

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

CIVIL ACTION NO. 20-96-DLB-CJS

GREATER CINCINNATI NORTHERN
KENTUCKY APARTMENT ASSOCIATION, et al.

PLAINTIFFS

v.

JOHN C. MIDDLETON, in his official capacity
as Circuit Clerk for the 16th Judicial Division, et al.

DEFENDANTS

**MOTION FOR LEAVE TO FILE A MEMORANDUM OF LAW BY AMICI CURIAE
IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RELIEF**

Amici Curiae, three public interest organizations that specialize in housing matters, pursuant to the Court's inherent powers, hereby move the Court for leave to file an *amicus curiae* brief in opposition to Plaintiffs' Emergency Motion for Restraining Order and/or Preliminary Injunction and in support of the actions Governor Beshear and the Kentucky Supreme Court have taken to protect Kentuckians who rent their homes from eviction during a global pandemic and economic crisis. In support of this Motion, they state:

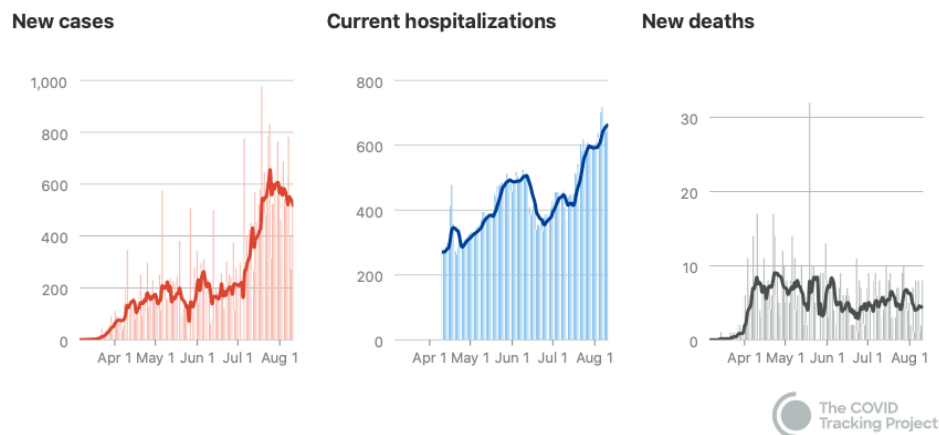
1. The *Amici* are public interest organizations that protect tenants' access to safe and affordable housing. Together, we provide a range of services, including direct representation, policy expertise, community and social services. We all represent or advocate on behalf of lower-income homerenters, and many focus our efforts on the intersection between health and housing.
2. The **Homeless and Housing Coalition of Kentucky** (HHCK) is a statewide coalition of partners and advocates working to end homelessness and create opportunities for low-income Kentuckians to live in affordable homes. HHCK educates policymakers at the state and federal levels of government and among communities across the Commonwealth. HHCK also directly provides rental assistance to landlords on behalf of 120 families who have experienced chronic homelessness across Kentucky (excluding Fayette and Jefferson

Counties). Under the current pandemic environment, HHCK fields daily requests for homeless assistance and rental assistance from low-income households.

