UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY

TONI FLOYD and CHERI NICHOLSON
On behalf of themselves and all those similarly situated

Plaintiffs,

v. Civil Action No. 3:21-cv-00058-DJH

HON. ANNETTE KAREM, in her official capacity as Chief Judge of the Jefferson County District Court

Defendant.

Reply to Defendant's Response to Plaintiffs' Motion for Preliminary Injunction

The Named Plaintiffs brought this action seeking prospective injunctive relief for a class of people who, like them, are facing eviction proceedings during a pandemic and who, like them, received notices of their Zoom Eviction Hearings from the Jefferson County District Court so deficient they violate the basic protections guaranteed by the Due Process Clause in the the 14th Amendment.

Instead of getting to work to fix the obvious and ongoing Constitutional violations in the Court's eviction processes, the Jefferson District Court decided to respond to Plaintiffs' Motion for Injunctive Relief with technical defenses. The Defendants' Response disputes that this Court has the authority to rule in the matter, disputes that Plaintiffs are the proper parties to complain of the Jefferson District Court's decisions and conduct. However, the Defendant's Response does not dispute the factual allegations that form the foundation of Plaintiffs' Complaint and Motion for Injunctive Relief.

Things are the way we thought they are. Unfortunately.

The Jefferson District Court will have held more than 400 eviction hearings from the time Plaintiffs filed their lawsuit last Monday to the to the time Plaintiffs file this Reply to the Jefferson District Court's technical arguments regarding this Court's authority to constrain state actors

from violating rights guaranteed to every Kentuckian in the United States Constitution and the Plaintiffs' standing to bring this action. There are no disputed issues of material fact. No hearing is necessary, though Plaintiffs are happy to have one if it would assist the Court.

In the sections that follow, the Plaintiffs will show:

1. This Court has the authority to act and must—immediately—to prevent any additional harm from befalling people facing eviction in Louisville.
2. The Plaintiffs have standing to bring this action as they attempt to protect others from the injuries they suffered and the injuries made imminent by the Jefferson District Court's eviction practices.

1. The Anti-Injunction Act does not prevent this Court from ordering the Jefferson District Court not to hear forcible detainer matters until Defendant fixes its unconstitutional notice practices for its Zoom Eviction Hearings.

The law is not always transparent, but it *is* often sensible. If I told you that a *federal court* was powerless to stop a state court from violating rights guaranteed to people by the *federal Constitution*…does that make sense? It does not. And, in fact (because the law is often sensible), the United States Supreme Court recognizes an exception to the Anti-Injunction Act (AIA) for cases just like this one—cases in which people bring actions under 42 U.S.C. § 1983 to enjoin state actors from violating the rights guaranteed to them in the U.S. Constitution.

This has been the law since 1972 when the U.S. Supreme Court decided *Mitchum v. Foster*, 407 U.S. 225 (1972), a case Defendant did not mention in its Response brief.

As described in the sections below, the AIA is no barrier to this Court enjoining the Jefferson District Court in this case. The U.S. Supreme Court has established that 42 U.S.C § 1983 expressly authorizes federal courts to use their equitable powers to enjoin state actors from depriving people of "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Further, the 1996 amendments to 42 USC § 1983 under the Federal Courts Improvement Act ratify § 1983's status as an exception to the AIA's prohibition of federal courts

enjoining state proceedings. Numerous circuits have held that relief against state judicial officers is viable under the declaratory/injunctive relief aspect of § 1983, including the Sixth Circuit.

1.1. *Mitchum v. Foster* establishes 42 U.S.C. § 1983 as an "express authorization" from Congress for federal courts to "grant an injunction to stay proceedings in a State court"

Under the AIA, this Court may "grant an injunction to stay proceedings in a State court" if "expressly authorized by Act of Congress…." 28 U.S.C. § 2283. In *Mitchum*, the United States Supreme Court held that 42 U.S.C. § 1983 is just such an Act of Congress that allows this Court to enjoin the Defendant here. The availability and necessity of injunctive relief in § 1983 cases cannot be said more clearly or succinctly than Justice Stewart said himself:

> Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to **protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.**' In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a 'suit in equity' as one of the means of redress. And this Court long ago recognized that **federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights**.
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> *Mitchum v. Foster*, 407 U.S. 225, 242, 92 S. Ct. 2151, 2162, 32 L. Ed. 2d 705 (1972). (Internal citations omitted, emphasis added.)

Indeed (and as we will see below), the decision leaves no doubt as to to the ability of federal courts to act to enjoin state actors, even courts:

> [The] legislative history [of 42 U.S.C. § 1983's predecessor, the Civil Rights Act of 1871] makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; **it was concerned that state instrumentalities could not**

> **protect those rights**; it realized that state officers might, in fact, be **antipathetic**[1] **to the vindication of those rights**; and it **believed that these failings extended to the state courts**.
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> *Mitchum v. Foster*, 407 U.S. 225, 242, 92 S. Ct. 2151, 2162, 32 L. Ed. 2d 705 (1972) (emphasis added).

Instead of injunctive relief being, as Defendant argues, completely unavailable to Plaintiffs in this case, the *Mitchum* decision provides both the vehicle for securing injunctive relief (42 U.S.C. § 1983) *and* articulates the showing Plaintiffs must make to deserve injunctive relief from this Court. Referencing its then-recent decision in *Younger v. Harris*, the Supreme Court said it had:

> "clearly left room for federal injunctive intervention in a pending state court [criminal] prosecution in certain exceptional circumstances—where irreparable injury is 'both great and immediate,' where the state law is "flagrantly and patently violative of express constitutional prohibitions," or where there is a showing of 'bad faith, harassment, or . . . other unusual circumstances that would call for equitable relief.'
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> *Mitchum v. Foster*, 407 U.S. 225, 230 (1972).

