



Maryland Attorney General's
COVID-19 Access to Justice Task Force

Andre M. Davis, Vice Chair
Former Judge, U.S. Court of Appeals, 4th Cir.

Brian E. Frosh, Chair
Maryland Attorney General

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Maryland Access to Justice Commission

July 28, 2020

Via electronic mail

The Honorable Lawrence J. Hogan, Jr.
Governor
State House
100 State Circle
Annapolis, Maryland 21401

Re: Extension of Executive Orders on Evictions, Debt Collections, and Residential Services

Dear Governor Hogan:

On behalf of the Attorney General's COVID-19 Access to Justice Task Force,¹ I write to request that you extend and expand the scope of your Executive Orders on eviction, debt collection, and residential services² to ensure that they provide the protection Marylanders need to avoid further devastation during this COVID-19 crisis.³

Specifically, we request that you: 1) amend your eviction and debt collection order so that, rather than requiring largely self-represented tenants to shoulder the burden of proving COVID-19 hardship to avoid eviction, the order actually affords Marylanders effective protection against losing their homes and possessions in the midst of this public health and economic crisis; 2) increase the amount of rental assistance and civil legal aid funding available to meet the enormous

¹ A partnership between the Maryland Office of the Attorney General and the Maryland Access to Justice Commission, the Task Force brings together high-level and diverse leaders from the health, disaster recovery, business, government, and many other sectors to confront the civil legal issues exacerbated by the COVID-19 pandemic, including housing, consumer fraud and debt, public benefits, the looming deficit in civil legal aid funding, and the disparities in outcomes among communities of color. The Task Force will develop strategies, devise solutions, and drive reforms and innovations necessary to ensure equity, fairness, and access to justice for all Marylanders.

² Executive Orders 20.04.03.01; 20.04.29.03; and 20.06.29.01

³ Task Force members who are members of the Judiciary and the Administration were recused from participating in this request.

breadth of the need; 3) renew your prohibition against termination of utilities, other residential services, and late fees currently slated to end on August 1; and 4) through each renewal of your Declaration of State of Emergency,⁴ ensure that your orders on evictions, debt collections, and residential services remain fully in effect until the pandemic stabilizes sufficiently to enable Marylanders to return to work and have adequate resources to pay their rent and daily living expenses. Although the pandemic may be with us well into next year, our suggestion would be to ensure these protections extend until at least January 31, 2021 in order to allow time for you to work with the General Assembly to enact emergency legislation to assist Marylanders with the housing and debt crises they currently face.

The Task Force members appreciate your efforts to protect Marylanders against eviction and debt collection actions during these initial months of the COVID-19 emergency. We are concerned, however, that the State's continuing public health and economic challenges are such that resuming these actions now would place thousands of Marylanders at risk of potentially catastrophic homelessness and dislocation. As explained further below, we also believe that your eviction order must not require tenants to prove COVID-19 hardship, but rather must simply suspend all eviction actions, with narrow emergency-related exceptions, in order to provide meaningful protection for Marylanders. Mass homelessness would not only occasion deep suffering by the dislocated, but would also spread COVID-19 infections and death and prolong the crisis for everyone.

Extension of your executive orders is critical simply because the conditions underlying Marylanders' inability to pay rent, consumer debt, and fees for utilities and other residential services remain largely unchanged. Many Marylanders were struggling to pay housing and other expenses before the COVID-19 crisis, and the pandemic has exacerbated these difficulties exponentially. Specifically:

- The disease continues unabated and disproportionately harms communities of color: The number of COVID-19 infections is continuing to increase both nationally and in Maryland, and the impact of the disease has fallen disproportionately on people of color. Black and Latinx Marylanders have experienced higher rates of infections and deaths, as well as higher burdens of job loss, food insecurity, and other factors that fuel the inability to meet financial obligations;⁵
- Economic conditions that will reduce unemployment and enable schools to reopen seem unlikely to improve significantly in the short term: Marylanders are still being encouraged to

⁴ Renewal of Declaration of State of Emergency and Existence of Catastrophic Health Emergency – COVID-19 (July 1)

⁵ Meredith Cohn, Nathan Ruiz, and Pamela Wood, Black Marylanders make-up largest group of Coronavirus cases as state releases racial breakdown for first time, Baltimore Sun, April 09, 2020 <https://www.baltimoresun.com/coronavirus/bs-md-coronavirus-race-data-20200409-ffim7y4bljcz3hjk4dmt773mp4-story.html>; <https://www.marylandmatters.org/covid-19-in-maryland-2/#pctcases>

practice social distancing and to stay home to the extent possible. It looks increasingly like most Maryland schools will be operating remotely in the fall, making it difficult for many parents to return to work, even if their places of employment are open and they have not been laid off;

- Unemployment and other CARES Act benefits are inaccessible or slated to end soon: Congress has not extended unemployment and other CARES Act benefits beyond July 31, and the fate of efforts to provide further relief remains highly uncertain. Many Marylanders are also still having difficulty obtaining unemployment benefits; some applications are still pending at the Maryland Department of Labor, at least 100,000 applicants have been denied benefits,⁶ and many others are ineligible because of immigration status;
- Rental assistance and civil legal aid funding are limited: Counties and municipalities have tried to allocate some of their CARES Act funding for rental assistance, and your Administration has pledged \$30 million towards the effort, but these limited resources are simply inadequate to meet the enormous need. Some of the additional funding is also not expected to be available until the end of August. In addition, the Maryland Legal Services Corporation, the largest funder of civil legal aid in Maryland, is facing a 70% decline in funding at a time when more people will need help navigating civil justice cases, like evictions or consumer debt; and
- Court proceedings under COVID-19 conditions will make eviction and debt collection actions even more challenging for Marylanders: The dire circumstances of Marylanders hit hard by COVID-19 will make navigating new and complicated court procedures, whether online or in person, even more difficult, particularly for the vast majority who are self-represented in eviction and debt collection cases. Again, this hardship will disproportionately harm people of color, who were already excessively impacted by these suits⁷ and have had the highest rates of job loss during the pandemic.⁸ It also underscores the need to extend your eviction order to all of these cases, not simply those in which the tenant has the wherewithal to be aware of the COVID-19 affirmative defense and retain counsel to prove it.