3. The **Metropolitan Housing Coalition** (MHC) facilitates research-based advocacy for fair housing and affordable housing in the Louisville/Jefferson County Metropolitan Statistical Area by its over 300 organizational and individual members. MHC members include developers (both for-profit and nonprofit), banks, health care companies, local governments, churches, and individuals. The Louisville Metro Department of Health and Wellness designated MHC as the leader of one of the four pillars of Healthy Louisville 2025. In 2016 alone, Jefferson County accounted for 67% of the eviction filings for the entire state of Kentucky.¹ Additionally, since 43% of Kentucky's Black population lives in Jefferson County, the representation by an organization focused on fair housing in this geographic area is imperative.
4. The **Kentucky Equal Justice Center** (KEJC) promotes equal justice for all Kentuckians by advocating for low-income and other vulnerable members of society. KEJC is a nonprofit law firm and advocacy organization. KEJC represents low-income Kentuckians in court and represents their interests in Frankfort through legislative and regulatory advocacy. It coordinates task forces for legal aid and private attorneys across the state in the areas of family law, workers' rights, public benefits and healthcare, and consumer and housing. During the current pandemic and economic crisis, KEJC's attorneys and staff have provided public-facing information to Kentucky's homerenters regarding the ever-changing rules regarding evictions, facilitated meetings to share information among legal aid attorneys and housing advocates on the ever-changing rules regarding evictions, served on the Kentucky Supreme Court's "Eviction Subcommittee", advocated for uniform, safe, and fair eviction proceedings, and sued landlords for violating the CARES Act's prohibitions on charging Kentuckians' late fees. Ensuring that Kentuckians can remain both a) healthy and b) at home during a global pandemic is core to KEJC's mission.

¹ See [EvictionLab.org](https://evictionlab.org) and MHC's "[2018 State of Metropolitan Housing Report: Involuntary Displacement](#)".

5. The COVID-19 pandemic is the deadliest challenge our country has faced in modern history. In the five months since Defendants first started taking action to protect Kentuckians from the spread of SARS-CoV-2, the virus that causes COVID-19, 156,273 Americans have lost their lives to COVID-19 and more than 5 million Americans have been infected. *The COVID Tracking Project*, available at: <https://covidtracking.com/> (last visited August 12, 2020). In March and April, the responses to the emerging crisis from Kentucky’s elected officials—the Defendants in this case—included clear, regular communication with the public, early and appropriately aggressive shut-downs, a mask mandate (eventually), prohibitions on utility shutoffs, and the protections to court personnel, litigants, law enforcement, and the public at issue in this case. However, as Defendants know well, as Kentucky has “reopened” in recent months, case numbers have been surging in the Commonwealth, the number of hospitalizations is at an all-time high, and the number of Kentuckians dying each day has not decreased at all.²



Unfortunately, because the 7-day average of new cases did not peak until July 25th, we likely have not seen the almost inevitable increase in coronavirus deaths in Kentucky that follow new cases by, according to the CDC, about 21 days.³ The coronavirus will continue to affect

² See, “Kentucky Overview” at The COVID Tracking Project, <https://covidtracking.com/data/state/kentucky>. The charts above were last accessed there on August 12, 2020.

³ See, “A Second Coronavirus Death Surge Is Coming” at <https://www.theatlantic.com/health/archive/2020/07/second-coronavirus-death-surge/614122/>.

every aspect of our life and work until Americans and their elected officials take the basic steps needed to protect people and stop the spread of the SARS-CoV-2 virus.⁴

6. COVID-19 is particularly dangerous to the health of *amici*'s clients, with infection and death rates highest in lower-income and minority populations.⁵

7. In addition to the heavy death toll, COVID-19 has resulted in an unprecedented loss of employment. Over the past four months, Kentuckians have experienced job loss and

unemployment at levels several times what we

saw in the 2008 Great Recession. The most

recent data show that more than 136,000

Kentuckians are still making continued claims

for unemployment, down from 260,000 in

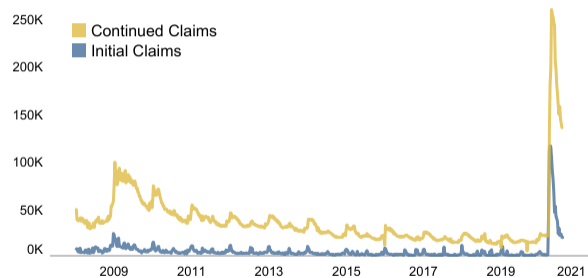
mid-April.⁶

8. COVID-19's economic slowdown has

devastated the people *amici* serve. According to a recent survey, 36% of homerenters and 30%

Weekly Unemployment Claims

Initial and continued unemployment insurance claims by the week they were filed from the week ending January 5, 2008 - August 1, 2020



Source: U.S. Department of Labor data and weekly claims news release.

