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9 *Commenting Party*

10 **IN THE SUPREME COURT**

11 **STATE OF ARIZONA**

12 In the Matter of:

Supreme Court No. R-24-0024

13
14 PETITION TO AMEND RULE 5(d),
ARIZONA RULES OF PROCEDURE FOR
15 EVICTION ACTIONS

**Comment to Petition to Amend Rule 5(d),
Arizona Rules of Procedure for Eviction
Actions**

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17 Commenting Party, Clark & Walker, P.C. (hereinafter "CW"), hereby submits its comment
18 in opposition to the Petition to amend Rule 5(d) (hereinafter "Petition") of the Arizona Rules of
19 Procedure for Eviction Actions (hereinafter "RPEA"), filed by Community Legal Services
20 (hereinafter "CLS"), DNA People's Legal Services (hereinafter "DNA"), Southern Arizona Legal
21 Aid (hereinafter "SALA"), and the William E Morris Institute for Justice (hereinafter "MIJ"), on
22 or about January 10, 2024 by and for the reasons set forth *infra*. For the purposes of this comment,
23 CLS, DNA, SALA, and MIJ will be collectively referred to as "Petitioners."

24 **I. STATEMENT OF INTEREST.**

25 CW is a law firm practicing in Arizona representing owners and operators of single and
26 multifamily residential rental properties throughout the state of Arizona. CW focuses its practice
27 on the representation of landlords in most legal matters pertaining to the operation of its client's

1 properties. CW attorneys make daily appearances throughout the state of Arizona on evictions
2 matters, including non-payment of rent matters which would be substantially and negatively
3 impacted by this erroneous interpretation of 15 U.S.C.A. § 9058(c). On behalf of itself, CW hereby
4 comments on the Petition and respectfully urges this Court to affirm its prior guidance on this
5 issue and, by so doing, reject the Petition entirely.

6 **II. PETITION R-24-0024.**

7 Petition seeks to amend RPEA Rule 5(d) to include language stating:

8 **d. Additional Requirements for Complaint.**

9 (...)

10 *(5) If the action involves a residential property, the complaint must contain*
11 *or be accompanied by a declaration verifying that the plaintiff has provided*
12 *the defendant with a notice to vacate at least 30 days prior to requiring the*
13 *defendant to vacate the dwelling unit with the filing of the complaint, as*
14 *mandated by the Coronavirus Aid, Relief, and Economic Security*
15 *(“CARES”) Act, or that the dwelling from which the plaintiff seeks to evict*
16 *the defendant is not located on or in a “covered property,” as defined in the*
17 *CARES Act.*

18 *(a) The declaration must include a complete statement of facts to verify*
19 *compliance with the CARES Act or the inapplicability of the CARES Act to*
20 *the dwelling unit at issue in the eviction action.*

21 *(b) The court shall dismiss a case filed without the declaration required by*
22 *this provision.*

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25 Petitioners allege that, to give effect to 15 U.S.C.A. § 9058(c) “a tenant has to know they
26 live in a rental home subject to the CARES Act.”² Petitioners argue that, because a tenant needs

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¹ Pet., at 8:21-9:5.

² Pet., at 12:18-19.

1 to know the type of funding a landlord has, to give effect to 15 U.S.C.A. § 9058(c) “requires
2 modification to the general pre-filing notice requirements of Arizona law in certain cases, as the
3 CARES Act imposes a longer notice period than previously required for covered properties.”³
4 Petitioners argue that Rule 5(d), RPEA is the foundation by which these concerns can be best
5 addressed and resolved in favor of the alleged uniformed tenant:
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7 RPEA 5(d) represents one of Arizona’s most important due process protections for
8 eviction defendants. The rule requires eviction plaintiffs to be transparent in their
9 disclosure of case-relevant information to eviction defendants. However, the
10 current version of RPEA 5(d) is incomplete without a provision requiring the
11 eviction plaintiff to disclose whether the property is a “covered property.” Such a
required disclosure will help ensure eviction plaintiffs’ compliance with the CARES
Act 30-day notice provision, along with the other important compliance measures
the rule presently includes.

