo. Nov. 30, 2020). Some local courts have interpreted the order only to affect evictions based formally on lease termination notices given under state nonpayment of rent eviction statutes. *See, e.g., Carson Co. v. Robinson,* 2020-0643 (La. App. 4 Cir. 6/30/21), --- So.3d ----2021 WL 2753992 (2021). Some courts have even openly defied the CDC order and refused to restrain evictions of covered tenants altogether, while still others have quietly done the same.[[4]](#footnote-4) Without legal representation, tenants will struggle to cope with these differing interpretations. They might they be erroneously evicted, and they will be hampered in making good decisions about their housing and negotiations with landlords due to the unpredictability of local court responses to CDC halt order defenses.

All of this complexity has been further multiplied by a series of federal court decisions, some of which upheld the CDC’s authority to restrain evictions and others of which found the order to have been unauthorized. *Compare, e.g.,* *Tiger Lily, LLC v. HUD.*, No. 21-5256, 2021 WL 3121373 (6th Cir. July 23, 2021) (CDC halt order without authority) *with* *Alabama Ass'n of Realtors v. DHHS.*, No. 21-5093, 2021 WL 2221646 (D.C. Cir. June 2, 2021) (upholding stay of order declaring the CDC halt order invalid because appellate court will likely find the order was authorized). Among the various decisions holding the CDC halt order to have been unauthorized, some applied only in limited geographic areas or to specific parties, while other rulings were stayed pending review. *See, e.g.,* *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2320 (2021) (upholding stay of order declaring CDC halt order unauthorized). And still more cases remain pending in federal courts and can be expected to produce decisions further complicating the applicability of the CDC order.

Apart from the CDC order, the federal CARES Act also requires tenants in properties having federally-backed mortgage loans or that participate in certain federal housing programs to receive at least 30 days’ notice of an eviction after July 24, 2020. *See* 15 U.S.C § 9058. This law covers an estimated 12.3 to 19.9 million rental units—or between 28.1 to 45.6 percent of the U.S. rental housing stock.[[5]](#footnote-5) Yet determining whether a housing unit is covered under the CARES Act is difficult and often not possible for tenants alone. Though some resources exist for finding out whether a property has a federally-backed multifamily mortgage loan or participates in certain site-based subsidy programs, many tenants live in small (1-4 unit) rental properties, and the Freddie Mac and Fannie Mae on-line loan lookup tools (for finding out whether those small properties have federally- backed mortgage loans) may only be used by borrowers—not tenants, tenant advocates, or courts. And there are no such tools for finding out whether housing vouchers are present in a multifamily property—indeed, privacy protections would likely restrict voucher administrators from disclosing the locations of their tenants. See 5 U.S.C. § 552a(b).

Aside from substantive legal protections, many courts have modified their rules and hearing procedures—sometimes quite dramatically—to account for pandemic conditions. Courts have shifted to remote, on-line hearings, or moved hearings to different facilities. Courts have adopted mask requirements, taken temperature readings of people entering court buildings, and denied admission to litigants, witnesses, or other persons who have (within so many days prior) traveled to certain locations, experienced certain symptoms, or been in contact with others who have.

Critical to the *Lindsey’s* court’s holding that summary eviction proceedings afforded due process in the run of cases was the view that nonpayment eviction cases tend to be relatively simple: “[t]enants 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,* 405 U.S. at 65. Eviction cases during Covid-19 are anything but.

These are only a handful of the complex reasons why a tenant without counsel is more likely to be erroneously evicted during the pandemic. Such a tenant might be entitled to protection under the CDC order, but not know about the order or how to invoke it. A tenant might not have required the required notice under the CARES Act, but might not know about the notice requirement or how to determine if it applies. In addition, a tenant might have a defense under state or local law, but may not know about the protection or the relevant procedural rules and requirements. Keeping track of the bewildering array state and local emergency orders, eviction moratoria, and new court policies and procedures—many of which change weekly or even more often—can be difficult for attorneys and courts; for unrepresented tenants to do so is far from realistic in the large majority of cases.

1. **Public health interest lessens the importance of speed and efficiency in eviction proceedings during a pandemic.**

As the *Lindsey* court discussed, the key governmental interest supporting the use of summary eviction proceedings has been the view that quickly and efficiently adjudicating the right to possession of rental premises avoids violence. *See Lindsey* at 73 (“Speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited harassment and dispossession when his lease or rental agreement gives him the right to peaceful and undisturbed possession of the property. Holding over … has proved a virulent source of friction and dispute.”). Indeed, summary eviction proceedings were originally adopted as an alternative to the extrajudicial, and often brutal, means landlords would traditionally use to eject tenants. *See Lindsey* at 57, *quoting* *Entelman v. Hagood,* 95 Ga. 390, 392; 22 S.E. 545 (1895) (self-help evictions historically “fraught with ‘violence and quarrels and bloodshed.’”). Summary proceedings serve this interest through the carrot of cheap and quick eviction procedures tilted heavily in the landlord’s favor. *See Lindsey* at 85 (Douglas, J., dissenting) (“Finding a lawyer in two days, acquainting him with the facts, and getting necessary witnesses make the theoretical opportunity to be heard and interpose a defense a promise of empty words. It is, indeed, a meaningless notice and opportunity to defend. The trial is likely to be held in the presence of only the judge and the landlord and the landlord's attorney.”).