Defendant claims that "Plaintiffs may only obtain an injunction if they can identify a federal statute expressly authorizing the court to stay state court forcible detainer proceedings. There is no such statute." (Defendant's Response, p. 8). Respectfully, Defendant misses that the *one claim* Plaintiffs brought in this case is pursuant to a statute that the United States Supreme Court has recognized for almost fifty years provides this Court the *broad authority* to enjoin state actors—including judges—from depriving people of "any rights, privileges, or immunities secured by the

[1] Antipathetic (adj.): "Showing or feeling a strong aversion"; Synonyms: hostile, opposed, antagonistic, averse, ill-disposed, unsympathetic. See, https://www.lexico.com/en/definition/antipathetic, last accessed February 6, 2021. In other words, the *Mitchum* Court recognized that state courts are sometimes opposed, averse, or ill-disposed to the vindication of people's Constitutional rights.

Constitution and laws". 42 U.S.C. § 1983. In other words, the Plaintiffs (and the courts) "clearly identify" 42 U.S.C. § 1983[2] as the statutory exception to the Anti-Injunction Act.

1.2. This Court can enjoin state court officials to prevent violations of the U.S. Constitution.

Federal circuit courts have confirmed that declaratory relief is available against state judicial officers in appropriate circumstances, as is injunctive relief when declaratory relief is unavailable or inadequate. See *Ward v. City of Norwalk*, 640 Fed. Appx. 462, 467 (6th Cir. 2016); *Brandon E. ex rel. Listenbee v. Reynolds*, 201 F.3d 194, 198 (3d Cir. 2000). See also *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603, 609 (8th Cir. 2018).

In *Ward*, a Sixth Circuit case from 2016, the Court held that the 1996 amendments to 42 U.S.C. § 1983 enacted as part of the Federal Courts Improvement Act allow declaratory/ injunctive relief against state court judges:

> The plain language of § 1983 contemplates a declaratory judgment against judicial officers like Judge Ridge and Clerk Boss in their official capacities." Section 1983 states, in part:
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> > Every person who, under color of any statute ... of any State, subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in ... [a] suit in equity ... *except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.* 42 U.S.C. § 1983 (emphasis in *Ward*).
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> The italicized portion reflects the language Congress added to the statute in 1996 as part of the Federal Courts Improvement Act. The Third Circuit has described the added language:

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[2] None of the citations to federal law on p. 8 of Defendant's brief involve § 1983 actions and are (for this and many other reasons) totally irrelevant to this Court's inquiry into its authority to restrain Defendant from violating the due process rights of people facing eviction in Jefferson District Court.

The issue before the Court is whether state judges can be held accountable through the declaratory/ injunctive relief available under § 1983 for constitutional violations, specifically lack of notice and procedural due process violations. See, e.g. *Caulder v. Durham Housing Authority*, 433 F.2d 998, 1002 (4th Cir. 1970). The issue is not, as the Defendant attempts to recast it, whether a federal court can "interfere" in state court forcible detainer actions.

> The ... amendatory language to § 1983 does not expressly authorize suits for declaratory relief against judges. Instead, it implicitly recognizes that declaratory relief is available in some circumstances, and then limits the availability of injunctive relief to circumstances in which declaratory relief is unavailable or inadequate.... A review of the legislative history confirms this reading of the amendment. The Senate Report accompanying the amendment suggests that the amendment's purpose was to overrule the Supreme Court's decision in *Pulliam v. Allen*, 466 U.S. 522, 541–43 [104 S.Ct. 1970, 80 L.Ed.2d 565] (1984) ... not to alter the landscape of declaratory relief. *Brandon E. ex rel. Listenbee v. Reynolds*, 201 F.3d 194, 197–98 (3d Cir.2000).
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> In *Pulliam*, the Supreme Court concluded that "judicial immunity is not a bar to prospective relief against a judicial officer acting in her judicial capacity." *Pulliam*, 466 U.S. 522, 541–42 (1984). The Court also stated that "it is for Congress, not this Court, to determine whether and to what extent to abrogate the judiciary's common-law immunity." Id. at 543. Congress took note of this responsibility and enacted the amendatory language to § 1983, which effectively overruled *Pulliam*.

The Sixth Circuit concluded its inquiry in *Ward* by explaining that "Section 1983 now implicitly recognizes that declaratory relief is available against judicial officers." In short, just five years ago the Sixth Circuit held that federal courts have the power to grant the precise relief Plaintiffs seek: prospective injunctive relief under 42 U.S.C. § 1983 to protect people from being deprived of federally-guaranteed rights by state-level judicial officers sued in their official capacities.

Defendant did not mention *Ward v. City of Norwalk* in its Response.

2. The Named Plaintiffs have standing under *Lujan* to challenge the Jefferson District Court's unconstitutional forcible detainer processes.

The law is not always transparent, but it *is* often sensible. Does it make sense that a person would need to *actually be evicted* (***in a pandemic***) before having the right to challenge the constitutionality of the proceedings used to evict that person? It does not. And yet, that is precisely what Defendant tells this Court must happen before someone has standing to challenge its unconstitutional eviction processes. "Neither Plaintiff has yet been evicted," Defendant says.

Defendant's Response, p. 9. And, because "[n]either Plaintiff has been ordered to vacate her property…they have suffered no injury." Defendant's Response at p. 10.[3]

Nonsense!

Plaintiffs showed up at the **exact time and place** the Jefferson District Court told them to show up for their Zoom Eviction Hearing. Because the Court decided to "upgrade"[4] its account without informing Plaintiffs of the change, the Plaintiffs were unable to appear at their one-time, summary Zoom Eviction Hearing the Jefferson District Court decided to hold in a new, undisclosed location starting on January 25, 2021. This "failure to appear" had two negative consequences.

First, the Plaintiffs did not receive the automatic two-week stay ("abeyance") available under the Kentucky Supreme Court's COVID-era eviction processes.[5] Second, because the Plaintiffs "failed" to appear in the new, undisclosed Zoom courtroom, they lost the opportunity to be heard before the Jefferson District Court entered judgments of eviction against each of them and ordered them to leave their homes within 7 days.

