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**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

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| In the Matter of:<br><br>PETITION TO AMEND<br>RULE 5(d)<br>of the RULES OF PROCEDURE<br>FOR EVICTION ACTIONS | Supreme Court No. R-24-0024<br><br><br>**Comment to Petition to Amend Rule 5(d), of the RULES OF PROCEDURE FOR EVICTION ACTIONS** |

Commenting Party, Unemployed Workers United ("UWU") hereby respectfully submits this Comment in support of the Petition to amend Rule 5(d) ("Petition") of the Arizona Rules of Procedure for Eviction Actions ("RPEA"), filed by Community Legal Services ("CLS"), DNA People's Legal Services ("DNA"), Southern Arizona Legal Aid ("SALA") and the William E. Morris Institute for Justice ("MIJ") on January 10, 2024.

In summary, the proposed amendment to RPEA (5)(d) does two things. One, it requires plaintiffs to disclose whether their rental properties benefit from certain forms of federal financing and as a result, are covered by the 2020 CARES Act. Two, it adopts the majority interpretation of 15 U.S.C. § 9058(c), and as such, requires covered properties to provide a 30-day pre-filing eviction notice. The Petitioners provide ample reasons why this amendment promotes procedural fairness and helps respond to the ballooning eviction crisis across the state. This comment will focus on three major reasons why the amendment should be adopted. First, the disclosure requirement is a very easy one for plaintiffs and is necessary in the face of asymmetric information access regarding the financing of rental properties. Second, the spirit and ethos of Arizona's civil procedure favors the adoption of these amendments. Third, adoption of the amendment is necessary to comply with federal law.

## I. STATEMENT OF INTEREST

This comment is made on behalf of Unemployed Workers United ("UWU"), a project of Working Families Power. UWU advocates for the rights of poor and working-class people, with a particular focus on the wellbeing of immigrants and people of color. UWU's work in Arizona has included bringing litigation to challenge former Arizona Governor Doug Ducey's premature termination of federal pandemic unemployment compensation and advocating for (and securing the adoption of) laws banning rental discrimination based on housing vouchers or other sources of income. The process of listening to and working with Arizonans throughout these campaigns led UWU to an even deeper understanding of the challenges and difficulties facing poor and working-class renters in Arizona.

Over the past several years, our members have identified rising housing costs as the most significant threat to their families' stability and security. In response, UWU began offering recurring virtual know-your-rights training for tenants, accompanied one of our members through the eviction process, and undertook a series of court-watch sessions—observing eviction hearings in a number of Maricopa County Justice Courts, both in person and virtually.

## II. ARIZONA'S EVICTION CRISIS

UWU members' experiences reflect a larger housing crisis across Arizona and, in particular, in Maricopa County. From 2019 to 2023, apartment rent went up 38% in the Phoenix area.[1] The number of evictions filed in Maricopa County in the past year was 33% higher than

[1] Housing Update, Maricopa Association of Governments (June 2023), https://azmag.gov/Programs/Maps-and-Data/Land-Use-and-Housing/Housing-Data-Explorer.

the pre-COVID annual average.[2] These numbers cannot be explained away by population growth—Maricopa's 5.2% eviction rate in 2023 is the highest in the last decade.[3] These rates continue to increase in 2024. While communities across the country are grappling with widespread housing insecurity, Arizona stands out. The state has one of the highest housing loss rates in the country, and Maricopa County leads the nation in evictions with rates nearly twice the national average.[4]

Evictions have negative health impacts and create significant compounding costs ultimately borne by the public. This includes costs related to, amongst other programs, shelter, education, health care, mental health services, and youth social services.[5] A University of Arizona Cost of Eviction Calculator estimates that evictions cost the state over $900,000 a year, or over $9,000 per household evicted.[6]

## III. UWU SUPPORTS THE PROPOSED RULE AMENDMENT

UWU supports the proposed rule amendment. Failure to ensure that a landlord plaintiff has provided a tenant in CARES Act-covered property with a 30-day pre-filing notice is a clear violation of federal law.

### A. Unequal Access to Information about Federal Mortgage and Housing Program Participation Compels the Affirmative Disclosure of CARES Act Coverage by the Plaintiff

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[2] Phoenix, Arizona, Eviction Lab (last accessed Apr. 2024), https://evictionlab.org/eviction-tracking/phoenix-az.
[3] Maricopa County: Eviction Dashboard, Arizona State University (last accessed Apr. 2024), https://resilience.asu.edu/evictions-dashboard.
[4] *Id.*
[5] Eviction Prevention: Reducing Harm To Households and Society, Wisconsin Institute for Research on Policy (Feb. 2023), https://www.irp.wisc.edu/resource/eviction-prevention-reducing-harm-to-households-and-society.
[6] The Cost of Eviction Calculator, Innovation for Justice (last accessed Apr. 2024), https://uarizona.neotalogic.com/a/costofevictioncalculator. This is based on national averages—given the high cost of healthcare in Arizona, the true cost to the state is likely higher.