⁶ Jenny Fulginiti, Over 800,000 unemployment claims filed in Maryland since March 14, WBAL-TV 11, <https://www.wbal.com/article/over-800000-marylanders-have-filed-for-unemployment-since-march-14/32903620#>.

⁷ Maryland Consumer Rights Coalition, No Exit: How Maryland's Debt Collection Practices Deepen Poverty and Widen the Racial Wealth Gap 9 (2018); Tim Thomas et al., Baltimore Eviction Map, The Evictions Study (2020), available at <https://evictions.study/maryland/report/baltimore.html>.

⁸ Economic Policy Institute, Nearly 11% of the workforce is out of work with no reasonable chance of getting called back to a prior job, Working Economics Blog (June 29, 2020), available at <https://www.epi.org/blog/nearly-11-of-the-workforce-is-out-of-work-with-zero-chance-of-getting-called-back-to-a-prior-job/>) (“[U]nemployment rates are extremely elevated across all demographic groups. However, the highest rates are found among Black and brown workers, women, and particularly Hispanic, Asian, and Black women.”).

Even under the moratoria, civil legal aid organizations have continued to provide front-line services as they help vulnerable Marylanders ward off threats to illegal evictions or shut-offs. Yet these organizations are able to assist only a fraction of tenants facing eviction proceedings even under pre-COVID funding levels. Without additional resources to compensate for funding reductions, they will be able to assist even fewer.

For example, if the eviction order is not extended and expanded, the courts will begin hearing tenant holding over and breach of lease actions. The courts will also resume processing warrants of restitution for failure to pay rent cases.⁹ If a defendant fails to file a Notice of Intention to Defend or appear at the hearing, the courts will enter a judgment. Yet only about 10% of defendants actually manage to appear under normal circumstances. Under the unprecedented hardships imposed by the pandemic, we must anticipate that even this small percentage will decline sharply. It is unrealistic to expect that tenants who are currently unemployed or behind in their rent and other expenses, or unable to find childcare, will appreciate the implications and be able to respond to a summons for rent or debts they do not believe they would be able to pay anyway.

Resumption of these cases poses risks to thousands of debtors and tenants whose COVID-19 reduced circumstances have not improved. Even with the delay in re-commencing failure to pay rent cases and extension of the moratorium on federally-funded housing evictions until the end of August, it is unlikely that the current hardships of the crisis will have improved by then, little more than a month from now.

By way of illustration, Maryland's percentage of adults who missed the prior month's rent or mortgage payment, or who had slight or no confidence in their ability to pay next month's rent or mortgage on time, has climbed back up in mid-July (27.3%) towards its level in late April (29.6%), after a notable dip in June (23.7%). These swings closely track Marylanders' access to CARES Act benefits.¹⁰

In sum, subject to exceptions for emergency-related evictions, your Executive Order should be expanded and extended to protect Marylanders from eviction in all cases - including failure to pay rent, breach of lease, and tenant holding over – without imposing upon them the unrealistic burden of retaining counsel to prove hardship from COVID-19 and its economic devastation. For reasons

⁹ The current Executive Order, 20.04.03.01, provides the COVID-19 hardship defense only for failure to pay rent and breach of lease actions. This limitation bars any eviction protection in tenant holding over cases, the basis of which is often a tenant's failure to pay rent. The Order should be expanded, therefore, by also including tenant holding over actions. Thus, it should suspend the effect of Md. Code Ann., Real Property Section 8-402(b)(1), in addition to Sections 8-401 and 8-402.1, which are already suspended by the current order to the extent that they provide the COVID-19 hardship defense.

¹⁰ U.S. Census Bureau, Housing Insecurity, Household Pulse Survey, available at https://www.census.gov/data-tools/demo/hhp/#/?s_state=00024&measures=HIR (scroll down to data table).

that also hold true with respect to debt collection cases and protection against termination of residential services, the State's ongoing COVID-19 crisis has not allowed for a sufficient stabilization of its rental housing market to allow tens of thousands of landlord-tenant actions to proceed without devastating consequences for Marylanders.

Finally, while we appreciate your allocation of \$30 million of CARES Act funding for rental assistance, it is widely believed that this amount is woefully inadequate to meet the needs of Maryland tenants at risk of eviction. Rather, we endorse the request of House Environment and Transportation Committee Chairman Barve and Vice-Chairman Stein, as put forward in their July 8, 2020 letter to Maryland Department of Housing and Community Development Secretary Holt (attached), that "the Administration identify all available sources of funds which may be used to support local rental assistance programs and commit additional funds to support renters and the rental housing industry, especially funds received pursuant to the CARES Act." Fifty members of the House of Delegates, as well as a coalition of non-profit legal assistance organizations who work closely with affected tenants, have also expressed support for the allocation of significantly more resources toward rental assistance.¹¹ We add that it is critical to ensure that funds are allocated in a manner to serve the communities most impacted by the pandemic.

