

A STATEMENT ON
Tenant right to counsel
Sounds nice. Destroys housing.

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We will lose our beautiful, historic, multifamily neighborhoods
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This idea – a tenant right to counsel – is being proposed nationwide, with well over one hundred affiliated organizations pushing it in state legislatures across the country.

If adopted, it will damage and destroy America’s low-income multifamily neighborhoods, causing a slide towards crime-ridden slums and housing loss.

If adopted, it will push many small landlords to decide to exit the rental housing market – and others never to enter it. It would replace many small local landlords with a few distant, corporate-bureaucratic large landlords both private and nonprofit. We would lose a valuable local resource, many men and women of practical skills and watchful eyes on our multifamily neighborhoods, lost forever.

Legal services lawyers have drafted this proposal in conjunction with tenant advocacy groups. The legal services lobby is a nationwide partisan, political movement funded by taxpayer dollars and other government appropriations. It should be defunded and made to seek private donations for its activities.

Small landlords predominate in lower-income neighborhoods, usually a husband and wife who own a handful of units, do their own management and repairs, and operate part-time or full-time from their homes. They are often minorities, as are their tenants. Over half of all U.S. rental housing is owned by small landlords. These people are at risk. They are never talked to. Just ignored.

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A **“tenant right to counsel” has only one goal and one outcome:** To prolong periods of nonpayment and give tenants free rent. Its proponents cannot state this goal openly, and they never research the impact.

The socio-economic impacts of widespread, prolonged nonpayment of rent are disastrous.

- Hostility and hatred between landlords and tenants
- Abandoned and boarded-up housing

- Permanent loss of low-rent housing
- Good-paying tenants displaced
- Neighborhoods sliding towards slums with crime
- Property tax and income tax revenue losses

FACT: America has lost a huge amount of low-rent housing over the last three decades. In 1990, low-rent housing (defined as rents below \$600) made up **46%** of America’s rental housing stock. By 2017, it had dropped to just **25%** [Note 1]. Various reasons caused this alarming loss, such as inflation, rising incomes, and condo conversion. But one significant reason is prolonged periods of nonpayment of rent caused by landlord-tenant laws.

FACT: Rents in lower-income neighborhoods are quite low. U.S. Census data found that, in Boston, almost **30%** of rents were less than **\$1,000** in 2017, based on random sampling, not realtors’ listings [Note 2]. Such low rents are barely sufficient to maintain the housing.

FACT: **95% of all evictions are for nonpayment of rent**, according to former Boston Housing Court chief administrator Harvey Chopp [Note 3]. This nonpayment occurs largely in lower-income neighborhoods, and it signals that virtually all nonpaying tenants would qualify for free lawyers. Judges typically award most of a tenant’s unpaid rent to the landlord, but it is virtually impossible to collect.

FACT: Funding for a Massachusetts “tenant right to counsel” would have to **increase by almost 13 times** its present allocation to handle a caseload that would grow from **2,895** nonpayment eviction cases in Fiscal Year 2019 to **37,000** cases a year [Note 4]. This funding would need to support 13 times more legal services attorneys, their salaries and benefits, and their office space, equipment, and support personnel. It would also need to support a corresponding increase in judges, courtroom space, and support personnel for the greatly increased litigation time. No cost-benefit analysis has been done.

How a “tenant right to counsel” would work

Small landlords in lower-income neighborhoods cannot afford attorneys at \$200 to \$300 an hour on rents below \$1,000 and one or more rents not being paid. With only a few units, small landlords are soon put out of business by prolonged nonpayment of rent. The claim that 80% of landlords come to court with attorneys may not be factually wrong, but is misleading. The landlords who come to court with attorneys are primarily public housing authorities, nonprofit “affordable housing” groups, and a few large landlords – not small landlords.

The playing field is tilted horribly against small landlords by a “tenant right to counsel.” The tenant is getting both a free attorney and free rent – and has no incentive whatsoever to resolve the case. The small landlord, in contrast, is losing rental income, seldom can afford an attorney, and desperately wants a quick resolution. Is this impact “equal justice” and “leveling the playing field,” as legal services lawyers claim? Just the opposite, it promises to crush small landlords.