12 4 Petition suggests that implementing the Petition will “help ensure eviction plaintiffs’ compliance
13 with the CARES Act 30-day notice provision, along with the other important compliance measures
14 the rule presently includes.”⁵

15 It is worth noting that the authors of the Petition seem rather confused as to the
16 beneficiaries of 15 U.S.C.A. § 9058(c), arguing that the notice provision required by 15 U.S.C.A. §
17 9058(c) “uniquely protects the rights of low-income and other vulnerable eviction defendants who
18 rent homes in federally assisted properties owned by businesses and individuals receiving various
19 federal benefits through mortgage financing and housing program participation.”⁶ While the
20 commenting party surely would agree that persons who are renting from properties under a Section
21 8 Housing Voucher or reside at a Section 8 Project Based community, a Low Income Housing
22 Tax Credit Community, or any other Section 504 governed community are likely lower income, to
23 misconstrue the term “Covered Property” to include only low income communities is a grave
24 overgeneralization as several high rent communities in Arizona and throughout the United States
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26 ³ Pet., 12:13-18.

27 ⁴ Pet., 14:1-11.

⁵ Pet., 14:8-11.

⁶ Pet., 14:12-16.

1 found themselves subject to 15 U.S.C.A. § 9058(c) without regard to their tenants being low
2 income. This fact is important to note because, by pushing this agenda, Petitioners seek to protect
3 not only the single mother of three with a Section 8 voucher but also the high-net-worth attorney
4 living at a high rise in downtown Phoenix that happens to have a loan through Fannie Mae, Freddie
5 Mac, or the Federal Home Loan Mortgage Corporation. To argue that this rule change protects
6 low income tenants, therefore, is a rather skewed viewpoint and defies logic and realities
7 surrounding what communities are considered covered by the CARES Act.

8 **III. PETITIONERS SEEK AN IMPERMISSIBLE SUBSTANTIVE RULE** 9 **CHANGE.**

10 At the outset, there are legal complications with the Petition that cannot be ignored as this
11 proposed rule change is really a request by the Petitioners to codify, by rule, a decision made by a
12 Superior Court Judge in Pima County, Arizona, a decision which Commenting Party asserts was
13 incorrect. Ultimately, the underlying purpose of the Petition is to pursue a substantive change in
14 Arizona law through the proposed rule change.

15 At the heart of this substantive vs. procedural argument is the separation of powers inherent
16 in our government. Article III of the Arizona State Constitution clearly states:
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18 The powers of the government of the state of Arizona shall be divided into three
19 separate departments, the legislative, the executive, and the judicial; and, except as
20 provided in this constitution, such departments shall be separate and distinct, and
21 no one of such departments shall exercise the powers properly belonging to either
22 of the others.

23 The Supreme Court is empowered to adopt rule changes that affect the procedure by which
24 actions are brought and prosecuted in Arizona courts.⁷ However, the Arizona Supreme Court is
25 not permitted to encroach into other governmental roles the Arizona Constitution clearly granted
26 to another branch of government.

27 Here, the Arizona Legislature is tasked with the creation of substantive laws. While the

⁷ Article IV, Section 5 of the Arizona State Constitution provides “[t]he supreme court shall have...[p]ower to make rules relative to all procedural matters in any court.”

1 Courts enforce the laws passed by the Legislature, it is the Legislature that creates substantive law.
2 Substantive law creates and defines rights, while procedural law prescribes the method by
3 which substantive law is enforced or implemented.⁸

4 In March of 2020, Congress passed The Coronavirus Aid, Relief, and Economic Security
5 Act, 15 U.S.C.A. §§ 9001–3141 (2020) (“CARES Act”), which was signed into law by President
6 Trump on March 27, 2020. 15 U.S.C.A. § 9058(c) (2020) provides

7 The lessor of a covered dwelling unit...(1) may not require the tenant to vacate the
8 covered dwelling unit before the date that is 30 days after the date on which the
9 lessor provides the tenant with a notice to vacate; and (2) may not issue a notice to
10 vacate under paragraph (1) until after the expiration of the period described in
subsection (b).

11 Petitioners have interpreted and seek to have this Court interpret the language within 15
12 U.S.C.A. § 9058(c) (2020) to mean “the CARES Act requires [a] pre-eviction notice of 30 days.”⁹
13 Petitioners have requested this Court amend RPEA Rule 5(d) to require landlords to provide a 30
14 day notice to vacate and wait for said notice to expire before filing an eviction action and include
15 within the complaint a declaration verifying compliance or inapplicability with the CARES Act,
16 among other items.¹⁰ There are a few problems with this request.

