

1 Lisa M. Panahi, Bar No. 023421
2 General Counsel
3 State Bar of Arizona
4 4201 N. 24th Street, Suite 100
5 Phoenix, AZ 85016-6288
6 (602) 340-7236

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

9 In the Matter of:

10 **PETITION TO AMEND RULE 5(d)**
11 **OF THE ARIZONA RULES OF**
12 **PROCEDURE FOR EVICTION**
13 **ACTIONS**

Supreme Court No. R-24-0024

STATE BAR OF ARIZONA
COMMENT

14 Pursuant to Rule 28(e) of the Arizona Rules of the Supreme Court, the State
15 Bar of Arizona (“State Bar”) submits this comment in opposition to the Petition filed
16 by Community Legal Services, DNA People’s Legal Services, Southern Arizona
17 Legal Aid, and the William E. Morris Institute, to amend Rule 5(d) of the Rules of
18 Procedure for Eviction Actions that seeks to address a federal notice provision in the
19 CARES Act that may apply to certain landlords in eviction actions. On the other
20 hand, if the Supreme Court believes that eviction action complaints should advise
21 tenants of the CARES Act, the State Bar suggests alternative language to the rule
22 Petition.
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1 **I. THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY**
2 **ACT**

3 Section 4024 of the federal Coronavirus Aid, Relief, and Economic Security
4 Act (“CARES Act”), Pub. L. No. 116-136, 134 Stat. 281, Title IV, Subtitle A (2020),
5 added 15 U.S.C. § 9058 to the U.S. Code. The title of the statute is “Temporary
6 moratorium on eviction filings.” Subsection (c)(1) of the CARES Act prevents
7 landlords in eviction actions concerning rentals of federally covered dwellings from
8 “requir[ing] the tenant to vacate the covered dwelling unit before the date that is 30
9 days after the date on which the lessor provides the tenant with a notice to vacate....”
10 15 U.S.C. § 9058(c)(1). Subsection (b) of the CARES Act imposed a moratorium
11 on certain evictions from the date of its enactment, March 27, 2020, for 120 days,
12 which was July 24, 2020.

13 While the moratorium provision in subsection (b) of the CARES Act
14 contained a sunset provision (120 days after enactment), the notice requirement in
15 subsection (c)(1) did not. The Colorado Supreme Court recently held that “the
16 Notice Provision [15 U.S.C. § 9058(c)(1)] includes no expiration date.” *Arvada Vill.*
17 *Gardens LP v. Garate*, 529 P.3d 105, 108, ¶ 13 (Col. 2023). Neither the Arizona
18 Court of Appeals nor Supreme Court has addressed this issue.

19 Legislation referred to as the “Respect State Housing Law Act” has been
20 introduced into the U.S. House of Representatives to repeal subsection (c) of the
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CARES Act. *See* 2023 Congress, U.S. HR 802 (“Section 4024 of the CARES Act (15 U.S.C. 9058) is amended by striking subsection (c).”). It does not appear any action has been taken on the bill since its introduction on February 2, 2023.

II. ARIZONA’S RESIDENTIAL LANDLORD AND TENANT ACT REQUIRES NOTICE BEFORE FILING AN EVICTION ACTION

In Arizona, a person who retains possession of leased premises after their tenancy ends commits forcible detainer. A.R.S. § 12-1173(1). Under Arizona’s Residential Landlord and Tenant Act, “[i]f rent is unpaid when due and the tenant fails to pay rent within five days after written notice by the landlord of nonpayment and the landlord’s intention to terminate the rental agreement if the rent is not paid within that period of time, the landlord may terminate the rental agreement by filing a special detainer action pursuant to section 33-1377.” A.R.S. § 33-1368(B).

If the tenant is found guilty of forcible detainer, the court enters judgment in favor of the landlord for restitution of the premises. A.R.S. § 33-1377(F). The judgment is enforced by a writ of restitution, which is issued five days after entry of judgment. A.R.S. § 12-1178(A). The constable executes a writ of restitution issued by the justice court, while the sheriff executes a writ of restitution issued by the superior court. A person who remains in or returns to the premises after having been served with a writ of restitution commits third degree criminal trespass. A.R.S. § 12-1178(D).

