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Dear Mayor Fischer and County Attorney O'Connell,

Mayor Fischer, I am writing to encourage you to use your emergency powers to protect thousands of people who rent their homes from eviction during our escalating (again) pandemic. Your action is necessary because the CDC's Order protecting renters from eviction *expires on December 31, 2020*. Without action from you, thousands of Kentuckians who cannot afford to pay rent will be evicted in the dead of winter in the middle of a pandemic. **Mayor Fischer, you must use your emergency powers to extend the CDC's protections in Jefferson County through March 31, 2020.**

Additionally, I have had an opportunity to review a brief opinion from the County Attorney's Office suggesting that Governor Beshear's September 4, 2020 Executive Order prevents the Mayor from ordering a local eviction moratorium. As you know, Governor Beshear's Order incorporates the CDC's Order, "Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19," into his Order. The CDC's Order *specifically allows for more protective action from state or local governments*.<sup>1</sup>

So, Mr. O'Connell, I am also writing to encourage you to revisit your office's opinion on the Mayor's power to order a local eviction moratorium. I will provide legal analysis to support an opinion from your office that nothing prevents Mayor Fischer from acting locally to provide people in Jefferson County more protections than state or federal authorities have provided to date. A local eviction moratorium is easily defensible if landlords attempt to challenge it in court. Meanwhile, a local eviction moratorium is an urgently necessary response to a growing pandemic in a deepening winter.

### **Eviction Moratoria Save Lives and are a Necessary Response to a Global Pandemic**

Each year, two-thirds of all evictions in Kentucky take place in Louisville. Because of our nation's racist history (Jim Crow, redlining, and the predatory lending that led up to the

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<sup>1</sup> See, "[Applicability](#)" in the CDC's Order: "This Order does not apply in any State, local, territorial, or tribal area with a moratorium on residential evictions that provides the same or greater level of public-health protection than the requirements listed in this Order."

foreclosure crisis), [the gap in homeownership between White and Black Americans is 30%](#) (72% v. 42%, respectively).<sup>2</sup> This means that Black and Brown Kentuckians are disproportionately impacted by our state's antiquated, unfair, and cruel eviction processes. It is morally, economically, and epidemiologically imperative that you *act now* to protect people in Jefferson County from the personal and systemic catastrophes caused by a wave of evictions that you have the power to prevent.

When it issued its nationwide moratorium on evictions for nonpayment of rent, the CDC explained [the various ways eviction moratoria support everyone's efforts](#) to prevent the spread of SARS-CoV-2:

Eviction moratoria **facilitate self-isolation** by people who become ill or who are at risk for severe illness from COVID-19 due to an underlying medical condition. They also **allow State and local authorities to more easily implement stay-at-home and social distancing directives** to mitigate the community spread of COVID-19. Furthermore, housing stability helps protect public health because **homelessness increases the likelihood of individuals moving into congregate settings**, such as homeless shelters, which then puts individuals at higher risk to COVID-19.

The CDC issued its nationwide eviction moratorium because it is well-understood that when people are evicted, they often go to congregate shelters or “double-up” with friends and family. This isn't safe. Epidemiologists know that evictions accelerate the spread of SARS-CoV-2 in three ways. When more people are living under one roof, the chances that someone will introduce SARS-CoV-2 into the home increase. With people living in more close quarters, the chances that infections will spread within households increase. And, third, because of increased spread within households, more people infected with SARS-CoV-2 emerge from their homes to spread infection within their community.<sup>3</sup>

Because the United States has been unable/unwilling to control the virus as effectively as other nations, researchers have had an opportunity now over the course of eight months to study the effects of eviction moratoriums on preventing the spread of SARS-CoV-2 and saving lives. The data are clear: extending the CDC's Eviction Moratorium in Jefferson County through March 31 would save lives. A recent article in the *JOURNAL OF URBAN HEALTH*, [“Pandemic Housing Policy: Examining the Relationship Among Eviction,](#)

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<sup>2</sup> As you know, the homeownership gap in Louisville is 35% (71% vs. 36%). See, Metropolitan Housing Coalition's 2019 Report, [“22,000 Equities: Addressing the Racial Gaps in Homeownership and Wealth”](#), p. 9.

