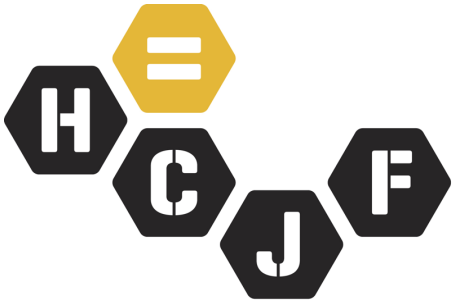

HEARTLAND CENTER FOR **JOBS** & **FREEDOM**

ARCH CITY
DEFENDERS

April 23, 2020

The Honorable David M. Byrn
Presiding Judge
Division 3
16th Circuit Court
of Jackson County Missouri
415 E 12th Street
Kansas City, Mo 64106

The Honorable Janette K. Rodecap
Associate Circuit Judge
Division 29
16th Circuit Court
of Jackson County Missouri
415 E 12th Street
Kansas City, Mo 64106

Re: *Remote Hearings with Pro Se Defendants*

Dear Judge Byrn and Judge Rodecap,

We hope this letter finds you and your families safe and well. We continue to admire the courts' leadership during these daunting times and we look forward to the day when we can appear in front of you again in person. We are writing because we recently learned that Division 29 is setting hearings with *pro se* defendants by phone and video and we believe that other courts in other jurisdictions are considering similar procedures. We offer our perspective on such hearings here and would appreciate a follow-up discussion by phone or video, if possible.

We want to begin by saying that we can only imagine the court's concern with the backlog of cases caused by the suspension of in-person appearances. We too are concerned that our organizations will be overwhelmed once the crisis ends. We also trust that the Court does not intend to sacrifice fundamental fairness for efficiency. We have information to share about a myriad of challenges that accompany remote hearings and *pro se* defendants. It is our hope that the court will reconsider handling these particular hearings remotely.

There are many reasons why remote hearings with *pro se* defendants[1] imperil due process rights, especially when it comes to eviction matters. The first and most critical reason stems from the inability of defendants to access the courts remotely, by any means. In its notices, the Court provides defendants with two ways of participating in a hearing: phone and Web Ex video conference. Tenants facing eviction are financially distressed and often struggling to keep their phones in service. It is not uncommon for our organizations to lose contact with a tenant because their phone service lapses. Given the mass unemployment that has befallen the public, many more defendants will be unable to pay their phone bills and will lose service. And, with stay-at-home orders in place, a defendant cannot even borrow a phone from another person, at least not safely. Even fewer defendants have computers, wifi access, or the types of sophisticated devices that would permit them to use Web Ex. That means scores of defendants will experience default judgments, not because they failed to appear, but because they could not appear at all, even if they wanted to. This invokes grave issues of due process and access to the courts. *Jamison v. Dep't of Soc. Servs., Div. of Family Servs.,* 218 S.W.3d 399 (Mo. 2007) (there must be a procedure in place for confronting evidence before one can be deprived of property or liberty),

More specifically, a due process analysis examines two questions. First, is there a fundamental liberty or property interest at stake? *Id.* It is beyond controversy that the right to one's home is a quintessential property right. *Lindsey v. Normet*, 405 U.S. 56, 82 (1972) ("[m]odern man's place of retreat for quiet and solace is the home. Whether rented or owned, it is his sanctuary. Being uprooted and put into the street is a traumatic experience.")

[1] This letter focuses on evictions, however, we are equally concerned with any *pro se* defendants – including those being sued for debts – that are receiving notices to appear in court remotely.

Where, as here, there is an important property right at stake, the next question is, what due process is due? *Jamison,* 218 S.W.3d at 405. In *Lindsey v. Normet*, the U.S. Supreme Court held that states must provide individuals the opportunity to be heard in a meaningful time and a meaningful manner with the ability to present "every available defense" before an eviction can occur. *Id* at 67. Further, in *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970), the Court held the "opportunity to be heard" meant the procedure must be "tailored to the capacities and circumstances of those who are to be heard." If a person lacks a telephone, there is no due process to be had whatsoever. The remote procedure simply cannot pass constitutional muster.