That is, the Court's failure to provide Plaintiffs with constitutionally adequate notice and denial of the opportunity to appear and be heard at their Zoom Eviction Hearings on January 27th

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[3] Defendant challenges Plaintiffs' standing to bring the suit within the question of whether Plaintiffs are likely to succeed on the merits, but the argument is effectively a ripeness argument usually found in a Motion to Dismiss but which Defendant understandably included in its Response to Plaintiffs' Motion for Preliminary Injunction under the circumstances.

Defendant makes both ripeness (here) and mootness (below) arguments in the Response. While Plaintiffs agree that there's no *good* time to sue a state court judge, Plaintiffs reject the implication—there's *no* time to sue a state court judge—found in Defendant's coinciding ripeness and mootness arguments. It cannot be the case that Plaintiffs are both too early *and* too late.

[4] Not everyone considers the change Defendant decided to make to its Zoom account an "upgrade" under the circumstances.

[5] See "Amended Order 2021-02" at B.1.d.ii. at https://kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/202102.pdf

both 1) denied them property—the automatic two-week stay—in which Plaintiffs had a legitimate claim of entitlement[6] and 2) made the loss of the homes Plaintiffs rent even more imminent.

2.1. Plaintiffs have a property interest in the two-week stay available under the Kentucky Supreme Court's rules; the Jefferson District Court's eviction processes denied them that benefit.

The Kentucky Supreme Court's Administrative Order 2021-02 changes traditional court processes in an attempt to "balance access to the courts and the constitutional rights guaranteed to the people of this Commonwealth with the health and safety of court employees, elected officials, and the public during the COVID-19 emergency." See Preamble to Amended Order 2021-02. As part of these new rules, the Kentucky Supreme Court requires that:

> ii. Following the initial hearing, all eviction proceedings shall be held in abeyance for fourteen days and rescheduled for the next available court date unless the landlord dismisses the complaint, with or without prejudice; a tenant who was properly served under KRS 383.210 or KRS 383.540 fails to appear; or the parties reach an agreement and file an AOC-218, Forcible Detainer Settlement Agreement, before the fourteen days expire.

The Plaintiffs were not able to appear at their initial hearings and their "failure to appear" was *a direct and undiluted consequence of the Jefferson District Court's unilateral and unannounced decision to upgrade its Zoom account and decision to tell no one how to appear in the new Zoom Eviction Hearing room*. The Jefferson District Court made the decisions and developed the policies that denied Plaintiffs the chance to appear at their Zoom Eviction Hearings. As a result, Plaintiffs did not enjoy the two-week stay they were entitled to under the Kentucky Supreme Court's COVID-era

[6] "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, (1972).

eviction rules. (Two weeks during which time they could seek rental assistance or try to—finally—get the unemployment insurance benefits so many Kentuckians are waiting on). Instead, the Jefferson District Court entered judgments of eviction against both Named Plaintiffs and gave them each seven days to move out of their homes.

That's a violation of Plaintiffs' due process rights. Period.

"Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, (1972). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.*

Here, the Kentucky Supreme Court's requirement that the Jefferson District Court hold a person's eviction action in abeyance for two-weeks if the person makes an appearance at the initial hearing is precisely the kind of benefit that the state cannot deny without due process of law. Entry of the stay is mandatory for anyone facing eviction for nonpayment of rent who appears at their initial hearing[7]: "Following the initial hearing, all eviction proceedings shall be held in abeyance for fourteen days and rescheduled for the next available court date." Kentucky Supreme Court Administrative Order 2021-02, *supra*.

"When the suit is one challenging the legality of government action or inaction, the nature and extent of facts [needed]…to establish standing depends considerably upon whether the plaintiff is…an object of the action (or forgone action) at issue. If [the plaintiff] is, there is ordinarily little question that the action or inaction has caused [plaintiff] injury, and that a

[7] The Kentucky Supreme Court's Order does not mandate entry of the two-week stay in situations not applicable here: in cases where either the landlord dismisses or the parties settle the forcible detainer action.

judgment preventing or requiring the action will redress it. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992).

Here, of course, the Plaintiffs are the subject of the government's action or inaction. This Court has the authority to prevent or require the Jefferson District Court from violating people's due process rights. Plaintiffs allege the Jefferson District Court's notice practices caused them to be unable to appear at their Eviction Hearing. These allegedly unconstitutional practices caused Plaintiffs to lose the benefit of a two-week stay[8] to which they were entitled under the Kentucky

[8] Plaintiffs primarily complaints are of the loss of the automatic, two-week stay that people facing eviction get by appearing at their Eviction Hearing and the harm made imminent by the Court's denial of the Plaintiffs' "opportunity to be heard" before entering judgment against them at their Zoom Eviction Hearing.

However, the inability to appear at a hearing has an additional negative consequence for people facing eviction. Kentucky Supreme Court Order 2020-62 requires that "at the initial hearing noticed by the summons, the parties must be informed that local funding agencies may be able to assist tenants with payment for some of all of the rent that is owed and assist landlords with recouping missed payments or late rent payments." AO-2020-62, ¶ 3. An employee from Louisville Metro Government's rental assistance program attends every eviction docket in Jefferson County District Court. This official serves as a bridge to the city's rental assistance program and has the ability to fast-track rental assistance to people with pending eviction actions in an effort to prevent as many evictions as possible during this crisis.

When the Jefferson District Court changed the Zoom Eviction Hearing room without telling anyone, yes, people lose the automatic entry of a two-week stay *and* the opportunity to be heard (as discussed above) before judgment is entered against them. And, they also miss out on the opportunity to be connected to vital community resources like the city's rental assistance program. While connection to rental assistance might not be a property interest that the Plaintiffs either lost or faced the imminent loss of, it is nevertheless an example of the collateral, *completely unnecessary* damage caused by the Jefferson District Court's decision to move Zoom Eviction Hearing rooms without providing notice to people facing eviction.