1 Arizona courts have described a forcible detainer action as “a summary,
2 speedy and adequate statutory remedy for obtaining possession of premises by one
3 entitled to actual possession.” *Carrington Mortgage Services LLC v. Woods*, 242
4 Ariz. 455, 456, ¶ 6 (App. 2017). A forcible detainer action does not “bar an action
5 for trespass, damages, waste, rent, or mesne profits.” A.R.S. § 12-1183.
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7 The Arizona Supreme Court enacted the Rules of Procedure for Eviction
8 Actions to “govern the procedure in the superior courts [*sic*] and justice courts
9 involving forcible and special detainer actions.” R.P.E.A. 1. Rule 5, which is the
10 rule the petition seeks to amend, sets forth what must be included in the summons
11 and complaint in an eviction action. Many of the requirements in Rule 5 as to what
12 must be included in the complaint are intended to advise tenants of their rights in a
13 special or forcible detainer action.
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16 **III. THE CARES ACT EVICTION NOTICE REQUIREMENTS**

17 As mentioned above, Arizona’s Residential Landlord and Tenant Act requires
18 the landlord to give the tenant five days’ notice before filing an eviction action.
19 However, if the dwelling unit is subject to the CARES Act, subsection (c)(1) requires
20 the landlord to give the tenant 30 days’ notice before “requir[ing] the tenant to vacate
21 the covered dwelling unit.”
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24 The CARES Act does not include a remedy if landlord violates subsection (c),
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1 nor does it state it is intended to be a defense to an eviction action. Indeed, subsection
2 (c) of the CARES Act does not reference state court eviction actions in any way. On
3 the other hand, subsection (b) of the CARES Act—the moratorium provision that
4 expired on July 24, 2020—does address eviction actions. Congress did not extend
5 that CARES Act moratorium provision beyond its July 24, 2020 end date. *Arvada*
6 *Vill. Gardens LP*, 529 P.3d at 108, ¶ 13.
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9 Shortly after the CARES Act moratorium ended, the CDC, on September 4,
10 2020, imposed a different eviction moratorium via administrative order, entitled
11 “Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-
12 19.” *See* 85 F.R. 55292-01. (“Under this Order, a landlord, owner of a residential
13 property, or other person with a legal right to pursue eviction or possessory action,
14 shall not evict any covered person from any residential property in any jurisdiction
15 to which this Order applies during the effective period of the Order.”). Although
16 this moratorium was set to expire on September 4, 2020, Congress extended it
17 through January 31, 2021. PL 116-260, 134 Stat 1182, § 502 (December 27, 2020)
18 (42 U.S.C. § 264 note) (“The order issued by the Centers for Disease Control and
19 Prevention under section 361 of the Public Health Service Act (42 U.S.C. 264),
20 entitled ‘Temporary Halt in Residential Evictions To Prevent the Further Spread of
21 COVID–19’ (85 Fed. Reg. 55292 (September 4, 2020)) is extended through January
22 31, 2021, notwithstanding the effective dates specified in such Order.”). The CDC
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1 then extended it through March, then June, and then July, 2021 by administrative
2 order. 86 F.R. 8020, 16731, 34010. The CDC announced on August 3, 2021 that it
3 would be extending eviction moratorium through October 3, 2021 for counties
4 experiencing substantial and high levels of community transmission levels of SARS-
5 CoV-2.
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7 While in effect, the CDC's administrative moratorium carried criminal
8 penalties for anyone who violated it. 85 F.R. 55292-01, 55296 (“[A] person violating
9 this Order may be subject to a fine of no more than \$100,000 if the violation does
10 not result in a death or one year in jail, or both, or a fine of no more than \$250,000
11 if the violation results in a death or one year in jail, or both, or as otherwise provided
12 by law.”). The U.S. Supreme Court ended any further extensions of the
13 administrative moratorium in its August 26, 2021 ruling in *Alabama Ass’n of*
14 *Realtors v. Dep’t of Health & Human Services*, 141 S. Ct. 2485 (2021). It was not
15 until the administrative eviction moratorium ended that the 30-day eviction notice
16 provision became operative and relevant.
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20 While the Supreme Court decision addressed the administrative moratorium
21 instead of the CARES Act, its analysis may be useful in addressing the issues raised
22 in the Petition. The Supreme Court found that the moratorium “intrude[d] into an
23 area that is the particular domain of state law: the landlord-tenant relationship.” *Id.*
24 at 2489. As such, Congress would have to “enact exceedingly clear language if it
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1 wishes to significantly alter the balance between federal and state power and the
2 power of the Government over private property.” *Id.* The Court further noted that
3 the administrative moratorium “put the applicants, along with millions of landlords
4 across the country, at risk of irreparable harm by depriving them of rent payments
5 with no guarantee of eventual recovery. And preventing them from evicting tenants
6 who breach their leases intrudes on one of the most fundamental elements of
7 property ownership—the right to exclude.” *Id.*
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10 **IV. THE PETITION SEEKS TO ESTABLISH, BY RULE, THAT THE**
11 **LONGER CARES ACT NOTICE REQUIREMENT SUPERSEDES**
12 **ARIZONA’S NOTICE REQUIREMENT.**