“Summary process” stops being summary. “Summary” means “quick,” as in “summary judgment.” When a person lives in someone else’s property without paying rent, the matter is serious and needs rapid resolution. The court system established “summary process” specifically for landlord-tenant issues, to replace “self-help” evictions. Landlords have accepted

summary process knowing it is slower than self-help, but relatively quick and inexpensive: after a short 14-day notice, the landlord and tenant state their case to the judge without attorneys. A “tenant right to counsel,” then, destroys a long history of legal practice – and guarantees that the eviction process will be as long and slow as possible when nonpayment is the sole cause of action.

How complicated are nonpayment eviction cases? The issue is simple. Did the tenant pay or not pay the rent? What is the evidence? The judge is an attorney. Do we need two or three attorneys in the courtroom to decide this simple fact?

What will free lawyers do for tenants in nonpayment situations? Come up with reasons why nonpaying tenants cannot be evicted. For example:

- **Demand** that the apartment must be certified code-perfect before the landlord can evict a nonpaying tenant (who starts damaging the apartment).
- **Demand** a jury trial to decide a simple nonpayment case – *at least* a three-month delay and three more months of free rent.
- **Demand** triple damages for each time a busy, less-literate small landlord has violated the provisions in complicated landlord-tenant laws, always drafted by legal services lawyers. A Boston landlord counselor says that these damage claims often mount up to \$40,000 and go as high as \$70,000 on rents around \$900 in Boston’s lower-income neighborhoods. If the poor landlord cannot pay \$\$\$\$, then demand more free rent for the tenant.

Who pays?

When nonpaying tenants get many more months of free rent, four losers pay for it:

- **Small landlords** suffer financially, as any family would from reduced or zero income, and when they can no longer do repairs and maintenance, they can lose their properties and abandon them.
- **A landlord’s other, good-paying tenants** can expect cutbacks in repairs and services, followed by rent increases. If landlords abandon their properties, these good-paying tenants can also lose their housing as it becomes unlivable.
- **The housing in lower-income neighborhoods especially** can be abandoned and start to decline rapidly from lack of repairs. In serious recessions (such as now), lower-income neighborhoods turn into slums with abandoned, boarded-up housing everywhere, and much low-rent housing is permanently lost. Crime becomes rampant. (See Lawrence MA below.)
- **Taxpayers** will pay for this loss in higher taxes because of lower property tax and income tax revenues from lower-income neighborhoods and increased budgeting to manage abandoned housing and higher crime rates.

Who wins?

The lawyers, the legal services lobby for whom a “right to counsel” is a full-employment act.

Examples of housing loss from nonpayment of rent

Lawrence, Massachusetts, demonstrates the potential impact of widespread, prolonged nonpayment of rent. The city lost much of its lower-income housing when it was hit hard by the early 1990s recession. Factories closed and laid-off workers could not pay their rents. They became unevictable because of the Massachusetts rent withholding law (MGL Ch 239 8A), which left

owners with no money to make the nonpaying tenant's unit code-perfect. Many landlords abandoned their housing. Over a two-year period, more than 200 buildings (both factories and housing) were torched [Note 5] for insurance proceeds. Six years later, the author of this article was invited by the city's chief inspector to view the lasting impact in Lawrence's damaged neighborhoods, which remained a broad patchwork of vacant lots and boarded-up housing, and a smattering of still-occupied buildings with nonpaying tenants hanging out on doorsteps. Crime was rampant: drug-dealers, pimps and prostitutes, squatters and vandals. The city inspector attributed this disaster to the state's defective rent-withholding law. In 1999, Skip Schloming and Lenore Monello Schloming received "honorable mention" in a Better Government competition sponsored by the Boston-based think tank Pioneer Institute for their white paper "The Road Home" [Note 6], which explained the need for a mandatory rent escrow requirement and included an account of Lawrence's experience.