The amendment would require that landlords disclose whether their property is covered by the CARES Act.[7] This is critically important because tenants often have no way of knowing whether their home is covered, if they even know to check.

### 1. Tenants Do Not Have the Ability to Definitively Determine Whether the Home Where They Live Is Covered by the CARES Act

Most renters do not know that additional protections exist for tenants of CARES Act properties. For those who do, determining whether a property is covered can be difficult or even impossible.

In certain instances, such as when a tenant resides in HUD-subsidized low-income housing or a Rural Development Housing Program property, it is clear that the property is covered by the CARES Act. However, for other types of federally financed properties it is impossible for a tenant or their advocate to determine if the property is covered. There are several databases where tenants can attempt to find out whether their property is covered. But a tenant could not determine whether 1-4 unit properties are covered by the CARES Act, because single-family homes and rental properties with less than five units are generally not listed in the publicly available databases.[8] In some scenarios, the only way to confirm whether a loan is owned by either Fannie Mae or Freddie Mac is to input the last four digits of the borrower's social security number and assert ownership or indicate that the searcher has the owner's consent to access the information–something that most tenants obviously cannot do.[9] This creates an information asymmetry that can only be remedied by affirmative landlord disclosure.

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[7] Covered properties are defined at 15 U.S.C. § 9058(a)(1), (2), (4) and (5).

[8] *See* Enforcing the CARES Act 30-Day Eviction Notice Requirement, National Housing Law Project, https://www.nhlp.org/wp-content/uploads/2023.02.03-Enforcing-the-CARES-Act-30-Notice-.pdf last accessed 4/30/2024.

[9] *See* https://yourhome.fanniemae.com/calculators-tools/loan-lookup and https://myhome.freddiemac.com/resources/loanlookup.

Furthermore, a disclosure requirement imposes little to no burden on the landlord. Most property owners know whether their property is covered by the CARES Act. For a landlord who does not know, they have access to the necessary personal information to do a database check that tenants are unable to perform.

In addition to the fact that many tenants simply cannot determine whether the property where they live is covered by the CARES Act, most tenants have no idea that they could or should attempt to identify whether their home is covered. And, since most tenants are unrepresented by legal counsel to advise them of the unique protections for CARES Act covered properties, the disclosure also ensures that both parties are in possession of all relevant information, regardless of whether they have representation in the courtroom.

**2. The Spirit and Ethos of Civil Procedure in Arizona Favors the Disclosure Requirement Proposed in the Amendment**

Considering this asymmetric information-access problem and the affirmative disclosure aspect of the proposed amendment, it's worth looking at the history of Arizona's Rules of Civil Procedure. The rules were overhauled in 1992 under the leadership of then-State Supreme Court Justice Thomas Zlaket.[10] The amendments adopted at that time came to be known as the Zlaket Amendments. They introduced comprehensive pretrial conferences, presumptive limits on discovery, and extensive disclosures, among other things. Importantly for this petition, the changes to the rules related to disclosure reflected a core value of the judicial system and legal process in the state: a commitment to the spirit of early and affirmative disclosure of relevant information in the interest of fairness and expediency.

[10] *See* Survey of the Arizona Bench and Bar On the Arizona Rules of Civil Procedure, Institute for the Advancement of the American Legal System, University of Denver, https://www.uscourts.gov/file/3353/download last accessed on 4/24/2024.

In 2009 the Institute for the Advancement of the American Legal System produced a report containing the results of a survey of the Arizona Bench and Bar about the Arizona Rules of Civil Procedure. The survey gathered information about Arizona Bar members' views of State Rules of Civil Procedure. The survey found that there is a strong consensus that disclosures "reveal the pertinent facts early in the case" (76% agreed; 23% disagreed) and "help narrow the issues early in the case" (70% agreed; 28% disagreed).

While special detainer actions are summary proceedings and not subject to the Arizona Rules of Civil Procedure, the spirit, ethos, and values of those rules, particularly Arizona Rule of Civil Procedure 26.1 which mandates the prompt disclosure of pertinent information in the interest of fairly informing all parties of the facts, should be a guiding force and favors the adoption of the simple disclosures proposed in the amendment.