The Task Force strongly believes that allowing your executive orders on evictions, debt collections, and residential services to lapse at this juncture will only exacerbate what is already a dire situation for many Marylanders. Accordingly, we respectfully request that you immediately extend and expand the protections of these orders until at least January 31, 2021. A few months reprieve would help the State avoid thousands of evictions and loss of services, harm to public health, and preventable suffering. It would give Marylanders much-needed time to continue working together to begin to overcome the extraordinary health and economic challenges of this pandemic.

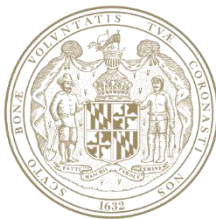
Sincerely,



Brian E. Frosh
Attorney General

Enclosures (2)

¹¹ April 29, 2020 letter from members of House of Delegates to Governor Hogan; July 17, 2020 letter from legal services organizations to Chief Judges Barbera and Morrissey (attached).



THE MARYLAND HOUSE OF DELEGATES
ENVIRONMENT AND TRANSPORTATION COMMITTEE

July 8, 2020

The Honorable Kenneth C. Holt
Secretary, Department of Housing and Community Development
7800 Harkins Rd.
Lanham, Maryland 20706

Dear Secretary Holt:

In our respective capacities as the Chairman and Vice Chairman of the House Environment and Transportation Committee, we would like to thank DHCD for its participation in the committee briefing held on June 29, 2020 entitled “The Effects of Covid-19 on Housing.” It was an enlightening experience and a solid first step in addressing this important issue which has affected many thousands of Marylanders.

The phrase “tsunami of evictions” was used throughout the briefing, and it serves as a poignant prospect of what may occur without immediate action by the State. Our local governments have acted swiftly to stem the tide, but they can only do so much. In the interest of partnership and given the committee’s background on these issues, we offer the following recommendations for further action by your department:

1) Work with Governor Hogan to extend the State’s Eviction Moratorium through January 31, 2021

Currently, the 120 day eviction moratorium for covered properties under the Coronavirus Aid, Relief and Economic Security (CARES) Act officially ends as of July 25, 2020. We understand that certain federal agencies have acted in a discretionary capacity to extend this moratorium until the end of August of this year. As for the State, Governor Hogan’s March 16, 2020 Executive Order prohibits Maryland courts from ordering the eviction of any tenant who can demonstrate, through objectively verifiable means, that the tenant suffered a substantial loss of income resulting from Covid-19 or the related proclamation of a state of emergency and catastrophic health emergency. This prohibition extends until the State of Emergency is lifted. The Judiciary of Maryland has also acted to phase reopening of Maryland’s courts. The effect of this means that district courts will not begin to hear “failure to pay rent” cases until August 31, 2020.

While we applaud the early action taken by the Hogan administration, the uncertainty surrounding the proliferation of this virus and the need to keep individuals housed for their health and safety suggest a longer limitation on evictions is needed. An extension until January 31, 2021 will allow time for (1) appropriate planning to prevent a flood of new eviction proceedings as a result of Covid-19; (2) recovery of the State job market, thus allowing Maryland citizens to return to work and continue to pay their rents and address any overdue rent; and (3) the General Assembly and the Hogan administration to meet and consider emergency legislation meant to address the Covid-19 crisis.

2) Work with Governor Hogan to identify additional funds for rental assistance programs beyond the \$30 million in CARES Act funds identified, and establish a plan for oversight of these funds

Again, while we recognize the actions taken by the Hogan administration to dedicate \$30 million in CARES Act funds for rental assistance and funding for certain housing providers, this amount seemingly pales in comparison to the need stated by both tenant advocates and representatives of property owners and managers. At the briefing, we heard testimony that a single large housing provider in the State has lost rent payments equal to approximately 8.7% (\$2.6 million) of this amount since March. Another large housing provider has an uncollected rent balance for May 2020 of approximately \$1.8 million, or 5.7 times its uncollected balance for the same month in 2019.

Our counties have taken the initiative to directly address the housing crisis, but many programs lack sufficient funds to address the need and will be ineffective without significant State assistance. As an example, in Phase 1 of Baltimore County's Covid-19 Eviction Prevention Program, it was estimated that \$1 million would help approximately 300 households; however, the program received 1,500 applications totaling over \$6 million in requests for assistance. Baltimore City, in its individual capacity, has committed \$13 million in CARES Act Community Development Block Grant funds to its Temporary Rental Assistance program. Finally, we heard testimony that the level of support required by nonprofit housing providers in Montgomery County between now and December is estimated at \$40 million; this figure does not account for funds to support commercial landlords who are losing rent owed to them.

We anticipate things will only get worse. As mentioned by several participants, including DHCD, the increased unemployment payments under the CARES Act and federal stimulus payments may have helped limit the number of individuals facing rental hardships during the early stages of this crisis. However, as these fall away in the coming weeks, renters impacted by Covid-19 will find themselves with even less available support and at greater risk of eviction due to nonpayment of rent.

While we are adamant that more State support is needed, we do not ask the Hogan administration to take steps that it would deem detrimental to the State budget; rather we ask that the Administration identify **all** available sources of funds which may be used to support local rental assistance programs and commit additional funds to support renters and the rental housing

The Honorable Kumar P. Barve
The Honorable Dana Stein
July 7, 2020
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industry, especially funds received pursuant to the CARES Act. We advocate for objective, fact-based decision making in light of the economic realities foisted upon us by this crisis.