Supreme Court's rules and in which they had a cognizable property interest[9] protected by the Due Process Clause. Additionally, as will be discussed in Section 2.3, Defendant's failure to provide proper notice and opportunity to be heard caused both Plaintiffs to have a judgment of eviction entered against them and ordered them to leave the property within 7 days of the order of eviction: the very definition of an "imminent" injury, an "imminent" deprivation of property without due process of law. But, first, now that the judgments against Plaintiffs have been set aside, Plaintiffs must address their standing to protect other people from losing their interest in an automatic, two-week stay when they fail to appear in the new, undisclosed location of the Jefferson District Court's Zoom Eviction Hearings.

2.2. Plaintiffs can seek prospective injunctive relief to protect the class from the same constitutional injury they have already suffered.

Through individual persistence, the Named Plaintiffs ultimately arrived at the correct Zoom Eviction Hearing room on January 27th.[10] Instead of having the judgments the Jefferson

[9] The property interest in the two-week automatic stay—a procedural right created by the Kentucky Supreme Court's COVID-era Orders—at stake here is easily distinguishable from the "procedure" in which the *Lujan* Court found the plaintiffs in that case had no property interest. In *Lujan*, the Eighth Circuit found citizens had standing to sue to enforce a statutory obligation to consult all "persons" . The U.S. Supreme Court distinguished the "abstract" "procedural right" in *Lujan* (which did not confer standing on *Lujan* plaintiffs) from other procedural rights in which people *do* have property interests which, when lost, *do* injure people and confer standing to challenge the loss of those procedural rights in court. The first example the *Lujan* Court provides is exactly on point. The *Lujan* Court said, "This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (e.g., the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them). *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 (1992). Here, the loss of a two-week stay is precisely the kind of procedural requirement that, when lost, would impair a separate concrete interest (not being evicted in a pandemic).

[10] Of course, neither this Court, nor Plaintiffs, nor the Jefferson District Court know how many people were unable to make an appearance in the correct Zoom Eviction Court over the past two weeks since Defendant instituted this change on January 25th. How many people have called 888-822-7517 and waited for the host to start the meeting? And, how many of those people—when the "host" never started the meeting—decided simply to move out, move on? In a pandemic. Despite the danger. How many people who waited for a host who would never start the meeting were told later by their landlords that the case was over? They lost. Get out.

District Court had already entered against them vacated *on the spot* and their cases stayed for two weeks pursuant to AO 2021-01, the Jefferson District Court told Plaintiffs they were "too late" and told them to connect with Legal Aid Society attorneys.[11]

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[11] Defendant says that people facing eviction who were denied an opportunity to be heard at their Zoom Eviction Hearing because of the Court's unannounced upgrade to its Zoom account can avail themselves of a new process the Jefferson District Court developed to fix the predictable consequences of its unconstitutional conduct by "hav[ing] his or her case re-docketed for the Friday eviction docket by contacting the Clerk's office or by having her attorney file a motion." Defendant's Response, p. 3. This "process" raises three questions.

First, why was it necessary for Plaintiffs—who appeared late to their eviction docket—to contact Legal Aid Society or the Clerk's office *at all*? For those parties who are able to appear in Court despite the District Court's switch-'em-up, why would the Court not simply fix the problem it created right then and there? Vacate the judgment. Contact the landlord. Enter the 2-week abeyance. Reschedule the hearing.

Second, Defendant's claim that people denied an opportunity to be heard at their Zoom Eviction Hearing can re-docket the case by contacting the Clerk's office is belied by the experience of the Named Plaintiffs. After appearing late for their Zoom Eviction Hearings, the Named Plaintiffs were instructed only to contact Legal Aid Society, not that they had an option of contacting the Legal Aid Society *or* the Jefferson County Circuit Court Clerk's Office. So, is the actual process "contact Legal Aid Society"?

Third, and related, the Court knew—in advance—that switching the location of its Zoom Eviction Hearings created "potential confusion" and so developed this new process, a "new docket held weekly on Fridays at 11:00." Defendant's Response at p. 3. How does the Jefferson District Court inform people of their right to avail themselves of the new process to remedy errors caused by the Court's "upgrade"? Does it send out notices to every person facing eviction who failed to appear that they have the right to have their case re-docketed for Friday at 11:00 if they experienced difficulties appearing at the Zoom Eviction Hearing? Does that notice contain information about how to exercise that right? Has it published a local rule describing the process? Of course, the answer to these questions is "no".

Defendant developed a special process to fix a problem—violation of people's fundamental rights—that Defendant decided to create when it decided to "upgrade" its Zoom account but provide no notice to people facing eviction of the new location of their Zoom Eviction Hearing. But, the Jefferson District Court provides people harmed by its conduct no notice of this new (burdensome, unnecessary) process. People facing eviction can only discover the existence of this process by their own efforts. Our justice system does not require participants to guess at what processes may or may not exist. If the Court has developed a new process whereby people facing eviction in Jefferson County can have judgments set aside that were entered as a result of the "potential confusion" caused District Court's Zoom "upgrade", the District Court needs to tell people facing eviction—immediately—of that new process. Of course it has not done that but has instead decided to let people facing eviction guess at what's next for them and their families.

After retaining attorneys[12] following the loss of the automatic two-week stay and after the Jefferson District Court entered judgments of eviction against each of them, both Named Plaintiffs were ultimately able to get the judgments of eviction set aside. Ms. Floyd's attorney got her judgment set aside on January 29th and Ms. Nicholson's attorney got her judgment set aside at a hearing on February 5.[13] Defendant argues that "Neither of the Plaintiffs have suffered an injury and there is no risk of imminent injury." Defendant's Response at p. 12. As articulated above, Plaintiffs' injuries were both complete (deprivation of the right to an automatic, two-week stay in their forcible detainer actions) and imminent (loss of their rented homes after entry of a judgment of eviction). Presumably, Defendant would argue that *even if* the loss of the two-week stay is a cognizable injury, it is one that is now moot as the Plaintiffs "have already been given the relief they seek—notice of a new hearing and an opportunity to present their cases." Defendant's Response at p. 12.