<sup>3</sup> For visual learners, epidemiologists have helpfully illustrated these transmission vectors in the paper, [“The Effect of Eviction Moratoriums on the Transmission of SARS-CoV-2.”](#)

Housing Instability, Health Inequity, and COVID-19 Transmission,” summarized the research:

[R]esearchers used varying expiration dates of state eviction moratoria to evaluate whether lifting moratoria was associated with increased COVID-19 spread and mortality. After controlling for mask orders, stay at home orders, school closures, and testing rates, as well as characteristics of states and underlying time trends, this natural experiment showed that lifting moratoria was associated with 1.6 times higher COVID-19 mortality after seven weeks and 5.4 times higher mortality after sixteen weeks. Similarly, lifting moratoria was associated with 1.6 times higher incidence of COVID-19 after ten weeks, and 2.1 times higher incidence after sixteen weeks compared to maintaining eviction moratoria. **Lifting moratoriums translated to a total of 433,700 excess cases and 10,700 excess deaths between March 1 and September 3, 2020.** Thus, eviction moratoria could be effective mechanisms for suppressing COVID-19 infection and mortality.

### **As Mayor, You Have the Power to Extend the CDC’s Protections through March 31, 2021**

I have reviewed a brief assessment from the County Attorney’s office regarding the Mayor’s power to enact a local eviction moratorium. The opinion finds, without analysis, that Governor Beshear’s eviction order preempts the Mayor’s power to act in this space. However, the office’s brief opinion does not consider the effect of the CDC’s *explicit language* allowing state and local governments to order more protective eviction prevention measures than the ones in the CDC’s Order. I believe the opinion needs to be revisited to find that Mayor Fischer has the authority to order a local eviction moratorium through March 31.

Here is the entirety of the opinion I was able to review:

Only the mayor of an urban-county government is vested with the authority to respond to a local disaster in a way that could affect the private contractual and property interests at play between a Landlord and Tenant. KRS § 39B.070 grants the mayor near plenary authority to address the circumstances of a local disaster. These powers would likely include a moratorium on evictions, which would only yield to any corresponding order from a state or federal authority. This is the current case. The Governor’s order enforcing the current CDC moratorium effectively preempts the Mayor from acting to do the same; while KRS § 383.500

preempts METRO's Legislative Council from passing any ordinance related to landlords and tenants whatsoever.

While recognizing the Mayor's broad powers ("near plenary authority") to act and acknowledging that those powers "likely include a moratorium on evictions", the County Attorney says "[t]he Governor's order enforcing the current CDC moratorium effectively preempts the Mayor from acting to do the same."

Of course, the County Attorney's office has recently litigated the question of state preemption of local action; it defended Louisville's minimum wage ordinance from a challenge based on claims of state preemption just a few years ago. In that case, the Kentucky Supreme Court found that Kentucky state law preempted Louisville and Lexington's ability to enact minimum wage ordinances that would require employers to pay workers more than the state-mandated minimum wage. The Kentucky Supreme Court explained,

The law on this issue is clear. A local government's power or function is in conflict with a statute if it is expressly prohibited by a statute or there is a comprehensive scheme of legislation on the same general subject embodied in the Kentucky Revised Statutes.

*Kentucky Rest. Ass'n v. Louisville/Jefferson Cty. Metro Gov't*, 501 S.W.3d 425, 428 (Ky. 2016).

Applying these same criteria to Gov. Beshear's September 4, 2020 Executive Order, the questions are:

1. Does Gov. Beshear's Executive Order expressly prohibit the Mayor from enacting a local eviction moratorium, and
2. Is Governor Beshear's EO a "comprehensive scheme" of eviction protections?

On both questions, the answer is "no".

The County Attorney's opinion does not identify any language in [Gov. Beshear's Executive Order](#) expressly prohibiting local officials from taking additional, more protective action. None exists.

If no "express prohibition" on local eviction moratoria exists, then is Governor Beshear's Executive Order a comprehensive scheme? It is—by its very terms—not.

Gov. Beshear's September 4, 2020 Executive Order changed previous Executive Orders regarding evictions to correspond to the contours of the eviction protections in the [CDC's Order](#) (announced on September 1 and made final the same day as Governor Beshear's Executive Order). In his Executive Order, Gov. Beshear says "the CDC Order...shall apply in the Commonwealth of Kentucky, and is incorporated by reference herein."

What does the CDC's Order say about preemption and local governments' authority to take more protective steps than those contained in the CDC's Order? It *explicitly disclaims* preemptive effect:

This Order does not apply in any State, local, territorial, or tribal area with a moratorium on residential evictions that provides the same or greater level of public-health protection than the requirements listed in this Order. [...] In accordance with 42 U.S.C. 264(e), this Order does not preclude State, local, territorial, and tribal authorities from imposing additional requirements that provide greater public-health protection and are more restrictive than the requirements in this Order.