The lack of firm details, transparency and accountability measures around the \$30 million in announced rental relief spending is alarming. While awarding the funds directly to large rental managers may be the most efficient method, we have significant concerns that some of those funds will not end up providing renters with relief. We cannot afford to waste a single dollar of taxpayer funding in this crisis. Please provide our committee with the plan by which it intends to administer these funds, including any application requirements, plans and conditions for their distribution and limitations which will be placed on their use. We expect this information to be made public before you begin to distribute funds. Finally, we ask that your department and the Hogan administration continue to provide updates as this response develops.

Thank you for your attention to this matter.

Yours truly,

A handwritten signature in blue ink, appearing to read "Kumar", with a stylized flourish at the end.

Kumar Barve, Chairman
Environment and Transportation Committee

A handwritten signature in black ink, appearing to read "Dana Stein", with a stylized flourish at the end.

Dana Stein, Vice Chairman
Environment and Transportation Committee

cc: Speaker Adrienne A. Jones
Keiffer Mitchell



MARYLAND
LEGAL AID



SENT BY ELECTRONIC MAIL

July 17, 2020

The Honorable Mary Ellen Barbera, Chief Judge
Court of Appeals of Maryland
c/o
Suzanne C. Johnson, Clerk
Court of Appeals of Maryland
COAClerkoftheCourt@mdcourts.gov

The Honorable John P. Morrissey, Chief Judge
District Court of Maryland
c/o
Roberta L. Warnken, Chief Clerk
roberta.warnken@mdcourts.gov

Re: Due process concerns in evictions cases and extension of eviction moratorium

Dear Chief Judge Barbera and Chief Judge Morrissey,

The Public Justice Center, Maryland State Bar Association Delivery of Legal Services Section, Maryland Volunteer Lawyers Service, Maryland Legal Aid, Homeless Persons Representation Project, Disability Rights Maryland, Community Legal Services of Prince George's County, and the ACLU of Maryland request that the Court address significant due process and disparate impact concerns that arise in the context of the ongoing COVID-19 pandemic and the use of remote hearings in eviction proceedings, and, in the interim, extend the current eviction moratorium currently set to expire on July 25, 2020. The House Environment and Transportation Committee of the Md. General Assembly recently called on Governor Hogan to extend the eviction moratorium

until January 31, 2021, to better protect public health and to identify additional resources to assist tenants in avoiding eviction and landlords in maintaining solvency.¹

I. Address Lack of Due Process Protections During COVID-19 Pandemic and Use of Remote Hearings.

Extending the eviction moratorium would provide the Judiciary time to issue guidance that addresses the urgent due process challenges inherent in conducting in-person and remote hearings during the pandemic. Eviction proceedings pose particularly significant constitutional and safety concerns given their extremely high volume as well as the fact that the vast majority of tenants are unrepresented.

Pursuant to the Court's June 3 administrative orders, proceedings in non-emergency, tenant-holding-over and breach-of-lease evictions cases are permitted to restart on Monday, July 27, 2020, with failure-to-pay-rent eviction cases permitted to restart on August 31, 2020. These orders provide discretion to the local administrative judge to determine when and under what conditions hearings will be held. The Court's May 1, 2020, order authorizes trial courts to hear matters remotely, and the Court's recent revisions to Rules 3-513.1, 2-802 and 2-803 provide guidance on when trial courts may permit remote participation. We are also aware that the Judiciary has formed a workgroup on remote hearings led by Judge Fred Hecker, Administrative Judge of the Circuit Court for Carroll County.

Nonetheless, we are concerned that this guidance is not sufficient to address the extensive due process concerns raised by the ongoing COVID-19 pandemic and the use of remote hearings, particularly for low-income households who do not have access to counsel, technology, or the personal capacity necessary to participate fully in judicial proceedings that affect their life, liberty or property. This letter addresses those concerns in the context of eviction, where there is no right to counsel and 99% of tenants are unrepresented, but similar concerns arise in other criminal and civil proceedings and are rooted in the requirements of constitutional due process pursuant to the Fourteenth Amendment to the U.S. Constitution and Article 24 of the Maryland Declaration of Rights, as well as open access to courts pursuant to Article 19 of the same declaration.

A. Due Process Requirements.

The core components of procedural due process are notice and a meaningful opportunity to be heard appropriate to the nature of the case. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). Whether specific procedures satisfy these requirements in connection with a particular type of deprivation is analyzed under the test set forth in *Mathews v. Eldridge*, 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. 424 U.S. 319, 334–35 (1976).

¹ Phil Davis, *Lawmakers call on Hogan to extend Maryland's eviction moratorium until Jan. 31*, BALTIMORE SUN, July 11, 2020, <https://www.baltimoresun.com/coronavirus/bs-md-eviction-moratorium-letter-hogan-20200711-zpygceb3sranblf5fqfnpzvym-story.html>

1. Importance of the Right

With respect to the importance of the right involved, the U.S. Supreme Court has acknowledged that the right to continued residence in a home is “a significant interest in property.”² The significance of this interest is multiplied one-hundred fold when a family is faced with eviction in the midst of a deadly pandemic and economic depression. It has been well-documented, even prior to the COVID-19 public health crisis, that eviction often sets off a chain of devastating hardships, including physical and mental health issues, chronic joblessness, financial loss, and homelessness.³ Eviction is the direct cause of homelessness for 22% of homeless families in Baltimore City.⁴ Persons who are homeless are unable to comply with safer-at-home and any future stay-at-home order that may issue and may be forced to stay in homeless shelters – if such beds are available – in close quarters that are breeding grounds for the spread of COVID-19. The number of families facing the prospect of eviction, homelessness and heightened risk of COVID-19 infection has more than doubled since the start of the pandemic. The Maryland Multi-Housing Association testified on June 29, 2020, at a hearing with the House Environment and Transportation Committee that the current rent delinquency rate for all multi-family properties in Maryland is approximately 22%, with even higher rates in non-luxury properties, i.e., properties occupied by Maryland’s “essential workers.”⁵ This is at least 100% greater than the pre-COVID-19 delinquency rate. Accordingly, Maryland is facing a tidal wave of evictions during this deadly pandemic with no clear pathway forward or relief for Marylanders.