The Plaintiffs' standing to bring the suit is relevant to the entry of a preliminary injunction (it's hard to be likely to prevail on the merits without standing). Therefore, Plaintiffs need to articulate why their willingness to jump through additional hoops and retain counsel to correct the problem the Jefferson District Court created does not now strip them of the ability to serve as class representatives to protect people from the same unconstitutional injury they suffered when they lost their right to an automatic, two-week stay and instead had an entry of judgment entered against them before having the opportunity to be heard.

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[12] And after a nontrivial expenditure of precious time, energy, and attention by staff and counsel at Legal Aid Society to meet Plaintiffs, determine their eligibility for representation, prepare and file Motions to Set Aside, and appear at the Defendant's specially-created Friday docket…

[13] At the Court's Status Conference on Wednesday, February 3, this Court requested that Plaintiffs provide a detailed procedural history of each Plaintiffs' case. Respectfully, Defendant has provided accurate procedural histories of each of the Named Plaintiffs' cases on pp. 3-5 of its Response Brief. The only additional update to provide the Court beyond the procedural history in Plaintiffs' Complaint and Defendant's Brief is this: the Jefferson District Court scheduled a "Review" of Ms. Nicholson's case for March 2 at 11:00 a.m.at the February 5th hearing at which the Jefferson District Court set aside its January 27th judgment of eviction.

The United States Supreme Court recognized that plaintiffs with now-moot claims have standing to seek prospective injunctive relief to protect a class of people from suffering the same constitutional injuries the plaintiffs did in the 1991 case of *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).[14] In *County of Riverside*, the U.S. Supreme Court recognized that even while "the claims of the named plaintiffs have since been rendered moot", Plaintiffs may still represent the class to protect them from harm because "[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *County of Riverside* at 51, 52. Here, Kentucky's eviction processes are exactly such a transitory process. Under Kentucky law, a person must receive at least three whole days' notice of the Eviction Hearing[15], which is a "summary proceeding"[16] at which, if the person facing eviction does not appear (or even, as here, she appears late) the District Court Judge enters a default judgment providing the person seven

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[14] Defendant's argument that Plaintiffs will not suffer "irreparable injury" within the test for whether injunctive relief is appropriate is really an argument that Plaintiffs' claims are mooted by their own efforts to avoid the imminent injury they faced. Having had a judgment of eviction entered against them before having an opportunity to be heard, having retained counsel, and having the judgments entered as a result of unconstitutional processes set aside, "[t]he Plaintiffs have already been given the relief they seek [i.e. their claims are moot]—notice of a new hearing and an opportunity to be heard." Defendant's Response, p. 12.

Of course, Plaintiffs are pleased that their attorneys successfully set aside the judgments the Jefferson District Court entered against them in violation of Plaintiffs constitutional rights. Plaintiffs would have preferred that the Jefferson District Court not violate their constitutional rights in the first place. The "relief they seek" is that this Court enjoin Jefferson District Court from hearing pending forcible detainer actions until it has processes in place that protect people's constitutional right to meaningful notice and the opportunity to be heard.

[15] KRS 383.210 (1) instructs the sheriff or constable to "give [people facing eviction] at least three (3) days' notice of the time and place of the meeting of the jury."

[16] "Forcible detainer actions are designed to be summary proceedings. In general, the only issues are possession by the plaintiff and detainer by the defendant. Notice periods are short, pleadings are restricted, triable issues are limited, discovery is generally unavailable, and the judgment is promptly operative." In Kentucky, a district court can hold trial in such a case as early as three days after service of the warrant notifying the tenant of the action. KRS 383.215. *Phillips v. M & M Corbin Properties, LLC*, 593 S.W.3d 525, 529 (Ky. Ct. App. 2020). Internal citations omitted.

whole days to vacate their home.[17] The *County of Riverside* Court explained, "Our cases leave no doubt, however, that by obtaining class certification, plaintiffs preserved the merits of the controversy for our review." *County of Riverside* at 51. And "the the termination of a class representative's claim does not moot the claims of the unnamed members of the class." *Id.* Plaintiffs injured by allegedly unconstitutional court processes have standing to challenge those processes even if "the class was not certified until after the named plaintiffs' claims had become moot." *County of Riverside* at 52.

In *Dixon v. City of St. Louis*, a federal district court in the Eastern District of Missouri recently relied upon *County of Riverside* to reject the Defendants' argument that "many putative class members lack standing because their alleged injury is now in the past, while Plaintiffs seek prospective relief." In *Dixon v. City of St. Louis*,[18] city officials (including municipal judges sued in their official capacity) argued that the class plaintiffs lacked standing to challenge the constitutionality of the city's cash bail processes and practices because those plaintiffs were no longer being held on cash bail. Citing *County of Riverside*, the federal district court in *Dixon* found that "the fact that the named Plaintiffs eventually received bond hearings and are no longer detained in the Workhouse or CJC does not moot the claims of the unnamed members of the class" and found that "Plaintiffs have standing to bring their claims." *Dixon* at p. 9.

In the same way, the instant case features Plaintiffs who lost their right to the entry of an automatic, two-week stay and had eviction judgments entered against them without the opportunity to be heard because of Defendant's due process violations. That the Plaintiffs—postjudgment—with additional effort and after retaining counsel, were able to avoid the worst consequences of the Jefferson District Court's failure to provide people facing eviction with notice and opportunity to appear and be heard does not strip them of standing to ask this Court to protect others from the Jefferson District Court's unconstitutional practices in its forcible detainer court. In the same way that the Plaintiffs in *Dixon* and *County of Riverside* were eventually

[17] KRS 383.245 allows a landlord to seek a warrant of restitution seven days after the judgment.