17 First, this Court is not permitted to

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19 [a]dopt or enforce a rule or policy that requires a mandatory or technical form for
20 providing notice or for pleadings in an action for forcible entry or forcible or special
21 detainer. The form of any notice or pleading that meets statutory requirements for
content and formatting of a notice or pleading is sufficient to provide notice and to
pursue an action for forcible entry or forcible or special detainer.

22 See A.R.S. § 12-1175(D). As the Petition itself seeks to have landlords add more information to
23 the curable notice of breach of contract for non-payment of rent as required by A.R.S. § 33-
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27 ⁸ *Daou v. Harris*, 139 Ariz. 353, 358, 678 P.2d 934, 939 (1984)

⁹ Pet., at 11:23-25.

¹⁰ Pet., at 8–9.

1 1368(B), the Petition must fail.¹¹

2 Second, Petitioner argue, at great length, about alleged disparities between Landlords and
3 Tenants, the lack of legal representation of Tenants, and the pace by which evictions proceed in
4 Arizona. Petitioners have grave concerns about the eviction process in Arizona and have,
5 historically, pushed for measures to increase the amount of time it takes to evict a tenant in Arizona
6 for non-payment of rent. The Petition is yet another vehicle by which they try to push this
7 legislative agenda. The Petition points out that “out of 1,097 cases observed, 94% of landlords
8 were represented by an attorney in court, while only 2 tenants were represented by an attorney.”¹²
9 Whether that is true or not, what relevance does such a fact have on a procedural rule change?
10 The plain answer, it doesn’t. Instead, it is one of several attempts by the Petitioners to argue for a
11 change in the eviction process as a whole, not just the process by which the Court enforces the
12 law. As Petitioners have not been successful in their legislative agenda, they have attempted to
13 argue to this Court that it should adopt this rule to slow down evictions. Again, this is substantive
14 over procedural, a hurdle Petitions cannot overcome.

15 Third, Petitioners argue that this Court should find persuasive courts in other jurisdictions
16 that found the notice requirement in 15 U.S.C.A. § 9058(c) to require a 30-day notice to vacate in
17 non-payment of rent evictions.¹³ This argument is flawed. For one, as Justice of the Peace Gerald
18 Williams correctly points out in his response, the cases cited do not seem to have considered the
19 issue that Arizona faces. It appears none of those jurisdictions had an administrative order from
20 their Supreme Court which permitted the enforcement of 15 U.S.C.A. § 9058(c) to affect the
21 issuance date of the writ, not the content of the notice itself.
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24 ¹¹ The notice itself must be, by the very construct of this rule, a 30-day cure period which offends
25 A.R.S. § 33-1368(B) and would need to be labeled as a CARES Act Notice to achieve the
“transparency” Petitioners argue is needed.

26 ¹² Pet., 14:2-5.

27 ¹³ If this Court were to find the outcomes in other jurisdictions persuasive, Commenting Party
suggests this Court consider what the New Jersey Supreme Court did when it decreed the notice
requirements under 15 U.S.C.A. § 9058(c) moot.

(<https://www.njcourts.gov/sites/default/files/notices/2023/08/n230825a.pdf>) accessed on
April 22, 2024.

1 Second, this Court previously issued an administrative order that permitted the
2 modification of the writ to comply with U.S.C.A. § 9058(c) in Administrative Order 2022-14, a
3 practice Petitioners seek to abolish. By so doing, this Court gave effect to the plain language of
4 U.S.C.A. § 9058(c) which required notice to vacate not notice to vacate and cure. What is
5 implicit in the Petition is contention that this Court was wrong in its interpretation of 15 U.S.C.A.
6 § 9058(c) and that this Court sanctioned thousands of improper evictions. Such a position is
7 absurd and should be summarily rejected by this Court.

8 Based on the above, it is evident that the Petition seeks a substantive change in Arizona
9 law, not a change in the procedure by which the Court enforced said law. Pursuant to Arizona law
10 this Court is an inappropriate forum to effectuate that change and this Court is unable to approve
11 the Petitioner's modification request to RPEA Rule 5(d).