13 The Petition seeks to require the landlord to: (1) provide the tenant with the
14 CARES Act notice 30 days before filing the eviction action; and (2) verify in the
15 forcible detainer action complaint that it has complied with the CARES Act 30-day
16 notice requirement. If the landlord does not comply with these requirements, the
17 petition would require the court to dismiss the eviction action as the remedy for
18 noncompliance.
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21 **V. THE STATE BAR OPPOSES THE PETITION AS DRAFTED**

22 The State Bar opposes the proposed amendment to R.P.E.A. 5(d) because it
23 would create a direct conflict between existing Arizona law and seeks to resolve
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1 disputed legal issues as to how the CARES Act affects Arizona’s eviction statutes
2 without the Arizona courts having addressed those issues on the merits.
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4 **A. The Petition is in direct conflict with existing Arizona law.**

5 The Arizona Residential Landlord Tenant Act requires a landlord to provide
6 five days’ before filing a forcible detainer action. A.R.S. § 33-1368(B). As
7 explained at length, above, the CARES Act imposes a 30-day notice requirement.
8 15 U.S.C. § 9058(c)(1). Putting aside the issue discussed in the next section
9 regarding what the CARES Act’s 30-day period measures, the proposed rule change
10 in the Petition would put the Rules of Procedure for Eviction Actions in direct
11 conflict with A.R.S. § 33-1368(B). It is possible that, as the Petition assumes, the
12 CARES Act provision supersedes state law with respect to evictions from properties
13 covered by the CARES Act, but that issue has not been litigated through the
14 adversarial system and should not be resolved by rule amendment.
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18 **B. What the CARES Act requires is not clear.**

19 The CARES Act states that a tenant may not be forced “to *vacate* the covered
20 dwelling unit” before 30 days after the tenant receives “a *notice to vacate*.” 15
21 U.S.C. § 9058(c)(1) (emphasis added). The Petition interprets this language as
22 requiring 30 days’ notice before the landlord *files an eviction action*, but it could
23 reasonably be read only to require 30 days’ notice before the landlord obtains a
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1 judgment that requires the tenant to *vacate*. The issue is unsettled. At least two
2 intermediate state appellate courts have reached the same conclusion as the Petition,
3 but there is reason to believe the Arizona Supreme Court disagrees.
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5 The Ohio Court of Appeals, for example, held that “[b]ecause a landlord must
6 file a forcible entry and detainer action to require a tenant to vacate the rented
7 premises, the plain language of 15 U.S.C. 9058(c)(1) mandates that a landlord must
8 provide a tenant with a notice to vacate 30 days before filing such an action.”
9 *Olentangy Commons Owner LLC v. Fawley*, 2023-Ohio-4039, ¶ 39, ___ N.E.3d ___,
10 2023 WL 7327716 (Ohio Ct. App. Nov. 7, 2023). The Washington Court of Appeals
11 similarly held that “the plain language of the CARES Act notice provision requires
12 that landlords subject to the act provide a 30-day notice to tenants prior to
13 commencing an unlawful detainer action.” *Sherwood Auburn LLC v. Pinzon*, 521
14 P.3d 212, 220 ¶24 (Wash. Ct. App. 2022). The Washington case turned, in part, on
15 a Washington statute that the notice required prior to beginning an eviction action
16 must explain that further notice may be required by federal law. *Id*, citing RCWA
17 59.18.057 (“The form required in this section does not abrogate any additional notice
18 requirements to tenants as required by federal, state, or local law.”).¹
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24 ¹ A case is currently pending in the Nebraska Supreme Court on the issue of
25 whether a landlord must serve the 30-day notice under the CARES Act 30 days
before filing an eviction action. See *MIMG LXXIV Colonial LLC v. Ellis*, No. S-