Hendry Street in Boston A recent article in the Boston Globe [Note 7] reported that on "Boston's Hendry Street,... by 2009 [the Great Recession], half of the 20 properties on the street were foreclosed, and vacant buildings had been taken over by gangs." A "stabilization" program "fell short," and private investors "... snapped up properties, rented them out until the market stabilized, and then once again flipped them for a significant profit."

Recessions always bring a rise in abandoned housing. Boston maintains a list of abandoned properties [Note 8] based on neighbor complaints, currently at 737 entries, with 10 properties listed in the last 14 days and 25 properties in the last month. Common complaints are: "drug activity and paraphernalia," "rat infestation affecting surrounding areas," "homeless people living there using drugs and squatting, windows and doors not secured, weeds overgrowing sidewalk, fence falling apart," and it goes on and on. These conditions lower property assessments in the surrounding areas.

Cost comparison: right to counsel vs. financial assistance to tenants

A "tenant right to counsel" is very high-cost, almost a 13-fold increase in lawyers and judges and their infrastructure needs, as stated above.

One-time financial assistance, however, is highly cost-effective. The state's RAFT program (Residential Assistance to Families in Transition) recently spent, on average, less than \$3,000 per tenant household in one-time grants to resolve evictions-about-to-happen – compared to \$3,000 **per month** in "emergency assistance" to put families up in hotel and motel rooms – and not preserve the tenancies.

The same amount of public investment for a "tenant right to counsel" would be FAR BETTER SPENT on such small grants to tenants. They simultaneously **help tenants** stay in their homes and **help small landlords** stay in business.

A stated goal to "protect tenants from displacement" never mentions the other side of the coin: landlords who, in almost all cases, are not receiving rent from tenants. It is as if landlords do not exist and can be completely ignored, or worse yet, they are evil and greedy – stereotyping and hatred that in a racial context would be considered reprehensible. Displacement, moreover, is not always bad or harmful, even involuntary displacement. Why not study it? The job of protecting tenants from displacement is not one that small private landlords are able to do. **Temporary financial assistance** is, again, the most economical way to do it.

“Right to counsel” in the current pandemic crisis

No amount of funding and rapid rollout can possibly happen fast enough to provide a 13-fold increase in legal services lawyers and judges and all their infrastructure needs – plus paralegals, mediators, and financial assistance services.

Thus, adding a “tenant right to counsel” to every nonpayment eviction case in the current pandemic crisis promises a huge pile-up of cases – adding months and months and even years of free rent to these eviction-delayed, nonpaying tenants.

With such lengthy delays, we can safely predict that a “right to counsel” will cause a massive disruption in lower-income neighborhoods, accelerate housing loss, and displace tenants.

SPOA’s proposals: fast, low-cost, practical

Despite a year’s backlog of eviction cases, no “tsunami of evictions” will happen. The eviction process itself will involve at least two or three months of further nonpayment on top of pandemic-related nonpayment, which landlords will want to avoid in any way possible.

We suggest, therefore, to expect landlords and tenants to work things out on their own, to negotiate with each other just as they have done many times in the past to start new tenancies.

We recommend a statewide mailing to all landlords and tenants using municipal assessors databases, giving both parties advice drafted by their respective advocates, with the aim to encourage and guide these private settlements.

SPOA recommends, for the current crisis, that landlords forgive past-due rent (it is virtually unrecoverable anyway) and set a new rent based on each tenant household’s income and the landlord’s own needs, likely a rent level less than previously.

Provide financial assistance, as described above, when tenant incomes are too low or landlord needs are too great to come to a rent that works for both parties. Also, **provide mediation services** as a voluntary option if one or both parties feel such a service might help.

By working out such agreements, with mediation and/or one-time financial assistance as needed, the eviction caseload in the courts and the Commonwealth’s financial outlay will both be substantially reduced.