[18] Attached as **Exhibit 1**.

no longer subject to the unconstitutional practices they complained of and yet were still able to protect the class of from suffering the same constitutional violations, Ms. Floyd and Ms. Nicholson have standing to protect other people from losing their right to have an automatic, two-week stay entered in their case and instead having judgments of eviction entered against them as the result of Defendant's unconstitutional violations of the due process rights of people facing eviction.

2.3. Plaintiffs' deprivation of their property is still imminent; or, if not, Plaintiffs (as people who faced imminent injury) have standing to protect those who still face imminent injury

To have standing, "the Plaintiffs must first show that they have suffered a concrete and particularized injury, or that such injury is imminent." Defendant's Response at p. 10, citing *Lujan* at 560, *supra*. As discussed in Section 2.1, Plaintiffs have standing because they have *already* suffered a concrete and particularized injury[19] caused by the Defendant. As such, they have standing to challenge the constitutionality of Defendant's eviction processes. Still, at this very moment, Plaintiffs each have forcible detainer cases pending against them. Hearings are set for February 25 (Floyd) and March 2 (Nicholson). With the forcible detainer actions still pending, this Court can find that Plaintiffs have an imminent risk of being deprived of their property right now.

However, when Plaintiffs filed their Complaint, Ms. Nicholson still had a judgment of eviction against her and an Order giving her seven days to vacate her rented home. Even if the Court does not believe Plaintiffs have an *ongoing* risk of imminent injury, certainly both plaintiffs faced an imminent risk of deprivation of property without due process of law and, absent their own quick action to fix the "potential confusion" caused by the Jefferson District Court's decision to change the location of the Zoom Eviction Hearing, would have suffered the imminent harm they hope to prevent from befalling others with this lawsuit.

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[19] Loss of the right to an automatic, two-week stay of their cases after they failed to timely appear at the new Zoom Eviction Hearing room because of Defendant's unconstitutional notice practices

Defendant's argument regarding imminent injury, then, appears to be one of mootness. In the same way that people with "completed" constitutional injuries can still get prospective injunctive relief under *County of Riverside/Dixon*, Plaintiffs whose injury was imminent but no longer is (by their own additional efforts) can still get prospective injunctive relief for the class of people *still facing* imminent injury at the hands of Defendant. Just because Plaintiffs unknotted the rope binding them to the conveyor belt in time to escape the buzzsaw does not mean they cannot ask this Court to turn off the buzzsaw for those still tied to the belt.

3. The Jefferson District Court's eviction practices are unconstitutional; this Court must prevent Defendant from violating the due process rights of people facing eviction.

"(D)ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) citing *Goldberg v. Kelly*, 397 U.S. 254 at 263-271 (1970). Any procedures the government uses "must be "tailored, in light of the decision to be made, to the 'capacities and circumstances of *those who are to be heard*.'" *Mathews* at 424 U.S. 319, 349 citing *Goldberg* at 268-269.

In *Greene v. Lindsey*, the U.S. Supreme Court reviewed the requirements for notice within the context of forcible detainer proceedings and held that while *personal service* is not required in every proceeding,

> the Due Process Clause does prescribe a constitutional minimum: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

> *Greene v. Lindsey*, 456 U.S. 444, 449–50 (1982) quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

This Court must judge the sufficiency of the Jefferson District Court's decisions, processes, and notices within the context of "all the circumstances" surrounding the Court's decision to "upgrade" its Zoom account. It must consider the interests a person facing eviction in a pandemic has in the property at stake (whether that property is a rented home or procedural safeguards designed to provide people with the opportunity to pursue rental assistance and remain #HealthyAtHome). It must evaluate the Court's decisions regarding its forcible detainer notices and practices in light of the incredibly high likelihood that people who had the wrong Zoom Eviction Hearing information would be erroneously deprived of their property *and* the many alternative paths the Jefferson District Court could have followed that would have provided substantially more protection (some alternative steps available at a vanishingly small cost to the court).

That is, this Court must decide whether the notice and process Plaintiffs received was constitutionally sufficient after the Jefferson District Court:

1. Decided to upgrade its Zoom account;
2. Decided when to upgrade its Zoom account[20];
3. Knew in advance of the upgrade it would lose access to the number (1-888-822-7517) it had been providing to people facing eviction *for months;*
4. Knew in advance of the upgrade that the notices it had previously sent to people facing eviction contained **inaccurate information** about how to appear at the Jefferson District Court's new Zoom Eviction Hearing location;
5. Decided not to send new notices to people facing eviction with instruction on how to appear at the new Zoom Eviction Hearing location;
6. Decided during this transition to the "upgraded" account *not* to continue the cases of people who did not appear at the new Zoom Eviction Hearing location, send notices to those people who missed their one-time, summary eviction hearing, and provide them another chance of appearing (this time with the correct information);

[20] One could imagine the Jefferson District Court managing the rollout of a Zoom "upgrade" in such a way that the Court was able to provide people facing eviction—those with pending cases and those receiving information about the Jefferson District Court's Zoom Eviction Hearings for the first time—with accurate information well in advance of any "upgrade".

7. Decided instead to enter default judgment against anyone who did not appear at the new, unnoticed[21], unannounced Zoom Eviction Hearing location;
8. Decided not to dismiss the forcible detainer actions filed by landlords and landlords' attorneys who failed to appear in the new Zoom Eviction Hearing location but, instead, decided, where possible, to *call those litigants* and *help them appear* in the new location.[22]
9. Decided—despite knowing the "potential confusion" its decisions would create—not to automatically vacate Plaintiffs' cases once they appeared (too late) in Court, but rather to require them to take the additional steps of, in Plaintiffs' cases, retaining counsel and filing a Motion to Set Aside the judgment of eviction;
10. Decided to create a special docket to fix the mistakes it made when the "potential confusion" became "actual confusion" and the people facing eviction took extra, unannounced[23] steps to help the Jefferson District Court fix its errors;
11. Decided to deny Plaintiffs with the automatic, two-week stay to which they were entitled but instead to tell them they were "too late" and to "call Legal Aid Society."