12 **IV. PETITIONERS HAVE SOUGHT TO EXPAND THE PLAIN MEANING OF**
13 **THE CARES ACT.**

14 15 U.S.C.A. § 9058(c) discusses a notice to vacate, not a notice to cure. 15 U.S.C.A. §
15 9058(c) provides the following:

16 The lessor of a covered dwelling unit--

17 (1) may not require the tenant to vacate the covered dwelling unit before the
18 date that is 30 days after the date on which the lessor provides the tenant with a
19 notice to vacate; and

20 (2) may not issue a notice to vacate under paragraph (1) until after the
21 expiration of the period described in subsection (b).

22 The Petition seems to confuse vacate and cure and, as a result, has sought to expand the clear
23 language in the statute at issue.

24 Arizona law affords a tenant five days to cure a breach of the lease for non-payment of
25 rent.¹⁴ Tenants in default of their rent must cure this breach within five days of their receipt of
26 the notice of default else Landlord may proceed with the commencement of a special detainer
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¹⁴ See A.R.S. § 33-1368(B).

1 action.¹⁵ At the time of the commencement of a special detainer action, a Tenant retains the right
2 to cure the breach by remitting, in full, all amounts owed at that time under the lease including
3 outstanding rent, utilities, and late fees as well as payment of any of Landlords incurred court costs
4 and attorney's fees.¹⁶ Arizona is a cure jurisdiction, as such, delaying the date by which a notice
5 for non-payment of rent can be filed with the Court prolongs the cure period beyond that which
6 the Legislature intended and creates fundamental constitutional concerns, namely equal protection
7 and fair and just application of the law. Tenants at non-CARES Act covered properties would
8 find themselves with the statutory cure period to pay rent to avoid the commencement of an
9 eviction action while those who found themselves in a CARES Act covered property would be
10 subject to a cure period six (6) times the length of the non-CARES Act covered tenant. Such a
11 disparate treatment should not be sanctioned by the Court and approved through this rule change.

12 Cannons of statutory interpretation require that statutes be given their plain meaning.
13 Arizona courts begin by reading the statute's words "neither narrowly nor liberally, but rather
14 according to the plain meaning of the words in their broader statutory context." ¹⁷ "In construing
15 a specific provision, we look to the statute as a whole and we may also consider statutes that are *in*
16 *pari materia*—of the same subject or general purpose—for guidance and to give effect to all of the
17 provisions involved." ¹⁸ Where possible, Arizona courts give meaning "to every word and
18 provision so that no word or provision is rendered superfluous."¹⁹

19 In this matter, 15 U.S.C.A. § 9058(c) requires notice to **vacate**. While there was a drafting
20 error in the bill which has left this *temporary* measure in effect well after the end of the COVID-19
21 Pandemic, we are left with the language as is until current legislation in the House of
22 Representatives is fully passed and signed into law. As such, we must look at the actual language
23 used in the statute.
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26 ¹⁵ Id.

27 ¹⁶ Id.

¹⁷ *S. Ariz. Home Builders Ass'n v. Town of Marana*, 254 Ariz. 281, 286 ¶ 31 (2023).

¹⁸ *Stambaugh v. Killian*, 242 Ariz. 508, 509 ¶ 7 (2017)

¹⁹ *Nicaise v. Sundaram*, 245 Ariz. 566, 568 ¶ 11 (2019).

1 15 U.S.C.A. § 9058(c) provides that a thirty (30) day notice to vacate must be provided.
2 Presumably, Congress knows the difference between *cure* and *vacate*. The exclusion of the word
3 *cure* leaves us with only the word *vacate* to review. According to Merriam-Webster, the word *vacate*
4 is a transitive verb which means either a) to deprive of an incumbent or occupant or b) to give up
5 the incumbency or occupancy of.²⁰ According to the current practice, Tenants at CARES Act
6 covered properties are given thirty (30) days from the date the non-payment of rent notice is issued
7 before they can be locked out through the writ of restitution, a practice that is in harmony with 15
8 U.S.C.A. § 9058(c). What Petitioners have argued for is not in harmony with 15 U.S.C.A. § 9058(c)
9 and would result in a substantive change in Arizona law.