Governor Beshear's Executive Order, which contains no explicit preemption language itself, incorporates the [CDC's Order](#) which explicitly contemplates and tolerates *more protective* local action. Any legal challenge by landlords to extending the CDC's Order in Jefferson County to March 31 would survive a preemption argument. The County Attorney needs to revise its opinion to incorporate the permission both the federal government (CDC) and state government (incorporation of CDC's Order into Gov. Beshear's Executive Order) have provided to local officials to take more protective action to protect people from eviction.

### **Courts Across the Country Find Eviction Protections Necessary to Prevent the Spread of SARS-CoV-2**

In fact, local and state eviction moratoria fare extremely well in court, regardless of the various legal theories landlords bring. To date, judges considering challenges to state and local eviction moratoria have denied landlords' requests for injunctive relief or ruled outright in favor of government officials in: Arizona, California, Connecticut, Illinois, Massachusetts, Los Angeles, New York, Philadelphia and San Francisco. Meanwhile, federal courts in Georgia, Ohio, and Tennessee have denied landlords injunctive relief in suits challenging the legality of the CDC's Order itself. Bottom line: courts across the nation recognize these eviction protections as reasonable, necessary actions to curb a clear and present threat to public safety.

Louisville cannot wait for Kentucky, the CDC, Congress, or President Biden to act. The CDC's eviction protections expire in just a few weeks. People who rent their homes are making decisions *now* about whether to go to work even though they might not feel great because they know they need to make rent. People who rent their homes are making decisions *now* about whether and where to move.

## **Your Order Must Close a Loophole Landlords are Using to Evict People in Louisville**

The CDC's Order still allows landlords to pursue evictions in five special circumstances:

1. Engaging in criminal activity while on the premises;
2. Threatening the health or safety of other residents;
3. Damaging or posing an immediate and significant risk of damage to property;
4. Violating any applicable building code, health ordinance, or similar regulation relating to health and safety; or
5. Violating any other contractual obligation, other than the timely payment of rent or similar housing-related payment (including non-payment or late payment of fees, penalties or interest).

Unfortunately, landlords have used that last provision to evict people by claiming that the “contractual obligation” that a renter is violating is overstaying the term of a lease. As you know, many people in Louisville are on month-to-month leases. Landlords have used this provision to evict people during a pandemic by 1) terminating the month-to-month lease term and then, 2) claiming the “reason” for eviction is overstaying the lease term in violation of the contract.

Your local eviction moratorium *must* protect people who rent from this kind of abuse. Your eviction moratorium can extend the CDC's eviction order in its entirety, but you must include language that makes it clear that overstaying the term of a lease is not a violation of a “contractual obligation” that would support an eviction during a pandemic under your Order. The risk to public health is too great to allow these kinds of **cruel and tragic shenanigans**.

## **Landlords Need Assistance You Cannot Provide; People Need Eviction Protections You Can**

I know landlords need rental assistance. I am not unsympathetic to the economic pressures eviction moratoria place on landlords. However, you do not have the same power to enact generous rental assistance programs that the federal government has. For many (or for me, at least), this pandemic has provided many opportunities to return to “The Serenity Prayer” and focus on mustering “the courage to change the things I can” instead of all the things that are beyond our control.

Mayor Fischer, you—like the rest of us—can call on the federal government to provide additional rental assistance to landlords during our shared pandemic. Generous, enduring payments to landlords is an obvious and necessary response to our shared epidemic, **as I**

have been saying since late April. But, you cannot change the U.S. Senate's failure to provide any additional coronavirus aid since the CARES Act in March.

However, the thing you—and only you—can change is what protections people have from eviction in Jefferson County. You can protect people in Louisville from eviction for nonpayment of rent by extending the CDC's eviction moratorium locally until March 31, 2021.

I urge you to exercise that power to protect people in Jefferson County—people who are disproportionately Black and Brown because of our community's racist systems of oppression—from eviction. Today. Extending the moratorium through March will provide federal policymakers more time to enact a comprehensive relief package that includes rental assistance to landlords and robust housing and homelessness resources for state and local governments.

Thank you for the work you and your administration have done to quickly secure and distribute the rental assistance Congress provided in the CARES Act in March. Extending the CDC's eviction protections through March 31 is the next step your administration can take to protect our community from unnecessary evictions and the additional sickness and death flowing from the completely preventable spread of SARS-CoV-2.

Sincerely,



Ben Carter

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