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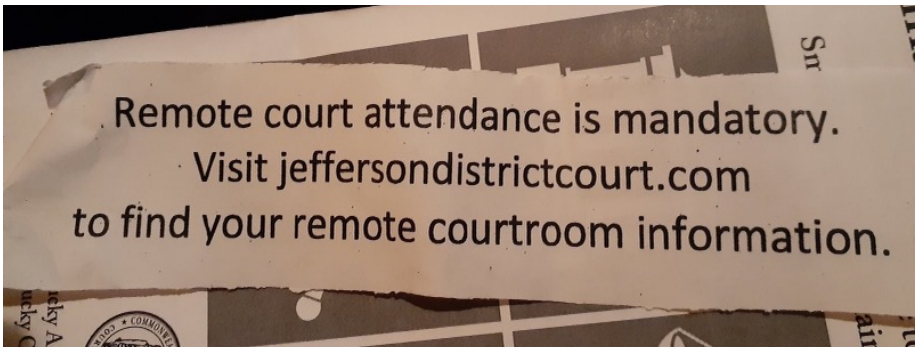
[21] The Jefferson District Court says that it posted the new Zoom Hearing Room location on its website. The notice that the Court provided to Plaintiffs (the notice the Court used for months) did not provide the Jefferson District Court's web address to people facing eviction. Nor did that notice inform people facing eviction that the information to appear at their Zoom Eviction Hearing might change and to call the Clerk or check the website in advance of the hearing to check if the information was still accurate.

[22] Again, Plaintiffs do not have access to the last two weeks of eviction hearings conducted by the Jefferson District Court, but will secure them as part of the prosecution of this case. In fairness, it is possible that those hearings show the Jefferson District Court calling landlords and landlords' attorneys, but also asking those parties how to contact people facing eviction, as well.

[23] Defendant says that people facing eviction can put their case on this special docket by contacting Legal Aid Society or by calling the Clerk's office. How will people learn about their right to a post-judgment hearing regarding access to the new Zoom Eviction Hearing location? Plaintiffs were able to get this information by—eventually—finding the new Zoom Eviction Hearing room. What about the people who don't make it to the new room? Does the Court provide that information to people facing eviction on the judgments it enters against them? Judging from the Judgments entered against Named Plaintiffs, the answer to that question is "no." Nor is this process (or even the availability of this process) described on the Court's website (which, again, was not provided on the Jefferson District Court's notice until it was the exclusive scrap of information the Jefferson District Court decided to provide people facing eviction).

And, this court must decide whether the recent changes the Jefferson District Court has made to its eviction notice and practice satisfy the constitutional minimums of due process after the Jefferson District Court:

12. Decided to change the information it provides to people facing eviction with the Notice of Eviction Hearing (Summons);
13. Decided that
    - instead of providing people with the information they need to appear at their Zoom Eviction Hearing directly (Zoom meeting ID, telephone number, access codes, etc.)
    - instead of providing people (like in the past) with the Clerk's email address and telephone number directly (in case people lack a reliable phone or computer or "have trouble")
14. Decided, instead, to provide people facing eviction with *only* a link to its homepage, jeffersondistrictcourt.com, to find information and instructions about how to appear remotely at their Zoom Eviction Hearing;



15. Decided to tell people facing eviction that remote appearance at eviction hearings is "mandatory" when, in fact, since January 4, 2021, Defendant has apparently maintained an unannounced policy of allowing "any party who wishes to attend an eviction proceeding in person to do so." Defendant's Response, p. 2, n. 3.
16. Decided to provide people facing eviction with *no information* about the option to appear in-person for their Eviction Hearing: the existence of this option, how to avail themselves of the option. The Jefferson District Court's *current notice* tells people it is "mandatory" to attend court remotely when that is, according to Defendant's Response, not true.

Lawyers and laypeople alike understand the fundamental unfairness of a court of law deciding to move a court proceeding without telling one of the litigants the new location.[24] Named Plaintiffs have sued to prevent other people from suffering the same violation of their due process rights as Plaintiffs suffered on January 27th.

In other contexts, the Jefferson District Court's inaccurate statements, its incomplete statements, its willingness to let the incorrect information it provided to people go uncorrected (particularly when it was aware of the likelihood of confusion (harm))… In other contexts, this conduct would be actionable as something other than a complaint for due process violations seeking only prospective injunctive relief to protect others from these unconstitutional practices.

When subjected to the paradigmatic, 3-part inquiry to test the constitutionality of the government's processes—1) private interest that will be affected by the official action; 2) risk of an erroneous deprivation and probable value of additional or substitute procedural safeguards; 3) Government's interest, including fiscal/administrative burdens of additional process—the unconstitutionality of the Jefferson District Court's eviction practices are clear. Never have the stakes been higher for "home". With Kentucky's lightning-fast eviction processes, the risk of erroneous deprivation if people are unable to appear at *a hearing at which they have a judgment of eviction entered against them if they do not appear*—is enormous. The Jefferson District Court could have managed its forcible detainer notices and practices in almost innumerable different ways to

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[24] The Jefferson District Court knows well that most people who are facing eviction are unrepresented and unfamiliar with the forcible detainer processes. That the Jefferson District Court did not tell unrepresented laypeople facing eviction in a pandemic and unprecedented economic crisis in which 20% of the lowest-wage workers in America are unemployed the new location of their Zoom Eviction Hearing but, where possible, *called landlords and landlords' attorneys to assist them in appearing at the new Zoom Eviction Hearing location*, only compounds the unfairness of the Court's chosen course of action once it decided it needed to upgrade its Zoom account and understood that an upgrade would mean 1) losing access to the old Zoom Eviction Hearing room and 2) that the information it provided to people facing eviction was no longer accurate.