10 By operation of Arizona law, the Petition seeks to expand the cure period by requiring
11 Landlords to issue the thirty-day notice of non-payment and demand to vacate and waiting for
12 same to expire. The Petition, on its face, has read into 15 U.S.C.A. § 9058(c) a cure right beyond
13 what Arizona law requires. Petitioners have not, nor can they, explained how the prior guidance
14 from this Court under Administrative Order 2022-14 does not give 15 U.S.C.A. § 9058(c) its full
15 force and weight. Petitioners have made clear that their desire is to slow down the eviction process,
16 the Petition is just one of several vehicles by which Petitioners hope to accomplish this political
17 endeavor. This Court should not be persuaded by this and should, consistent with the canons of
18 statutory interpretation in Arizona, give 15 U.S.C.A. § 9058(c) its full weight and effect by denying
19 the Petition and allowing the trial courts in Arizona, with the exception of Pima County, to govern
20 themselves as they have chosen proper based on prior guidance from this Court in Administrative
21 Order 2022-14.
22

23 **V. PETITION IGNORES WHOM THE AGGRIEVED PARTY IS IN AN**
24 **EVICITION ACTION.**

25 Although not popular actions, there is a common misconception that Tenants are the
26 aggrieved parties in an eviction action. Members of our legislature both on the state level and
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²⁰ <https://www.merriam-webster.com/dictionary/vacate> (accessed on April 22, 2024)

1 federal level as well as several media outlets and, most especially, the Petitioners, feel as though
2 Tenants are the victim in an eviction, not the aggrieved landlord who isn't being paid.

3 For far too long, Landlords have been cast as the super-rich fat cats looking to oust
4 financially vulnerable adults from their homes. These narratives ignore the realities of the situation.
5 Most Landlords are not institutional high-value owners. Instead, nearly 60% of all landlords in
6 this country are small mom and pop landlords.²¹ As the economy tightens, it tightens on us all.
7 Far too many stories were published during the COVID-19 pandemic of the catastrophic
8 consequences owners of properties faced with tenants seeking the illegal protections offered by
9 the Centers for Disease Control through their unconstitutional attempt to expand the moratorium,
10 seemingly indefinitely.²²

11 Commenting Party is not unsympathetic to the economic realities of today and the effects
12 inflation and the economic slowdown has had on all Arizonans. However, Commenting Party
13 believes in the rule of law. Contracts provide the basic fundamental agreement between the
14 contracting parties as to their respective duties. When those duties are breached, the non-
15 breaching party should have recourse in a court of law and should not face obstacles because of
16 political narratives concerning its adversary. The financial difficulties of one party does not excuse
17 that party's performance under the contract. However, reviewing the Petition, it is the Tenant
18 who is the victim, not the Landlord who has been deprived of rent, rent that pays for items such
19 as the mortgage, taxes, utilities, upkeep and maintenance, etc. Petitioners seem to live in a world
20 where these obligations get paid regardless of the number of tenants that don't pay their rent and
21 seem to believe that Arizona landlords can simply delay the filing process and add additional
22 months of rental loss onto their books to accomplish a political agenda, an agenda that Petitioners
23 cannot get passed through the legislature. This is not how the law works and, as attorneys, we
24 expect that the law be fair and impartial. As such, whatever hardships Tenants may face, the Court

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27 ²¹ <https://www.forbes.com/sites/forbesrealestatecouncil/2020/05/12/dont-forget-the-mom-and-pops-how-crises-can-negatively-affect-small-investors/?sh=73eb54444dae> (accessed on April 22, 2024)

²² Id.

1 must view the case through its specific facts and not seek to compensate by expanding the time to
2 cure or otherwise delaying proceedings to benefit one party to the detriment of the other.

3 **VI. CONCLUSION.**

4 Petition and the proposed rule change should be denied because Petition is a substantive
5 rule change disguised as a procedural change. Further, Petitioners seek to have this Court enforce
6 notice and pleading requirements that go beyond the limitations in Arizona statute, requirements
7 that this Court is estopped from creating and enforcing. Lastly, the Petition seeks to fundamentally
8 alter 15 U.S.C.A. § 9058(C) to fit its desired result and has provided no evidence that the current
9 court practice in play of extending the writ of restitution date, as approved by this Court in the
10 aftermath of the CARES Act, does not achieve the legislative intent of 15 U.S.C.A. § 9058(c).

11 RESPECTFULLY SUBMITTED THIS DATE, the 1st of May 2024,

12 **CLARK & WALKER, P.C.**

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14 By /s/ Christopher R. Walker, (AZBN 028977)
15 Christopher R. Walker, Esq.
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