**B. The Supremacy Clause of the U.S. Constitution Requires the Application of the Law As Reflected in the Amendment**

The Supremacy Clause of the federal constitution *requires* that all tenants of CARES Act-covered properties be provided with a 30-day pre-filing eviction notice as described at 15 U.S.C. § 9058(c). Opposing comments from the Maricopa County Justice Court Bench state that their Best Practices Committee interpreted the law based on the text of the statute *and to be consistent with state law.* However, this is a flawed interpretive approach because the interpretation of federal law should begin *only* by reading the plain text, not also reading text *to harmonize federal law to state law.* The Supremacy Clause "creates a rule of decision: Courts 'shall' regard the 'Constitution,' and all laws 'made in Pursuance thereof,' as 'the supreme Law of the Land." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015) (quoting U.S. Const. art. VI, cl. 2). Thus, courts "must not give effect to state laws that conflict with federal laws." *Armstrong*, 575 U.S. at 324. In fact, the Supreme Court has determined that state courts have a "coordinate responsibility" to enforce federal law, as "the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature." *Howlett v. Rose*, 496 U.S. 356, 367 (1990). "Under the Supremacy Clause of the Federal Constitution, when a state law conflicts with a properly enacted federal law, the state law is preempted." *Varela v. FCA US LLC*, 505 P.3d 244 (Ariz. 2022).

For CARES Act covered properties, the 30-day pre-filing eviction notice requirement does conflict with the 5- or 10-day notices required by A.R.S § 33-1368. There is no legal precedent or guidance that directs courts or judges to attempt to harmonize a federal law when it conflicts with a state law. Rather, the state law gives way.

**C. Interpretation of 15 U.S.C. § 9058(c) Across the Country Is Aligned with the Proposed Amendment**

Congress enacted the CARES Act on March 27, 2020.[11] As both the Petitioner and one Commenter in opposition to the amendment have made clear, this Petition also addresses the issue of whether 15 U.S.C. § 9058(c) imposes a 30-day pre-filing eviction notice requirement on landlords. The plain language of the statute makes clear that it does. It states: "The lessor of a covered dwelling unit may not require the tenant to vacate the covered dwelling unit before the date that is 30 days after the date on which the lessor provides the tenant with a notice to vacate". Under Arizona state law, the only lawful means by which to "require a tenant to vacate" is by filing an eviction action in the appropriate justice court. A.R.S. § 33-1377. As such, there is only one reasonable interpretation of 15 U.S.C. § 9058(c)(1)—that it imposes a 30-day *pre-filing eviction notice* requirement on landlords of covered dwellings.

[11] *See* Pub. L. No. 116-136, 134 Stat. 281 (2020), available at https://www.congress.gov/116/plaws/publ136/PLAW-116publ136.pdf

This interpretation has been adopted in multiple jurisdictions across the country. Appellate courts in Ohio, Washington, Indiana, and Colorado that have considered the issue have reached the same conclusion, that the CARES Act notice requirement remains in effect and requires a 30-day pre-filing notice.[12]

In *Sherwood Auburn LLC v. Pinzon*, the Washington Court of Appeals considered and rejected a landlord's argument that the CARES Act notice provision merely precludes the Superior Court from enforcing a breach of a lease agreement during the 30-day notice period but did not preclude the landlord from commencing an unlawful detainer action during that time. 521 P.3d 212, 217 (2022), review denied, 526 P.3d 848 (Wash. 2023). In other words, the landlords in *Sherwood Auburn* proposed the same interpretation of 15 U.S.C. § 9058(c) put forth by the Maricopa County Justice Court Bench in their February 16, 2024 comment in opposition to the petition at issue. However, the Washington Court of Appeals found that such an interpretation is, "both contrary to the statute's plain language and inconsistent with the authority pursuant to which Congress enacted the statute." *Id* at 216.

The Colorado Supreme Court has also weighed in on 15 U.S.C. § 9058(c). In that case, the central question was whether the 30-day notice requirement had expired along with the eviction moratorium in section (b) of 15 U.S.C. § 9058. *Arvada Vill. Gardens LP v. Garate*, 529 P.3d 105 (Colo. 2023). In addition to concluding that the 30-day notice provision has not expired, the Colorado court also concluded that 30-day notice is a "pre-filing" notice. *Id.*

A number of jurisdictions have adopted procedural rules or updated standard court filing forms to reflect the notice and disclosure requirements of the law. In addition to the rules of

[12] *See Arvada Vill. Gardens LP v. Garate*, 529 P.3d 105 (Colo. 2023), *Sherwood Auburn LLC v. Pinzon* 526 P.3d 848 (Wash. 2023), *Olentangy Commons Owner LLC v. Fawley*, 228 N.E.3d 621 (2023 Ct. App. Ohio); *Hazelwood v. Common Wealth Apartments*, 23A-EV-1404, 2024 WL 1223521 (Ind. Ct. App. Mar. 22, 2024).

