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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

Petition to Amend 5(d), Rules of
Procedure for Eviction Actions

Arizona Supreme Court No. R-24-0024

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

Pursuant to Rule 28(e) of the Rules of the Supreme Court of Arizona, Disability Rights Arizona (DRAZ), formerly the Arizona Center for Disability Law, respectfully submits this comment in support of Petition R-24-0024 (the Petition), filed by the William E. Morris Institute for Justice, Community Legal Services, DNA People's Legal Services, and Southern Arizona Legal Aid (Petitioners). The Petition appropriately proposes amending Rule 5(d) of the Rules of Procedure for Eviction Actions (RPEA) to provide eviction courts and tenants with the information necessary to determine whether a particular property is covered by the CARES Act notice provision, 15 U.S.C. § 9058(c)(1).

DRAZ is a non-profit law firm that provides free legal and advocacy services to

Arizonans with disabilities who meet grant requirements. DRAZ is also the federally-designated Protection and Advocacy agency for Arizona. DRAZ's mission is to assist Arizonans with disabilities to promote and protect their legal rights to independence, justice, and equality. Protection and Advocacy agencies throughout the United States work towards ensuring that the human and civil rights of persons with disabilities are protected. DRAZ represents individuals and classes of individuals in negotiations, administrative proceedings, alternative dispute resolution, and litigation. For the past decade, one of DRAZ's areas of focus is addressing discriminatory housing practices that prevent or burden people with disabilities from living in the housing of their choice.

As explained below, covered housing programs under the CARES Act include programs specifically designed for people with disabilities, and tenants with disabilities are more likely to reside in federally assisted housing in general. Inconsistent and incomplete enforcement of the CARES Act notice provision has had a devastating disparate impact on tenants with disabilities in Arizona. The rule change proposed by the Petition is well within this Court's rulemaking authority to create a procedural rule for implementation of the substantive requirements of the plain meaning of federal law. The proposed rule change is urgently needed and should be addressed during this year's Rules Agenda.

I. The lack of consistent enforcement of the CARES Act 30-day notice requirement has had a devastating disparate impact on Arizona tenants with disabilities.

The CARES Act notice provision is federal law providing for a heightened pre-eviction notice period for tenants of certain covered properties whose landlords receive

substantial federal financial assistance. 15 U.S.C. § 9058. Landlords of covered properties may not “require the tenant to vacate before the date that is 30 days after the date on which the lessor provides the tenant with a notice to vacate.” 15 U.S.C. § 9058(c)(1).

There are two major groups of properties covered by the CARES Act. The first group are properties participating in a long list of federally funded housing programs administered by the U.S. Department of Housing and Urban Development (HUD) and enumerated in the definitions section of the Violence Against Women Act (VAWA), 34 U.S.C. § 12491(a)(3).¹ Covered properties include, among others, those participating in HUD’s Section 811 program to provide supportive housing for persons with disabilities, HUD’s program for homeless veterans with special needs, HUD’s Housing Choice Voucher program, as well as traditional public housing.² The second major group of covered properties are those properties that have a federally backed mortgage loan or federally backed multifamily mortgage loan. 15 U.S.C. § 9058(a)(2)(B).

The lawful method by which Arizona landlords may require a tenant to vacate for alleged violation of a lease agreement is by providing a proper notice and then terminating the lease agreement by bringing a judicial action for eviction. *See* A.R.S. §§ 33-1368; 33-1377. Under the plain meaning of the CARES Act notice provision, a landlord may not require a tenant to vacate until “30 days after the date on which the lessor provides the tenant with a notice to vacate.” 15 U.S.C. § 9058(c)(1). Accordingly, a landlord of a

¹ The list of covered housing programs under VAWA are explicitly incorporated by reference in the CARES Act. 15 U.S.C. § 9058(a)(2)(A)(i).

² 34 U.S.C. § 12491(a)(3).

covered property must wait for 30 days after giving a notice to vacate before bringing a judicial action for eviction to enforce the demand to vacate.