2. Risk of Erroneous Deprivation

The risk of erroneous deprivation in eviction proceedings has also increased significantly since the coronavirus outbreak began. The federal CARES Act took effect on March 27, 2020, and restricts lessors of “covered dwellings” from filing new eviction actions because the tenant did not pay rent or other fees or charges during the first 120 days thereafter (*i.e.*, until July 25, 2020). *See* Pub.L. 116-136, § 4024(b)(1). The federal moratorium also provides that a landlord may not evict a tenant after the moratorium expires except after providing 30 days’ notice—which may not be given until after the moratorium period. *Id.* § 4024(c). Landlords who receive mortgage forbearance, which was recently extended to

² *Greene v. Lindsey*, 456 U.S. 444, 450-451 (1982) (finding notice to tenants of eviction was invalid as matter of due process).

³ 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.

⁴ Neil Steinkamp, Stout Risius Ross, LLC, *The Economic Impact of an Eviction Right to Counsel in Baltimore City at 35* (May 8, 2020), <https://bmorerentersunited.org/rtc/stoutreport/>

⁵ Md. House of Delegates, Environment and Transportation Committee Virtual Briefing on the Effects of COVID-19 on Housing, June 29, 2020, <https://www.youtube.com/watch?v=tzxm45mm2gw&feature=youtu.be>

August 31, 2020, in many cases⁶ are bound by a similar moratorium on eviction actions during the forbearance. *Id.* § 4023(d). At least 12.3 million rental housing units (28% of all units nationally) are covered by the CARES Act by virtue of having federally-backed mortgage loans alone, *i.e.*, not including Housing Choice Vouchers, tax credit properties and other subsidies.⁷

There is no single, complete database to determine whether a property is covered by the CARES Act, placing this critical information solely within the knowledge and control of the landlord. This Court has required that all landlords who file eviction actions for failure to pay rent must file a Declaration of Compliance with the CARES Act, which will be important in the coming months to reduce the risk of error in those proceedings. Even so, the Court has not yet extended the declaration requirement to the Tenant Holding Over and Breach of Lease proceedings scheduled to restart on July 27, 2020, even though the CARES Act could provide a defense to such proceedings when the termination/breach is based on the tenant's alleged failure to pay rent if the landlord did not provide the requisite 30-day notice to vacate after expiration of the CARES Act on July 25 (or later if the landlord receives forbearance) and before initiating an eviction action. § 4024(c). We urge the Court to extend the Declaration of Compliance requirement to all residential eviction actions and ensure that even when a declaration is filed, the tenant has a meaningful opportunity at trial to challenge the veracity of the declaration, although it should be acknowledged that effectively challenging such declarations is another aspect of the new complexity of proceedings.⁸ A part of that meaningful opportunity should include ensuring that the tenant has an opportunity between the filing and service of any eviction complaint and the scheduling of any hearing to examine the Declaration of Compliance which will not be

⁶ Consumer Financial Protection Bureau, Learn about mortgage relief options and protections, July 1, 2020 <https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/mortgage-relief/>

⁷ Urban Institute, *The CARES Act Eviction Moratorium Covers All Federally Financed Rentals—That's One in Four US Rental Units*, URBANWIRE (Apr. 2, 2020), <https://www.urban.org/urban-wire/cares-act-eviction-moratorium-covers-all-federally-financed-rentals-thats-one-four-us-rental-units>

⁸ Analysis of cases in other jurisdictions suggest that many landlords are filing and pursuing eviction cases in violation of the CARES Act. *See, e.g.*, Megan Kimble, *Texas Landlords are Filing Hundreds of Illegal Evictions*, June 24, 2020, TexasObserver.org, <https://texasobserver.org/evictions-texas-illegal> (approximately 10% of evictions filed in Harris County between March 27, 2020 and June 22, 2020 were filed in violation of the CARES Act despite the affidavit requirement); Jeff Ernsthansen, Ellis Simani and Justin Elliott, *Despite Federal Ban, Landlords are Still Moving to Evict People During the Pandemic*, April 16, 2020, ProPublica.org, <https://www.propublica.org/article/despite-federal-ban-landlords-are-still-moving-to-evict-people-during-the-pandemic> (found filings in violation of the CARES Act in each of four jurisdictions studied – Houston, Tampa, metro Atlanta, and Oklahoma); Jerod MacDonald-Evoy, *Thousands of Evictions Loom as Moratorium Set to Expire this Month*, July 14, 2020, AZMirror.com, <https://www.azmirror.com/2020/07/14/thousands-of-evictions-loom-as-moratorium-set-to-expire-this-month/> (found 194 eviction cases filed in violation of the CARES Act in Pima County, Arizona).

served on the tenant with the complaint (as we understand the proposal) but will be on file with the court. This is particularly important because any action involving a CARES act property should be subject to dismissal if it is filed before the expiration of the 30-day notice to vacate period required by the act.