It is important to add that, not only will defendants lose their homes, their reputational interests are also under threat and that threat bolsters the need for due process protection even more. *See, Jamison.,* 218 S.W.3d at 406 (reputational harm invokes due process protection, especially when coupled with a property right). Eviction judgments permanently mark tenants' records in ways that prevent them from securing housing long into the future. With such high stakes, full access to the courts, in person, is a must. *Id.*

These problems alone warrant ceasing the remote hearing procedure. Unlike in criminal cases, the remote process provides no guarantee that defendants will have the technical means to participate in the court process and we are convinced that such remote procedures cannot withstand constitutional scrutiny.[2]

The notice also requires defendants to submit documentation by email, three days before the court date. In our experience, many defendants are ill equipped to use email (assuming they have the electronic device to access it), especially those who are elderly or impaired. Very few tenants have the ability to scan documents to be emailed. This is especially true given the short window between the date when notices are sent and the deadline for providing the court with documents.

Moreover, tenants who wish to raise issues of habitability defensively won't be able to. Tenants rarely know about the requirement to file affirmative defenses and the remote process deprives them of access to the attorneys they would otherwise meet in the courthouse. Contact with our legal teams allows tenants to obtain free advice, affirmative defense forms, and limited or full legal representation. But without that direct contact in court, the vast majority of tenants do not know what we do or how to reach us.

In sum, many defendants will lose their cases, not because they lacked a defense, but because they had no means to assert it. This too raises deep concerns around due process, access to the courts and access to counsel. The three-day rule also contradicts § 517.031 RSMo and *Neenan v. Cox*, 955 S.W.2d 595 (Mo. App. W.D. 1997), which allow defendants to file

[2] Even when litigants can access remote technology, studies show they are much less likely to fairly defend themselves. Ingrid V. Eagly, "Remote Adjudication in Immigration" U.S.A. Vol 109, No. 4. (2015).

affirmative defenses up until the day before the hearing, as continued. *See, State ex rel. Johnston v. Luckenbill*, 975 S.W.2d 253, 254 (Mo. App. 1998) (holding that a court cannot schedule a hearing in an eviction case prior to the date listed on the summons, even if the tenant was alleged to have received notice).

There are still more issues. It is also true that non-English speakers and defendants with hearing and vision impairments will not be able to communicate with the court in advance to request an interpreter in accordance with §§ 476.803 and 476.753 RSMo. This too would deprive defendants of the ability to participate in the court process and would usurp fundamental rights of equal protection, due process and court access.

In the rare instance where a defendant appears by phone and asks for a trial, holding that trial remotely will be totally untenable. The defendant will not be able to submit physical evidence to the court, will not be able to inspect the evidence from the landlord, will not be able to call witnesses, and will lack the ability to assess the credibility of the landlord's witnesses (and vice versa). A hearing that deprives a tenant the ability to present both physical and documentary evidence, witness testimony and, the ability to adequately cross-examine the evidence and witnesses, wholly fails to meet the meaningfulness standard. *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970).

In addition, remote trials conflict with Supreme Court Rule 55.29, which states, "[a]ll trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom."

Finally, as defendants begin receiving default judgments by mail, they are unlikely to know about the suspension of executions. Tenants may leave voluntarily when they see the judgment. Moreover, even if tenants do not leave on their own, landlords are likely to use the judgments to press them to leave. Where will they go? To perilous homeless shelters - ground zero for virus spread. Or they will crowd into the homes of others, overstay welcomes, and begin moving from home to home and shelter to shelter, a major public health hazard. We already know that tenants facing eviction are more likely to be African American,[3] the very same group most vulnerable to perishing from this terrible virus. Issuing judgments will only contribute to this stark and tragic inequity.

Given the rash of challenges that come with remote hearings and unrepresented defendants, we sincerely hope the Court will reconsider this process. If there is anything we can do to assist the Court, please let us know. We thank you for your continued leadership and for taking the time to consider our perspective on this critical issue.

[3] https://www.evictionkc.org/project; https://www.kansascity.com/news/coronavirus/article241824321.html?fbclid=IwAR3XKwocOCZw6wpUhjYVXQMfPmdYqdi7igG_LEkyC0CRT8zFzcBLaluGxHQ

Sincerely,

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