The Colorado Supreme Court and intermediate courts of appeals in Ohio, Indiana, and Washington have each held in published opinions that a 30-day notice is required before a landlord in those states may bring a judicial action to evict a tenant from a covered property for nonpayment of rent.³ Although some commenters argue that the proposed rule would resolve an unsettled question of law, undersigned counsel is aware of no court of record in any state which has reached a different conclusion.

The additional notice period granted tenants whose landlords receive significant federal financial assistance and are therefore covered by the CARES Act are particularly important for many tenants with disabilities. Not only do CARES Act covered properties include properties participating in subsidized housing programs designed specifically for individuals with disabilities, but HUD-assisted households in general are more than twice as likely as non-assisted households to include an individual with a disability.⁴

³ See *Sherwood Auburn LLC v. Pinzon*, 24 Wash. App. 2d 664, 521 P.3d 212 (Wash. Ct. App. 2022), *review denied*, 526 P.3d 848 (2023); *Olentangy Commons Owner LLC v. Fawley*, 2023-Ohio-4039, 228 N.E.3d 621 (2023 Ct. App. Ohio); *In re Arvada Village Gardens LP v. Garate*, 2023 Colo. 24, ¶ 17, 529 P.3d 105 (2023); *Hazelwood v. Common Wealth Apartments*, 23A-EV-1404, 2024 WL 1223521 (Ind. Ct. App. 2024). The only federal court to have confronted the issue concurred. *Watson v. Vici Community Dev. Corp.*, W.D.Okla. No. CIV-20-1011-F, 2022 WL 910155 (Mar. 28, 2022) (“The CARES Act requires certain landlords to give tenants at least 30 days’ notice to vacate a covered dwelling before filing a petition for eviction.”) The Pima County Superior Court has reached the same conclusion, as noted in the Comment of the Maricopa County Justice of the Peace Bench at 6, n.8. Although all courts of record to have considered the matter appear to concur that a 30-day pre-eviction notice is required in nonpayment cases, there is some dispute in the caselaw as to whether the same is also true for eviction cases arising from other types of alleged lease violations. Compare *Pendleton Place, LLC v. Asentista*, 541 P.3d 397 (Wash. Ct. App. 2024) with *Hous. Auth. of Cnty. of King v. Knight*, 543 P.3d 891 (Wash. Ct. App. 2024).

⁴ U.S. Government Accountability Office, *HUD Rental Assistance: Serving Households with*

Arizona eviction courts are clogged with actions seeking eviction of tenants with disabilities for reasons directly related to disability. For example, people with disabilities may face eviction for nonpayment of rent stemming from an interruption in disability benefits, which can be caused by administrative error on the part of Social Security Administration or a tenant's bank. Similarly, people with disabilities are at a higher risk of missing work due to hospitalization or deterioration of a disability-related medical condition, leading to a loss of income and nonpayment of rent.

Where the CARES Act is not applicable or not properly enforced, only a five-day notice period and opportunity to cure the alleged nonpayment before facing eviction is available in nonpayment cases. *See* A.R.S. § 33-1368(A)(2). Five days is commonly insufficient for a tenant with a disability to resolve a disability-related lapse in income from either benefits or employment. Tenants with disabilities may be hospitalized or otherwise incapacitated for the entire five-day cure period. In contrast, when the CARES Act is properly enforced as to covered properties, a disabled tenant has a realistic shot at remedying a lapse of income due to the expanded protections provided by the CARES Act notice provision.

Tenants with disabilities also routinely face eviction for alleged noncompliance with a lease agreement even when current on rent. Tenants who rely on service animals or emotional support animals are routinely sued for eviction when landlords

Disabilities, GAO-23-106339 (March 29, 2023), available at <https://www.gao.gov/assets/gao-23-106339.pdf>

misunderstand or ignore the requirements of the Fair Housing Act. Tenants with mental health disabilities, or developmental disabilities such as autism, that may lead to making noises face eviction for being too loud.⁵ Tenants with disabilities may face eviction for failing to maintain landscaping or housekeeping while hospitalized or otherwise incapacitated due to their disability. Tenants with intellectual or cognitive disabilities, traumatic brain injuries, or mental health disabilities regularly face eviction from CARES Act covered properties because of disability-related barriers to complying with burdensome HUD-program reporting and recertification requirements.