State and local governments have provided for additional tenant protections in the midst of COVID-19 that will make many eviction proceedings more complex. Governor Hogan has issued an executive order barring evictions in Breach of Lease and Failure to Pay Rent proceedings when the tenant can prove a loss of income due to COVID-19,⁹ and proving this to the satisfaction of a court can be very difficult depending on the tenant's exact circumstances. Additionally, various local jurisdictions in Maryland have barred landlords from increasing the rent, charging late fees, and/or terminating tenancies during COVID-19,¹⁰ but tenants may not know of these protections or how to successfully invoke them. Based on these changes to federal, state, and local law, along with the fact that the state and local moratoria have frequently changed in both scope and duration, the risk of error in all eviction proceedings, particularly with overwhelmingly low-income, *pro se* tenants, is exceptionally high.

3. Procedural Safeguards: Notice and an Opportunity to Be Heard

Due process in Maryland eviction matters is already minimal – providing for “nail and mail” service, restricting or eliminating any discovery in failure-to-pay-rent and tenant-holding-over matters, and requiring failure-to-pay-rent actions to be heard within five days of the filing – without respect to service – of a complaint and summons.¹¹ Such process is rendered more problematic by the challenges of remote hearings and COVID-19.

a. Option to Participate Remotely or In-Person

Of particular concern to the undersigned organizations is any requirement that tenants participate in remote hearings and the imposition of a penalty such as a default judgment if tenants do not attend remote hearings. A requirement to participate in remote hearings denies access to anyone who lacks either the necessary equipment (*e.g.*, computer or mobile device with functioning camera and microphone, and internet access) or the ability to utilize it. A lack of equipment or technical capacity can pose significant barriers for low-income tenants, many of whom may be using outdated or damaged mobile devices, lack reliable internet access, rely on pay-as-you-go mobile plans or face tight data limits, and endure phone/internet shut-offs or account closures for non-payment. As the American Bar

⁹ Gov. Larry Hogan, Order of the Governor of the State of Maryland No. 20-04-03-01, April 3, 2020 <https://governor.maryland.gov/wp-content/uploads/2020/04/Evictions-Repossessions-Foreclosure-AMENDED-4.3.20.pdf>

¹⁰ *See, e.g.*, Balt. City Ord. 20-364, effective May 18, 2020 (prohibiting late fees and rent increases); Howard Cnty. CB33-2020, effective May 23, 2020 (prohibiting late fees, rent increases and tenancy terminations for monetary defaults).

¹¹ Md. Code, Real Prop § 8-401(b)(3)(i) (RP).

Association Standing Committee on Legal Aid and Indigent Defendants recently noted: “Many individuals lack the technology, connectivity, communication or other skills necessary to effectively participate in such proceedings without assistance. When designing and evaluating virtual and remote court procedures, it is important to keep in mind these potential participants and their struggles.”¹² Additionally, there are those individuals who may not be able to fully participate in a remote proceeding because of a disability or language barrier. Finally, it will often be impossible for a judge to know whether a tenant declined to participate in a remote session as opposed to being unable to do so.

The digital divide in Maryland and throughout the country remains wide, with a disparate impact on Black and Latinx households. According to a 2019 Pew study, 30% of adults without a high school education do not use the internet.¹³ Adults from households earning less than \$30,000 a year are far less likely to use the internet compared to higher earning counterparts.¹⁴ Another Pew study noted that about one quarter of rural adults report that “access to high-speed internet is a major problem in their local community.”¹⁵ The percentage of adults using broadband at home also differs by race, with almost 80% of white adults reporting home broadband access, compared to 66% of black adults and 61% of Hispanic adults.¹⁶ In Baltimore City, only 50% of Black households and less than 50% of Latino households had wired broadband access, compared to 75% of white households. Also in Baltimore, only 43% of very-low-income families have wired internet access, compared to 87.2% for families that made more than \$150,000.¹⁷

Accordingly, any sanction or penalty imposed upon a tenant who does not participate in a remote eviction proceeding fails a rudimentary analysis of due process and raises questions regarding discriminatory treatment and/or disparate impact under the Fair Housing Act.

Similarly problematic is any failure to offer the option for remote participation when the tenant wants to do so for reasons related to COVID-19, including hospitalization, illness or quarantine for themselves or a family member, a pre-existing condition that renders them particularly vulnerable to COVID-19, or a disability that makes it impossible to come to

¹² American Bar Association Standing Committee on Legal Aid and Indigent Defendants, Report to the House of Delegates at 5 (May 5, 2020), on file with author, short description available at https://www.americanbar.org/groups/young_lawyers/events_cle/annual/assembly/ (ABA Committee Report).

¹³ Monica Anderson, et al., *10% of Americans don't use the internet. Who are they?*, April 22, 2019, <https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/>.

¹⁴ *Id.*

¹⁵ Monica Anderson, *About a quarter of rural Americans say access to high-speed internet is a major problem*, Sept 10 2018, <https://www.pewresearch.org/fact-tank/2018/09/10/about-a-quarter-of-rural-americans-say-access-to-high-speed-internet-is-a-major-problem/>.

¹⁶ Pew Research, *Internet/Broadband Face Sheet*, June 12, 2019, <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/>.

¹⁷ Danielle Gaines, Abell Foundation: Digital Divide for Baltimore Wider Than Other Cities, May 15, 2020 <https://www.marylandmatters.org/2020/05/15/abell-foundation-digital-divide-for-baltimore-wider-than-other-cities/>.

court due to current restrictions such as mandatory face masks. In-person hearings, as recognized by the Court in imposing the current restrictions, continue to present serious health risks to the parties and court staff, particularly in older, less spacious buildings with poor ventilation. These health risks are also barriers for such persons to filing a motion seeking a postponement or other relief at present, and there is no administrative guidance that would address this issue and make it easier for affected individuals to seek a postponement or other appropriate relief.