Note: Most recent week is "advance claim" which is adjusted the following week for actual initial and continued claims.

⁴ The three-step solution to restricting the spread of SARS-CoV-2 is not difficult to understand — it's 1) social distancing, 2) widespread testing, and 3) comprehensive contact tracing. However, *implementing* these programs and *supporting people* while their lives are upended by the social distancing necessary to stop the spread until widespread testing and comprehensive contact tracing is available requires a collective investment of time, energy, and money. Unlike other nations with advanced economies, the United States has not yet summoned the grit it needs to make these investments.

As Ed Yong said in his recent cover story for *The Atlantic*, "Instead, the U.S. sleepwalked into the worst possible scenario: People suffered all the debilitating effects of a lockdown with few of the benefits. Most states felt compelled to reopen without accruing enough tests or contact tracers. In April and May, the nation was stuck on a terrible plateau, averaging 20,000 to 30,000 new cases every day. In June, the plateau again became an upward slope, soaring to record-breaking heights." See, "How the Pandemic Defeated America" at <https://www.theatlantic.com/magazine/archive/2020/09/coronavirus-american-failure/614191/>.

We are now averaging about 54,000 new cases each day in America, down slightly from our high in late-July of 67,000 cases per day. Record-breaking and heart-breaking.

⁵ Center for Disease Control, COVID-19 in Racial and Ethnic Minority Groups (June 25, 2020) available at: <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html>.

⁶ Compare this to the 100,000 new claims filed in January of 2009, the height new claims in Kentucky during the Great Recession. See, "Tracking the Economic Fallout of COVID-19 in Kentucky" at <https://kypolicy.org/tracking-the-economic-fallout-of-covid-19-in-kentucky/>.

of homeowners were unable to make their full housing payment in July.⁷

9. The Governor's current Executive Order—protecting a homerenter from being set-out during a global pandemic—will avoid costly and dangerous and often unnecessary turmoil during a time in which everyone is trying to stay #HealthyAtHome. Kentucky renters have been hit hard by the coronavirus pandemic and resulting economic crisis. A recent study estimates that 221,000 Kentucky households (44% of all households that rent their homes) are unable to pay rent and are at risk of eviction absent Governor Beshear's Executive Order protecting them from being set-out. Without that protection, an estimated 149,000 Kentucky households (not individuals) will be evicted *in the next four months*.⁸
10. COVID-19 is transmitted through regular social interaction, and experts recommend staying home as much as possible to prevent infection. Obviously, being evicted from your home makes that impossible. For hundreds of thousands of residents, this moratorium is the only legal protection saving them from homelessness and exposure to a deadly disease. It is now under attack by three landlords claiming to have “several” renters who have the ability to pay but refuse to.
11. Unfortunately, Plaintiffs do not disclose the buildings at issue, have not identified these “several” tenants, and have not notified their tenants of this litigation. This is a gross violation of those tenants' due process rights. Because the tenants cannot defend themselves here, because *amici* are working every day to prevent and mitigate the devastating consequences of the potential eviction crisis, and because the work of *amici* will be deeply impacted—for better or worse—by the Court's decision, it is imperative that *amici* be allowed to speak on behalf of the group of people who will be most impacted by the Court's decision

⁷ Rob Warnock and Chris Salvati, “Missed Housing Payments Continue Piling Up in July,” ApartmentList.com (June 8, 2020) at <https://www.apartmentlist.com/research/july-housing-payments>

Note, however, that Plaintiffs do not allege experiencing a high delinquency rate themselves, only that “several” homerenters are not paying rent despite (Plaintiffs allege) having the ability to.

⁸ See the National Coalition for a Civil Right to Counsel's [press release](https://bit.ly/evictionestimates) for information about the tool and <https://bit.ly/evictionestimates> for the tool itself.

and the group of people noticeably absent from this litigation: Kentuckians who rent their homes.