While it is not necessary for the Court's decision whether to grant a preliminary injunction, Plaintiffs will want to develop evidence in anticipation of entry of a final judgment in this case about: 1) the Court's decision to upgrade its Zoom account and 2) the scope of the Court's efforts to inform landlords and landlords' attorneys how to access the new Zoom Eviction Hearing room.

have provided adequate (even great) notice and opportunity to be heard to people facing eviction. And, many of those are available at relatively little cost[25]. The Defendant has warned that this Court's entry of an injunction would "interfere with the orderly administration of court business" and require the Defendant to send "notices to hundreds of litigants who may[26] already know how to access their hearing." Defendant's Response, p. 14.

Plaintiffs are under no illusion that not allowing the Jefferson District Court to hear pending eviction cases until the Defendant provides[27] people facing eviction with the information they need to 1) appear in the new Zoom Eviction Hearing room or 2) decide to avail themselves of the Court's in-person Eviction Hearing processes won't inconvenience the Court. Having to reschedule some matters scheduled to be heard in the next few weeks while the Jefferson District Court provides adequate notice *will* inconvenience the Jefferson District Court. But, the basic

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[25] To counsel's knowledge, the Jefferson District Court has not been sued during the COVID era before it decided to "upgrade" its Zoom account and downgrade the notice it provides to people facing eviction.

[26] This "may" says it all. The Jefferson District Court cannot tell this Court that the notices it sends to people are sufficient to *actually provide the information people need to appear in the Defendant's Zoom Eviction Hearings*. Instead, some people in Jefferson County "may" already have navigated to the Court's homepage and found the Zoom Eviction Hearing information buried on another page on the Court's website.

[27] In the Response, Defendant says "Presumably, the Plaintiffs would like the [federal] Court to fashion any such notice." Defendant's Response, p. 8, n. 8. And, "the Plaintiffs ask this Court to draft notices to their satisfaction and require the Jefferson District Court to use those notices before any other eviction proceedings may continue." Defendant's Response, p. 13. This is not the case.

Plaintiffs moved this Court to enter an injunction " barring the Jefferson County District Court from conducting hearings in forcible detainer actions *until the Jefferson County District Court has provided Constitutionally-adequate notice* to people facing eviction of the time and place of their forcible detainer hearings." Plaintiffs' Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction, p. 1, ¶ 1. It is the Jefferson District Court's responsibility to provide people constitutionally-adequate notice of the time and place of their hearing—before, during, and after a pandemic. It is this Court's responsibility to stop evictions until the Defendant builds processes and practices that meet its basic obligations under the Constitution.

demands of the Constitution do not bend to the Jefferson District Court's convenience.[28] Respectfully, when "home"[29] is on the line—especially now that "home" is "school", is "work", is "safety", is "sanctuary"—the Constitution requires more that what Jefferson District Court is currently doing.

Here, there is no question that the Jefferson District Court's decision not to provide people facing eviction with the information necessary to appear in the Court's new Zoom Eviction Hearing room denied Plaintiffs the automatic, two-week stay to which they were entitled and the opportunity to be heard on January 27th before Jefferson District Court entered judgment against each of them. This result—loss of the automatic, two-week stay and judgment before an opportunity to be heard—is, quite literally, preposterous: the Jefferson District Court has put the thing at the end ("post"/judgment) before the thing that comes first ("pre"/opportunity to be heard). The Due Process Clause of the 14th Amendment protects everyone—even people who rent their homes—from such preposterous treatment from government officials—even judges.

CONCLUSION

The Jefferson District Court has spent months giving people information about how to appear at their one-time Zoom Eviction Hearings. If people do not appear, the Jefferson District Court enters a default judgment of eviction against them. The information the Jefferson District Court gave to people is now inaccurate and the Jefferson District Court has done *virtually nothing* to inform people of the change, inform *laypeople* how to appear at this lightning-fast hearing in which "home" is on the line. The basic due process requirements of our Constitution cannot tolerate this. This Court has the power to enjoin state court proceedings when irreparable injury is 'both great and immediate,' where the state law is "flagrantly and patently violative of express

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[28] And, the Jefferson District Court could have avoided any inconvenience caused by this Court's injunction by "upgrading" its Zoom account and notices in a way that prophylactically protected the due process rights of people facing eviction.

[29] The Kentucky Supreme Court recognizes that evictions can have "far-reaching societal impacts… including homelessness, financial instability, food and health care insecurity, and foreclosures." Preamble to AO 2020-62.

constitutional prohibitions," or where there is a showing of 'bad faith, harassment, or . . . other unusual circumstances that would call for equitable relief.' *Mitchum v. Foster*, 407 U.S. 225, 230, (1972). Each week, hundreds of people facing eviction appear (or try to) in Jefferson District Court. An eviction—any time, but *especially* in a pandemic—is a great and immediate irreparable injury. Hundreds of families face it each week in Jefferson District Court. The constitutional violations described in the Plaintiffs pleadings are flagrant violations of people's due process rights, equally identifiable by seasoned attorneys and laypeople. Finally, while the Plaintiffs will steer clear of "bad faith" or "harassment", certainly the extraordinary circumstances in which we find ourselves counsels toward greater, not fewer, protections for people facing eviction.

Plaintiffs only need to satisfy one of the three conditions of the test outlined in *Mitchum* to be entitled to injunctive relief, yet they satisfy all three here. The Plaintiffs have standing to protect people going forward who are facing eviction in Jefferson District Court. This Court has the power to protect people from the Jefferson District Court's current eviction processes, which violate the due process rights of people facing eviction.

This Court must use that power. Fast.

Dated: February 8, 2021

Respectfully Submitted,
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