Finally, for those tenants willing to appear remotely, special consideration should be given to ensure that tenants have clear, accurate notice regarding their participation in such proceedings, meaningful access to legal counsel where possible, meaningful access to the court file, and the technological means to present their case.

b. Notice

Any summons or notice for a remote hearing should provide tenants clear instructions on how to participate as well as their right to object to participating via a remote hearing. Similarly, any summons to attend an in-person hearing should provide tenants with information about their right to object and seek to participate remotely. Any contradictory information from a pre-coronavirus summons form should be removed. Information about these rights should be announced as well at the beginning of any hearing.

Moreover, the Court should recognize that the likelihood of confusion over the time, place, and venue of any proceeding will be significantly greater with any process to address this issue. Other courts around the country that are attempting remote eviction proceedings are experiencing the administrative challenges of mixed-up hearing dates, last-minute email instructions to participate, “lost” emails that end up in a spam box and similar horrors – all while deciding whether someone should lose their home in the midst of an ongoing pandemic.¹⁸ Because of these logistical challenges and the other due process concerns described below, the Court should also consider requiring that any mailed copy of a complaint/summons seeking eviction be accompanied by a list of local legal resources from whom tenants may seek further information and representation.

c. Meaningful Participation

¹⁸ See, e.g., Eric Heisig, *Cleveland man evicted by Housing Court, lawyer says she never received link to virtual Zoom hearing*, Cleveland.com, July 10, 2020, <https://www.cleveland.com/realestate-news/2020/07/cleveland-man-evicted-by-housing-court-lawyer-says-she-never-received-link-to-virtual-zoom-hearing.html>; Erin Coe, *Technical Difficulties: Courts Face COVID-19 Learning Curve*, Law360.com, March 23, 2020, <https://www.law360.com/articles/1256124/technical-difficulties-courts-face-covid-19-learning-curve>; Patty Machelor, *Despite Available COVID-19 Reprieve, Pima County Evictions Uneven, Frequent*, Tuscon.com, June 16, 2020, Updated June 25, 2020, https://tucson.com/news/local/despite-available-covid-19-reprieve-pima-county-evictions-uneven-frequent/article_9c7ebe56-942f-5081-b33b-2b1578db9854.html.

If a tenant opts to participate in a remote proceeding and is able to do so from a technological perspective, the structure of that proceeding may still prevent the tenant from complete, meaningful participation. The presentation of documentary evidence by a *pro se* party is often the most significant hurdle. A best practice for holding hearings through remote conferencing, for instance, is to file exhibits in an electronic folder that may be shared with the parties.¹⁹ Yet, this may not be practical for tenants who lack sufficient capacity with a computer or scanner but who wish to share receipts, leases, photos, text messages or lengthy documents without access to a scanner. Federal courts have recognized that remote proceedings reduce the ability to successfully cross-examine witnesses because a litigant, attorney or fact finder may not be able to assess the witness's credibility based on demeanor or non-verbal cues – negatively impacting the due process available in remote proceedings.²⁰ As described above, language barriers or disabilities that already impact tenants' ability to participate in in-person proceedings are magnified significantly in remote proceedings. These facts suggest the need for more time to develop meaningful procedural protections, which in turn weighs in favor of extending the moratorium.

d. Counsel

Remote hearings and the pandemic also negatively impact a tenant's access to effective counsel. While the Due Process Clause has not been held generally to require appointment of publicly-funded attorneys in eviction cases, the more limited right to obtain counsel on one's own necessarily implies some minimal time in which to seek and obtain counsel—even if, as a practical matter, the amount of time is often insufficient to satisfactorily investigate the facts, research the law, and prepare a strong defense.²¹ It also implies a means of accessing counsel both immediately before and during the hearing. At in-person court proceedings, attorneys typically meet with the client immediately prior to the proceeding, often near the courtroom, to address last minute considerations. A number of legal services organizations make announcements prior to the start of any docket and attempt to provide assistance where possible. During the hearing, the litigants have access to counsel for confidential side bar conversations. Replicating this level of confidential communication and consultation in virtual or remote court proceedings is exceedingly difficult and complicated by the same issues of technical experience and access addressed above.

e. Deadlines and Postponements

Eviction cases in Maryland often operate under statutory or rule-based deadlines for trying the case and provide very limited grounds for postponement. Rigid adherence to such rules and procedures could violate a tenant's due process rights if the result is to deny a tenant a reasonable opportunity to obtain counsel or investigate and prepare a defense.²² Investigating and preparing a defense

¹⁹ Center for Legal & Court Technology, “Best Practices For Using Video Conferencing For Hearings And Related Proceedings,” 60 (Nov. 6, 2014).

²⁰ *Rapheal v. Mukasey*, 533 F.3d 521, 532–34 (7th Cir. 2008).

²¹ See *Lindsey v. Normet*, 450 U.S. 56, 85 (1972) (“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.”) (Douglas, J., dissenting).

²² See generally *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) (“[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions”).

related to obtaining documents from government agencies and private business via subpoena may be significantly delayed by the coronavirus. Legal services organizations may not have ready access to potential clients at their offices and at the courts as occurred prior to COVID-19. The Court should consider issuing guidance to the trial courts to consider the due process implications of denying requests for postponement in order to obtain counsel and prepare a defense based on the closures and uncertainties posed by the coronavirus.

f. Public Access

“Openness in judicial proceedings ‘enhances both the basic fairness of the proceeding and the appearance of fairness so essential to public confidence in the system.’”²³ The Court should consider providing public access to view and participate as necessary in any remote proceedings. Provision must be made to post all upcoming hearings in advance in a publicly accessible manner, including on the Court’s website.