12. Although *amicus curie* briefs are more common in appellate courts, they are permitted at the District Court level. “A district court has the inherent authority to appoint amici curiae to assist it in a proceeding.” *United States v. State of Mich.*, 116 F.R.D. 655, 660 (W.D. Mich. 1987). Such decisions are reviewed by appellate courts on an “abuse of discretion” standard. *See, Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir.1982).
13. “Participation as an amicus is ‘a privilege within the sound discretion of the courts, depending upon a finding that the proffered information of amicus is timely, useful, or otherwise necessary to the administration of justice.’”⁹ Here, no party to the litigation represents the one group of people that will be most deeply impacted by the Court’s decision: Kentuckians who rent their home. The Court should allow and consider *amici*’s brief before deciding legal and factual issues that will affect the rights and lives of literally hundreds of thousands of Kentucky homerenters.¹⁰

⁹ *BancInsure, Inc. v. U.K. Bancorporation Inc./United Kentucky Bank of Pendleton Cty., Inc.*, 830 F. Supp. 2d 294, 307 (E.D. Ky. 2011) citing *United States v. State of Mich.*, 116 F.R.D. 655, 660 (W.D. Mich. 1987) *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir.1991).

¹⁰ *Amici* do not, at this time, seek to be appointed as “litigating *amicus*” as the Court did for the National Prison Project in *United States v. State of Michigan*, cited above. Rather, *amici* seek to serve as traditional *amicus curiae* for the purpose of assisting the Court in determining the whether Plaintiffs are entitled to the preliminary relief they are seeking. *Amici* will do this by providing it with information about the remedies still available to the Plaintiffs, the assistance programs and mitigation strategies available to Plaintiffs, the programs and Orders from which Plaintiffs have benefitted, and the tremendous stakes of the Court’s decision on Kentucky’s homerenters and public health.

However, if the Court finds that *amici*’s information is not sufficiently “impartial” and *amici*’s interests are too adversary to Plaintiffs’ claims to serve as traditional *amici*, they would petition the Court to allow their brief as “litigating *amicus*” for the reason cited above: because Plaintiffs have not named those homerenters that they claim have the ability to pay but refuse to, homerenters have no voice in a lawsuit that will impact them more than any actual party to the suit.

See, generally, this Court’s analysis in *BancInsure*, cited above: the historical purpose of *amicus curiae* “was to provide *impartial* information on matters of law about which there was doubt, especially in matters of public interest. The orthodox view of *amicus curiae* was, and is, that of an *impartial* friend of the court—not an adversary party in interest in the litigation.” *BancInsure* at 307.

14. Plaintiffs' motion seeks a temporary injunction striking down the Governor's Order prohibiting people from being set-out of their homes while his Declaration of Emergency is in effect. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). Thus, in considering Plaintiffs' motion, this Court must consider not only Plaintiffs' likelihood of success on the merits, but also inquire into the nature of the harm Plaintiffs' allege (is it "irreparable"?), balance the equities, *and* find an injunction serves the public's interest.
15. By describing the programs and relief available to Plaintiffs, the rental assistance programs that are still waiting on funding from the federal government, *amici* can be particularly helpful in helping the court appreciate the nature and severity of Plaintiffs' claimed harm. Furthermore, *amici* know the enormous stakes for the homerenters across Kentucky that *amici* serve. Finally, *amici*'s brief will assist the Court identify and weigh the relevant equities at stake when Plaintiffs claim their immediate right to possession of their rental property should prevail over Kentuckians' rights to be secure in their homes during an ongoing global pandemic and economic crisis.

WHEREFORE, the undersigned ask the Court to enter an order:

- A. Granting the *Amici* leave to file the attached brief, and
- B. Granting any further relief this Court deems equitable and just.

Respectfully submitted,

/s/ Ben Carter

Ben Carter
Kentucky Equal Justice Center
222 South 1st Street, Suite 305
Louisville, KY 40202
502-303-4062
ben@kyequaljustice.org
On behalf of *Amici Curiae*