In all of these cases where tenants are evicted for reasons directly related to their disability, tenants have the right to request reasonable accommodations which may be necessary to allow for equal opportunity to remain housed.⁶ Tenants also have the right to assert a reasonable accommodation defense in eviction court.⁷ However, because of the summary nature of eviction proceedings and the lack of attorney representation of tenants, these viable defenses are commonly not raised, leading many tenants with disabilities to be unnecessarily evicted and frequently rendered unhoused.⁸

⁵ For example, children with autism or ADHD living in the household may make self-stimming vocalizations to soothe themselves or drown out offensive sounds or an individual with severe anxiety may pace during the night.

⁶ See 42 U.S.C. 3604(f)(3) (Fair Housing Act); A.R.S. § 41-1491.19(E) (Arizona Fair Housing Act) (defining as unlawful disability discrimination the failure to “make reasonable accommodations in rules, practices or services” when necessary to provide people with disabilities equal access to housing)

⁷ See *Douglas v. Kriegsfeld Corp.*, 884 A.2d 1109, 1129 (D.C. 2005) (discussing requirements for establishing a reasonable accommodation defense to eviction under the Fair Housing Act); see also *Miller v. Amos*, 2024 CO 11, ¶ 31, 543 P.3d 393, 401 (2024) (concluding that state fair housing act provided affirmative defense in state eviction action).

⁸ See Meghan P. Carter, *How Evictions from Subsidized Housing Routinely Violate the Rights of Persons with Mental Illness*, 5 Nw. J. L. & Soc. Pol'y. 118 (2010).

When the CARES Act notice requirement is properly enforced, individuals with disabilities face much better prospects of curing alleged lease violations that are related to tenants' disabilities. Tenants have additional time to request reasonable accommodations that may be sufficient to cure a lease violation, for example additional time to perform landscaping or housekeeping requirements, to request housekeeping services from a social service agency, or to install soundproofing measures. Even without requesting a reasonable accommodation, the 30-day cure period imposed on covered properties by the CARES Act notice provision may allow a tenant who is hospitalized or incapacitated sufficient time to obtain assistance from family, friends, or social services providers to cure a lease violation. And even if the lease violation cannot in a particular circumstance be cured, the 30-day period allows tenants with disabilities a chance to salvage their belongings, vacate, and locate alternative housing without facing a judicial action for eviction and the collateral consequences of a judgment of eviction.

II. The alternative interpretation of the CARES Act notice provision adopted by some Justice Courts in Arizona is not consistent with the plain meaning of the statute.

The Maricopa Justice of the Peace Bench commented that it does not interpret the CARES Act notice provision to preclude the filing of an eviction action until the 30-day notice period expires. Instead, they have interpreted the notice provision as merely requiring the eviction court to postpone issuance of a writ of restitution, the formal order from a court to a constable to have a tenant physically evicted from their property. That bench therefore currently allows landlords to file judicial actions for evictions from

covered properties before expiration of a 30-day notice period. This practice is contrary to the plain meaning of the CARES Act notice provision.⁹

The CARES Act notice provision explicitly provides that the “lessor” of a covered property may not require a tenant to vacate until the expiration of a 30-day notice period. 15 U.S.C. § 9058(c)(1). The statutory mechanism in Arizona for a lessor to require a tenant to vacate is by filing an action for eviction after giving proper notice. *See* A.R.S. §§ 33-1368; 33-1377. The court merely enforces that requirement by issuing a writ of restitution if the landlord succeeds in its eviction lawsuit and the tenant has not already vacated. A.R.S. § 33-1377(F) (“If the defendant is found guilty, the court shall give judgment for the plaintiff for restitution of the premises . . . and shall grant a writ of restitution”). Whereas a landlord requires a tenant to vacate by providing proper notice and filing an action for eviction, it is the court who issues a writ of restitution.