procedure adopted by the state of Vermont, which the Petitioners cite in their petition and on which the current amendment is modeled, other states have also made changes to court forms and procedures to reflect the necessity of disclosure as to whether a property is covered by the CARES Act. In New Jersey, the Landlord Case Information Sheet includes a box to check off to affirmatively indicate when a property is *not* CARES Act covered.[13] In Oklahoma, the state added an affirmative pleading requirement for eviction actions requiring the disclosure of whether the subject of the eviction dispute is a covered dwelling under the CARES Act. [14]

This interpretation is also widely shared by legal advisors for the landlord industry, including in Arizona and North Carolina.[15] In 2021, the Zona Law Group, which advises landlords in Arizona, posted a summary of their legal analysis of the CARES Act notice requirements on the website of the Arizona Real Estate Investors Association. The summary advises landlords of CARES Act-covered properties that the safest practice is to give tenants in covered dwellings a 30-day pre-filing eviction notice.[16] In June 2023, the Apartment Association of North Carolina posted a similar advisory to their members, urging them to comply with the 30 day notice to vacate requirement of the CARES Act for all covered properties.[17]

### D. Arizona Courts Have Previously Recognized and Given Effect to Heightened Federal Notice Requirements in Eviction Actions For Certain Properties

[13] *See* NJ Courts Landlord Case Information Statement https://www.njcourts.gov/sites/default/files/forms/12770_lcis.pdf last accessed 4/24/2024 last accessed on 4/24/2024.

[14] *See* Verification of Compliance with Section 4024 of the CARES Act http://www.oscn.net/images/opinions/2020-OK-22-verification-of-compliance-cares-act.pdf?d=20244248 last accessed on 4/24/2024.

[15] For additional evidence that there is general consensus as to ongoing legal force of the 30-day notice requirement, see H.R.802 - Respect State Housing Laws Act available at https://www.congress.gov/bill/118th-congress/house-bill/802/text which simply strikes the section (c), the notice provision, of 15 USC § 9058 completely. This bill would not exist if opponents sincerely believed it did not apply.

[16] *See* https://azreia.org/zona-law-group/alternative-30-day-notice-cares-act-covered-properties/

[17] *See* https://www.aanconline.org/news/new-clarity-regarding-cares-act-requirements

During the financial crisis of the mid-2000s, including the foreclosure crisis that began in 2008, Congress passed the Protecting Tenants At Foreclosure Act (PTFA).[18] The law required any successor in interest of a foreclosed rental property with federally related financing to provide tenants with a notice to vacate at least 90 days before the effective date of such notice. This law was challenged in Arizona. Patricia De Meo was a tenant of J.S., who had a mortgage provided by the Bank of New York Mellon ("the bank"). *Bank of New York Mellon v. De Meo*, 254 P.3d 1138, 1141 (Ct. App. 2011). J.S. defaulted on the mortgage and the property was foreclosed on. *Id.* The bank issued a 5-day notice to vacate and then filed a forcible entry and detainer. *Id.* The trial court granted judgment in the bank's favor. *Id.* On appeal, the bank argued that they had complied with the law because 97 days had elapsed between the 5-day notice and the judgment, but the Court of Appeals disagreed and held that because the bank failed to comply with the PTFA's 90-day notice requirement, the trial court erred in failing to dismiss the action for lack of proper written notice. *Id.* at 1142.

It's worth noting that *De Meo* was brought under Arizona's Forcible Detainer law and not the Arizona Residential Landlord Tenant Act. In that context, the tenant had no chance to cure and the court still rejected a pre-eviction notice that relied on the passage of time between the notice and the final judgment for compliance with federal pre-filing notice requirements. In the special detainer context, where there is typically an opportunity to cure, adequate notice is even more critical. *De Meo* suggests that Arizona courts should not permit an alternative interpretation of a straightforward federal pre-eviction notice requirement under the CARES Act and also demonstrates that Arizona laws regarding eviction notice can–and must–yield to alternative federal requirements.

[18] *See* Pub. L. No. 111-22, 123 Stat. 1661 (2009) https://www.govinfo.gov/content/pkg/PLAW-111publ22/pdf/PLAW-111publ22.pdf

## IV. CONCLUSION

UWU respectfully requests the proposed amendment to Rule 5(d) be accepted. A failure to do so puts the judiciary at risk of operating in violation of federal law and deprives tenants in CARES Act covered properties of the protections to which they are lawfully entitled.

RESPECTFULLY SUBMITTED, this 1st of May, 2024

UNEMPLOYED WORKERS UNITED

By: /s/ Keally L. Cieslik
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