1 On the other hand, the Arizona Supreme Court’s administrative order
2 concerning operations during the pandemic said the 30 days CARES Act notice only
3 requires the notice to be issued 30 days before the court issues the writ of restitution.
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5 *See* Sup. Ct. Admin. Order No. 2022-14 (“The order issuing a writ may be executed
6 by the constable or sheriff no earlier than five calendar days after the date of the
7 order or 30 days from the notice of breach if required by federal law.”). In other
8 words, a complaint can be filed after the 5-day notice period required by the Arizona
9 Residential Landlord and Tenant Act, but the writ of restitution cannot issue until
10 the tenant has had 30-days’ notice to vacate.
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12 In a comment to the Petition, the Maricopa County Justice Court explains their
13 judges address the CARES Act 30-day notice requirement by allowing landlords to
14 file a complaint after a 5-day notice period, but not allowing a Writ of Restitution
15 until 30 days after notice was given. The rationale is that the Writ is the document
16 that actually restores possession to the landlord. This harmonizes the notice
17 provisions of Arizona’s Residential Landlord and Tennant Act and the CARES Act.
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22 23-0438, 2023 WL 8627432 (Neb.). The landlord argues the CARES Act notice
23 does not preempt state landlord-tenant law because it does not specifically say it
24 does, but even if it does, it is unconstitutional. These arguments have not been
25 addressed by the courts that addressed the 30-day notice requirement. The Nebraska
case will likely be decided before the Arizona Supreme Court takes up the petition.

1 It is also consistent with the Supreme Court’s COVID-era administrative rule.

2 Like the Supremacy Clause issue identified in the preceding paragraph, the
3 State Bar does not believe that the Supreme Court should adopt one interpretation
4 over the other via rulemaking process, without the benefit of an adversarial
5 proceeding.
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8 **C. CARES Act notice provision may not still be effective or may soon
9 become ineffective by federal legislative action.**

10 Should the Supreme Court adopt the proposed amendment to R.P.E.A. 5(d),
11 it would necessarily have to find that the 30 days’ notice provision of the CARES
12 Act remains in effect, even though it is linked to the moratorium provision that
13 expired in July 2020 and the title of the section in which the provision is located
14 includes the word “temporary.” The State Bar believes there is sufficient ambiguity
15 in the notice provision that the Arizona rule should not be amended to implement it.
16 And, even if there was no ambiguity in the current status, the pending legislation to
17 expressly repeal the notice provision makes its long-term effectiveness unclear.
18 Adopting the Petition, with express reliance on a federal law that is subject to
19 potentially imminent repeal, seems imprudent, particularly when there may be other
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1 ways to address the concerns the Petition seeks to remedy (as discussed more fully,
2 below).²

3 4 **VI. POTENTIAL ALTERNATIVE LANGUAGE**

5 Although the State Bar does not support the Petition, as drafted, the Bar
6 recognizes the Petition has identified a legitimate concern that should be addressed;
7 *i.e.*, putting courts and vulnerable tenants on notice that there may be certain federal
8 notice requirements a landlord must meet before proceeding with eviction.
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10 If the Supreme Court chooses not to adopt the Petition for the reasons stated
11 above, it could alternatively amend Rule 5(d) to simply advise tenants that federal
12 law may also govern the eviction proceeding, and if it does, may provide tenants
13 with additional rights. The State Bar suggests the following alternative language:
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16 ***(5) If the action involves a residential property, the complaint must***
17 ***state whether it is a “covered property” under the federal Coronavirus***
18 ***Aid, Relief, and Economic Security (“CARES”) Act, as long as it***
19 ***remains in effect, and if it is, it must affirm that the landlord has***
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22 ² It is unusual, although not unprecedented, that Arizona’s rules would expressly
23 implement or enforce federal statutes. For example, although the federal Violence
24 Against Women’s Act (34 U.S.C. § 12491) prohibits landlords from evicting tenants
25 in certain housing projects “on the basis that the applicant or tenant is or has been a
victim of domestic violence, dating violence, sexual assault, or stalking,” the
R.P.E.A. does not advise tenants of that protection.

advised the tenant that the tenant may have additional rights under that Act.

This would put the tenant on notice that he/she may have additional rights under the CARES Act, but without the Court having determined what those rights are by way of rule amendment.

VII. CONCLUSION

Accordingly, the State Bar opposes the petition to amend Rule 5(d) of the Rules of Procedure for Eviction Actions, but if the Court is inclined to advise tenants of certain protections that may be available to them under the federal CARES Act, the State Bar has suggested more neutral alternative language that accomplishes the intent of the Petitioner, which is to put the tenant and the Court on notice of CARES Act application.

RESPECTFULLY SUBMITTED this 1st day of May 2024.

Lisa Pandi

Lisa M. Panahi
General Counsel

Electronic copy filed with the
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this 1st day of May 2024.

by: PSequin