For intransigent cases, allow them to go to court with new “diversion” steps in the process before a case is officially filed. These diversion steps would involve mandatory mediation and similar services. **SPOA warns,** however, that these “diversion” steps must be immediately available and not long in duration, not more than two weeks. Otherwise, they will encourage tenants to be stubborn in dealing with their landlords so that they get the extra free rent that prolonged nonpayment cases bring.

Another solution: more affordable housing options

Preserving present tenancies should not be the only goal. Tenants have good reasons to move: to a new job, to find a more affordable housing situation, and to stop the harm and loss to small landlords.

Shared housing is always a more affordable option, and restrictions should be removed, at least temporarily, on renting by rooms or on two households sharing the same apartment.

SPOA has asked President Trump to provide free Covid testing, allowing those who want to move and those accepting move-ins to establish their Covid-negative status. In addition, the CDC should work out safe habits and protocols for sharing housemates to live together safely.

Give landlords free attorneys, too? NO.

Giving both landlords and tenants free attorneys does nothing to shorten the prolonged periods of nonpayment that we must avoid. All that funding? Give it as direct assistance to tenants, not to lawyers.

An alternative solution: Deal separately with nonpayment. Let the court take evidence, determine whether nonpayment is happening, and issue an enforceable order for prompt possession. If the tenant has other issues with the landlord – housing conditions, violation of security deposit rules, etc. – let the tenant come with a free attorney to district, housing, or small claims court to adjudicate those issues. The dangers and unfairness of prolonged nonpayment are avoided, yet the tenant does not lose their right to make these other claims.

A Massachusetts Commission on Rental Housing Policy

A “**tenant right to counsel**” has obvious problems that have so far been ignored.

Until the current crisis, no communication – literally, none – has happened between tenant advocates and advocates for small landlords who, as the primary stakeholders, obviously share concerns.

Proposals such as tenant right to counsel, tenant opportunity to purchase, just-cause eviction, local option rent control, eviction sealing, rent cancellation, transfer fees for affordable housing, and others have been drafted by legal services lawyers and have not had proper discussion among all the stakeholders. They should not be rammed through in the name of a covid-19 emergency crisis, to wreak unknown havoc – since socio-economic impacts are so far always ignored.

Good government policy has been stated that recognizes the importance of including all stakeholders in the formulation of regulation that affects them. Google it.

“**Stakeholder meetings**,” recently sponsored by Citizens Housing and Planning Association (CHAPA), felt obliged, of necessity, to include SPOA and other landlord groups in discussions for dealing with today’s unprecedented crisis. The meetings were only the start of a good conversation.

Maybe if we all get together for good hearty discussions, we might come up with some truly workable good solutions.

SPOA urges that a “Massachusetts Commission on Rental Housing Policy” be established, to include all the relevant stakeholders, with the aim to have well-moderated, thoughtful, rational, evidence-based discussions.

Notes

1. www.jchs.harvard.edu/research-areas/working-papers/documenting-long-run-decline-low-cost-rental-units-us-state.
2. <https://data.census.gov/cedsci/table?q=rental%20housing&g=314M300US1446014454&tid=ACSDP1Y2017.DP04&hidePreview=true> (figures are rounded).

3. Personal communication with Skip Schloming.
4. The Massachusetts Legal Assistance Corporation (MLAC) processed from **2,895** nonpayment eviction cases in Fiscal Year 2019: <https://equaljusticecoalition.org/wp-content/uploads/2020/03/FY-21-Issue-fact-sheet-Housing.pdf>. Massachusetts District and Housing Courts processed **38,984** summary process (eviction) cases in 2019: www.mass.gov/lists/trial-court-statistics-for-fiscal-year-2019). Calculation is based on 95% of eviction cases involving nonpayment.
5. Wikipedia: <https://www.google.com/search?channel=cus2&client=firefox-b-1d&q=Wikipedia+history+of+lawrence+ma>
6. <https://spoa.com/TheRoadHome.pdf>
7. August 17, 2020.
8. https://mayors24.cityofboston.gov/?q=abandoned&service_id=4f38920fe75084437f000151&utf8=%E2%9C%93