4. Government Interest and Burden.

Finally, the government’s interest in preserving stable housing for tenants and preventing additional homelessness in the middle of a pandemic is far greater than any burden caused by postponing eviction hearings until constitutionally required procedures are put into place. Allowing eviction proceedings to go forward would present a public health risk to the community by preventing households from complying with safer-at-home and/or social distancing guidelines and forcing many evicted tenants to access taxpayer-funded social services in attempting to avoid homelessness.

II. Fair Housing Impact of Lack of Due Process Protections

A lack of due process protections in eviction actions may have a disparate impact on protected classes who are unfairly prejudiced by COVID-19-related court practices. For example, a failure to adapt remote hearing practices to accommodate limited-English-proficient (LEP) populations could have a disparate impact on persons based on national origin. Similar concerns may arise for failure to provide suitable accommodations for persons based on disability. The Judiciary has spent decades adapting its procedures to minimize any discriminatory impact of court practices on protected classes. The systemic challenges posed by the coronavirus and remote hearings for these protected classes as described above are not easily overcome without deliberate administrative guidance.

It is also important to note that COVID-19 and resulting evictions have a disparate impact on Black and Brown households in Maryland. A recent report documents that even prior to COVID-19, the eviction rate for Black headed households was significantly higher than white-headed households in Baltimore City.²⁴ Now, 57% of the state’s total COVID-19 cases and 52% of its recorded COVID-19 deaths have been endured by Black and Latinx households despite comprising a much lower

²³ *Courthouse News Serv. v. Planet*, 947 F.3d 581, 589 (9th Cir. 2020), quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984).

²⁴ See Dr. Timothy Thomas, et al., Baltimore Eviction Map (May 8, 2020) <https://evictions.study/maryland/report/baltimore.html> (“7.3% of all Black male headed households and 5.4% of all Black female headed households were removed from their homes. These rates are roughly 51% and 11% higher than the White male headed eviction rate.”).

proportion of Maryland’s population.²⁵ Nationally, it has become increasingly clear that people of color are vulnerable to COVID-19 itself and the resulting economic downturn in part because the pandemic exacerbates “systemic and institutional racism that [causes] Black people, people of color and indigenous people [to] face underlying inequities in health, income, wealth, access to government resources and participation, incarceration, education, and nearly every additional feature of society.”²⁶

III. Address Due Process Challenges.

For these reasons, the American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants has recommended that the ABA adopt a resolution calling on the courts to implement a number of guidelines and practices that address these deficiencies in due process, including that jurisdictions should:

- (1) Consider the ability of all participants to access and fully participate in the proceedings, including:
 - a. Ensuring that participation options for virtual or remote court proceedings are free for participants and observers;
 - b. Providing options concerning participation and permitting participants to select the means of participation best suited to them without prejudice;
 - c. Allowing participants to alter their chosen means of participation for each proceeding;
 - d. Providing necessary supports for those who, for financial, technological, language access, disability, or other reasons, may not be able to fully participate without assistance;
 - e. Ensuring that methods of participation reduce, to the fullest extent possible, any prejudice that might result from the circumstances of participation;
 - f. Ensuring that participants are not obligated or pressured to waive constitutional rights; and
- (2) Enable and encourage full attorney-client relationships, including permitting private consultation both before and during court proceedings and guaranteeing the confidentiality of such communications, as well as access to other litigation assistance programs previously available.²⁷

The ABA Committee further urges jurisdictions “to provide advance notice of proceedings and ensure full and meaningful public access to virtual proceedings, while also protecting the privacy of those proceedings legally exempted from public access[.]”²⁸

²⁵ Hannah Gaskill, *Experts Say Comorbidity Is Not The Only Reason for Racial Disparities in COVID-19 Cases*, MARYLAND MATTERS, June 11, 2020, <https://www.marylandmatters.org/2020/06/11/experts-say-comorbidity-is-not-the-only-reason-for-racial-disparities-in-covid-19-cases/>.

²⁶ See National League of Cities, *Disparate Impacts of Covid-19 on Communities of Color* (Apr. 201, 2020), <https://citiesspeak.org/2020/04/21/disparate-impacts-of-covid-19-on-communities-of-color/>.

²⁷ See ABA Committee Report, *supra*, at 1.

²⁸ *Id.*

A number of courts and commissions around the country have adopted guidance and best practices to address many of the issues raised in this letter.²⁹

IV. Extending the Eviction Moratorium.

The issues described above are of paramount importance to the constitutional functioning of the judiciary if the courts will once again be hearing eviction cases, and it is unlikely that these issues can be addressed by July 27, 2020, when those cases are scheduled to resume.

In light of the short time before the scheduled resumption of eviction actions and the importance of these due process considerations, the ongoing danger posed to public health and safety by the coronavirus – including the massive spike of cases in the South and Midwest that could quickly reverberate to Maryland, the call by General Assembly leadership to extend the moratorium until January 31, 2021, and the actions of comparable jurisdictions in extending their respective eviction moratoria, we ask that the Court consider extending the current moratorium, which would allow the Court to begin to address these due process concerns in the interim. In the alternative, the Court could provide discretion to local administrative judges, acting in concert with county executives, to extend the eviction moratorium where appropriate.

We are available to discuss this matter further. Please contact John Nethercut, 410-400-6952. Thank you for your attention to these concerns.

Regards,

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²⁹ See, e.g., Michigan Supreme Court, Order, June 24, 2020, https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08_2020-06-24_FormattedOrder_AmendtOfAO2020-17.pdf; Texas Access to Justice Commission, Best Practices for Courts in Zoom Hearings Involving Self Represented Litigants, <https://www.txcourts.gov/media/1446335/zoomsr1bestpractices.pdf>