The governmental interest in keeping landlords from removing tenants through violent means is critically important, as much so during the pandemic as before. But during the pandemic, avoiding such violence is not the government’s only concern. As the CDC, citing multiple studies, has stated, “evictions substantially contribute to COVID-19 transmission.” 86 Fed.Reg. at 43248. Eviction restrictions thus “can be an effective public health measure utilized to prevent the spread of communicable disease” during a pandemic—and especially the present Covid-19 pandemic, where “[c]ommunities with high rates of eviction have been shown to have lower coverage of COVID-19 vaccination.” 86 Fed.Reg. at 43246, 43249. The CDC has continuously imposed eviction restrictions on a nationwide basis, both to backstop areas where local officials have not taken sufficient steps to prevent evictions and where Covid transmission rates are highest. *See* 86 Fed.Reg. at 43250. Not only are erroneous evictions unjust and harmful to the affected individuals and households, but allowing such evictions during a pandemic undermines critical public health objectives.

Moreover, the government has other means by which to deter and prevent landlords from resorting to violence against tenants behind in rent. The federal government has appropriated over $46 billion in relief funds to pay delinquent tenants’ rent.[[6]](#footnote-6) Most states have statutes prohibiting extrajudicial evictions and providing strong legal remedies for tenants who are evicted through lock changes, utility disruptions, or violent actions. See, e.g., [*your state’s anti-lockout statute*]. The CDC eviction halt order provides significant criminal penalties for violations, including jail time and six-figure fines. See 86 Fed.Reg. at 43252. These deterrents should more than compensate for whatever incremental increase in the risk of landlord violence that might result from tenants being given access to lawyers before they are wrongfully evicted during a pandemic.

1. **The Court should not proceed with this eviction case unless and until Defendant Tia Tenant has access to legal representation.**

For all of the foregoing reasons, this Court should find that proceeding with this summary eviction lawsuit would violate Defendant Tenant’s right to procedural due process so long as she remains unrepresented by counsel. Traditionally, due process has been held only to require that a tenant be “afforded the opportunity to be heard either pro se or by a retained attorney.” *Tyson v. NYCHA,* 369 F. Supp. 513, 521 (S.D.N.Y. 1974). But during the Covid-19 pandemic, the importance of a tenant’s housing is even greater than in non-pandemic circumstances, the risk of erroneous deprivation is much higher, and the government’s interest in slowing the spread of Covid-19 must be considered alongside the usual interest in speed and efficiency (which is itself diminished by the availability of relief funds for landlords).

**IV. Conclusion**

The Court should either appoint counsel for Defendant Tia Tenant or continue this matter for so long as necessary for Defendant Tenant to obtain counsel on her own. The Court should decline to proceed or enter any substantive orders negatively affecting the rights of Defendant Tenant unless and until she has the assistance of counsel.

Respectfully submitted this \_\_ day of August, 2021,

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Tia Tenant, Defendant

1. See, e.g., Gracie Himmelstein and Matthew Desmond, “Eviction And Health: A Vicious Cycle Exacerbated By A Pandemic, " Health Affairs Health Policy Brief (Apr. 1, 2021) (“A large body of research documents the association between evictions and a host of social determinants of health and adverse health outcomes, including increased spread of COVID-19 and related morbidity and mortality.”). [↑](#footnote-ref-1)
2. *See* 86 Fed.Reg. 43244, 43248 (Aug. 6, 2021) (“Evicted renters must move, which leads to multiple outcomes that increase the risk of COVID-19 spread.”). [↑](#footnote-ref-2)
3. *See, e.g.,* Peter Hepburn and Renee Louis, “Preliminary Analysis: Six Months of the CDC Eviction Moratorium,” Eviction Lab (Mar. 8, 2021) (“Where you live plays a major role in determining how well the CDC moratorium protects you.”), <https://evictionlab.org/six-months-cdc/> [↑](#footnote-ref-3)
4. *See, e.g., Ken Gordon, “Franklin County will not comply with latest eviction moratorium, judge announces,” Columbus Dispatch (Aug. 5, 2021);* Heather Hollingsworth, “Kansas judge finds CDC eviction moratorium unenforceable,” Associated Press (June 18, 2021); Stephanie Stokes, “‘The CDC As Far As I Know Has No Control Over Georgia Courts’: Judges Continue Evictions Despite Moratorium,” WABE (Feb. 2, 2021). [↑](#footnote-ref-4)
5. See Sarah Stein and Nisha Sutaria, “Housing Policy Impact: Federal Eviction Protection Coverage and the Need for Better Data,” Federal Reserve Bank of Atlanta, <https://www.frbatlanta.org/community-development/publications/partners-update/2020/covid-19-publications/200616-housing-policy-impact-federal-eviction-protection-coverage-and-the-need-for-better-data.aspx> [↑](#footnote-ref-5)
6. See, The White House, “FACT SHEET: Biden-⁠Harris Administration Announces Initiatives to Promote Housing Stability By Supporting Vulnerable Tenants and Preventing Foreclosures” (June 24, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/24/fact-sheet-biden-harris-administration-announces-initiatives-to-promote-housing-stability-by-supporting-vulnerable-tenants-and-preventing-foreclosures/> [↑](#footnote-ref-6)