To interpret the notice provision in the manner suggested by the Maricopa Justice of Peace Bench would rewrite the statutory language of the CARES Act to replace the prohibition that the “lessor” not require a tenant to vacate for thirty days with a different requirement, not present in the statutory text, that a *court* not require a tenant to vacate for thirty days. *See Sherwood Auburn LLC v. Pinzon*, 673, 521 P.3d 212, 217 ¶ 15 (Ct.

⁹ The Courts of Appeals of Ohio and Washington have each published opinions reversing trial courts that interpreted the CARES Act notice provision in the same manner as Maricopa Justice Court Bench, holding that this interpretation is contrary to plain meaning of the statutory text. *See Sherwood Auburn LLC v. Pinzon*, 24 Wash. App. 2d 664, 521 P.3d 212 (2022), *review denied*, 526 P.3d 848 (Wash. Ct. App. 2023); *Olentangy Commons Owner LLC v. Fawley*, 2023-Ohio-4039, ¶ 40, 228 N.E.3d 621, 633 (2023 Ct. App. Ohio).

App. Wash. 2022) (“The CARES Act notice provision clearly prohibits the lessor (the beneficiary of the federal financial assistance)—not a state trial court—from requiring a tenant to vacate a covered housing unit prior to expiration of the notice period.”); *see also Olentangy Commons Owner LLC v. Fawley*, 228 N.E.3d 621, 633 ¶ 40 (2023 Ct. App. Ohio) (“[T]he actor prohibited from requiring the tenant to vacate is ‘the lessor,’ not the court or law enforcement officers”).

Moreover, the point of an eviction action in Arizona is to provide a “speedy and adequate remedy for obtaining possession of the premises withheld by a tenant.”¹⁰ The primary purpose of a special detainer action is to determine the right to “actual possession,” i.e. immediate possession of the premises.¹¹ But a landlord who cannot “require the tenant to vacate” under the CARES Act notice provision has no present right to possession. The Maricopa Justice of the Peace Bench’s interpretation allows landlords who have no present right of possession of the premises to nonetheless obtain a judgment of eviction in violation of the limited statutory purpose of an eviction action.

The interpretation suggested by the Maricopa Justice of the Peace Bench also conflicts with caselaw from Arizona appellate courts strictly construing eviction notice requirements and holding that the giving of a proper notice is a prerequisite to filing a suit for eviction.¹² It also conflicts with the requirement that eviction courts “shall dismiss”

¹⁰ *Iverson v. Nava*, 248 Ariz. 443, 448, 461 P.3d 463, 468 (Ct. App. 2020) (quoting *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 204, 167 P.2d 394 (1946)).

¹¹ *See* A.R.S. § 33-1377(D) (“*In addition to determining the right to actual possession, the court may assess damages, attorney fees and costs as prescribed by law*”) (emphasis added).

¹² *See Alton v. Tower Cap Co.*, 123 Ariz. 602, 601 P.2d 602 (Ariz. 1979); *Bank of New York Mellon v. De Meo*, 227 Ariz. 192, 254 P.3d 1138 (Ariz. App. 2011)

an eviction complaint if all proper notices and opportunities to cure were not provided prior to the filing of a suit for eviction. *See* RPEA 13(a)(2).

The interpretation offered by the Maricopa County Justice of the Peace Bench is not supported by the plain meaning of the CARES Act notice provision's statutory language. This Court is well within its constitutional rulemaking authority to create a procedural rule to implement the plain meaning of substantive federal law. Such action is desperately needed to provide courts and tenants with the information necessary to determine whether a particular property is covered by the CARES Act. DRAZ respectfully urges that the Court adopt the proposed rule change during this year's Rules Agenda.

RESPECTFULLY SUBMITTED this 1st day of May, 2024.

/s/ Joseph Falcon-Freeman
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DISABILITY RIGHTS ARIZONA