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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA MAGISTRATE DIVISION

[redacted],

Plaintiff,

v.

[redacted],

Defendants.

Case No. CV01-20-[redacted]

BRIEF OF AMICI CURIAE IDAHO LEGAL AID SERVICES AND ACLU OF IDAHO FOUNDATION

Idaho Legal Aid Services, Inc., and the American Civil Liberties Union of Idaho Foundation submit this emergency amicus brief because this unlawful detainer action poses profound and dangerous constitutional problems.

This Court should not proceed to default, try, or otherwise resolve any unlawful detainer case until those problems are addressed. It should certainly not

issue any judgment or writ of restitution in these cases. The Court should alert defendants in these cases to free legal assistance available to ensure these proceedings are fair and constitutional.

INTEREST OF AMICI CURIAE

Idaho Legal Aid Services, Inc. (ILAS) is an Idaho non-profit corporation which for over fifty (50) years has provided high quality legal representation, without charge, to low income Idahoans in all seven Idaho judicial districts. ILAS's mission is to provide equal access to the courts without regard to income or social status. Every year ILAS provides legal advice using a Housing Hot Line and direct court representation to hundreds of tenants in eviction cases. ILAS has also devoted resources to assist persons who are homeless in the City of Boise. ILAS was successful in challenging the criminalization of the status of homeless person by establishing under the Eight Amendment that persons cannot be charged with a crime when they have no alternative but to sleep outside. *See Martin v. City of Boise*, 920 F.3d 584 (2019), *cert. denied*, 140 S.Ct 674 (2019).

Housing is a substantial share of ILAS's attorney's case load. Since the COVID-19 crisis rose, ILAS has dedicated significant staff and financial resources to educate and advocate on behalf of tenants, who through no fault of their own, have found it difficult or impossible to pay their rent on time because of a reduction or loss of income after being laid off or having their work hours reduced at their place of employment. ILAS clients are the least likely to have jobs where they can continue to work remotely and are more likely not to have the funds to pay rent

after suffering a wage cut or job loss.

Idaho Legal Aid Services currently has clients throughout the courts in Idaho, including Ada County, with scheduled eviction hearings. ILAS knows from experience that most tenants are not represented during unlawful detainer proceedings while a majority of landlords and management companies can afford legal counsel. Most tenants are not familiar with the CARES Act eviction moratorium or the statutory requirements in the unlawful detainer statutes which limit the type of defenses that can be raised to prevent evictions. The COVID-19 crisis makes it crucial that tenants and their families can continue to shelter in place, which is not be possible without shelter. For that very reason, Congress has mandated an eviction moratorium under the CARES Act to prevent the homelessness of individuals and families. An increase in homelessness in Idaho communities will result in irreparable harm. ILAS is committed to protecting the rights of all tenants which are afforded under United States and Idaho constitutions and federal and state statutes during this unprecedented crisis.

The **American Civil Liberties Union of Idaho Foundation** (ACLU) is a statewide, nonprofit, nonpartisan public interest organization dedicated to the principles of liberty and fairness embodied in the United States and Idaho constitutions. Since its founding in 1993, the ACLU has frequently appeared before Idaho state and federal courts in cases involving constitutional questions, both as direct counsel and as *amicus curiae*. Unlawful detainer proceedings currently pending in state courts across Idaho all raise serious due process problems—

because of their unusual complexity, the ongoing global pandemic, new federal law establishing an eviction moratorium covering many properties, closed courthouses and misleading summonses, and new and extraordinary court forms and processes. Ensuring due process is guaranteed and jealously protected in this case and other unlawful detainer actions is, therefore, a matter of significant concern to the ACLU and its members throughout Idaho.

ARGUMENT

This is an urgent brief. It identifies three weighty, constitutional problems with unlawful detainer actions proceeding during early May 2020:

(1) The summonses in many, if not all, of these actions are misleading and confusing.

(2) Because of the federal CARES Act prohibiting evictions in many cases, the legal and factual issues are too complex to be constitutionally litigated in expedited proceedings.

(3) Any "Statement of Landlord Regarding CARES Act Eviction Moratorium" or similar document presents additional due process and evidentiary problems.

1. The Court Should Not Proceed Without an Adequate Summons.

Due to the global COVID-19 pandemic, courthouses throughout Idaho are mostly closed. Yet many, if not all, defendants in unlawful detainer actions scheduled for this week received standard summonses instructing them to appear in person at the Ada County Courthouse at 200 West Front Street. Though the amici learned that on Monday, May 4, 2020, court staff may have begun trying to reach unlawful detainer tenants by phone to explain how they might appear in this proceeding by telephone, those calls cannot cure the confusing, misleading, and

unconstitutionally insufficient summonses.

The form summonses for expedited unlawful detainer actions, prescribed by IRCP 4(a)(3)(A) and found in appendix B to the rules (https://isc.idaho.gov/rules/forms/IRCP_Rule_4(a)(3(A)_Form_07.18.docx), instruct defendants that a trial will be held at the courthouse. This misleads tenants into coming to a courthouse that is closed. Even if tenants risk infection and the health of court staff by coming to the courthouse to learn that the proceeding will be held by phone or internet videoconference, they will be prejudiced if they cannot enter the courthouse at all, cannot timely make it through additional security measures to enter, or must call in (if they can at all) from the sidewalk or parking lot outside of the courthouse. Even those tenants whom court staff may have reached by phone a day before the hearing will be prejudiced because they must attempt to defend an action that depends on documentary evidence and papers filed in the record—including a new "Statement of the Landlord" form— with which they were not served in advance and that they may be unable to sufficiently review or rebut over the phone or by video.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Greene v. Lindsey,* 456 U.S. 444, 449–50 (1982) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). To satisfy due process, the notice must be calculated to address

"unique information" about the particular circumstances in which notice is given. *Jones v. Flowers*, 547 U.S. 220, 230 (2006). A misleading or defective summons that prejudices the defendant invalidate the summons's sufficiency. *Osrecovery, Inc. v. One Grp. Int'l, Inc.*, 234 F.R.D. 59, 60 (S.D.N.Y. 2005). Actual notice attempting to cure such defects cannot cure them. *Id.*; *see also Nat'l Dev. Co. v. Triad Holding Corp.*, 930 F.2d 253, 256 (2d Cir. 1991).

The IRCP 4(a)(3)(A) summonses for expedited eviction actions simply do not provide adequate notice to defendants of where and how they may defend the action. Specifically, the summonses do not account for the current circumstances requiring remote proceedings and, therefore, will confuse and mislead defendants about the relevant details of the proceedings. The Court should quash any summons in an expedited unlawful detainer action that does not (consistent with the Idaho Supreme Court's April 22, 2020, order In Re: Emergency Reduction in Court Services and Limitation of Access to Court Facilities) (a) instruct defendants that all court proceedings are presumptively to be held remotely via phone or video and (b) also provide advance information to defendants about how they can participate in the proceeding and present their defense over the phone or by video, including the right to review and present documentary evidence.

2. The Pandemic and the CARES Act Make the Legal and Factual Issues Too Complex to Provide Due Process in an Expedited Proceeding.

The United States Constitution, Amend. XIV § 1, guarantees that the State of Idaho shall not deprive the defendants in this unlawful detainer action of their

home without due process of law. Likewise, the Idaho Constitution, Art. I, § 13, provides a nearly identical guarantee. The United States Supreme Court has considered the constitutionality, under the Due Process clause, of early trial provisions in eviction proceedings similar to those provided for under I.C. § 6-310. *Lindsey v. Normet*, 405 U.S. 56, 65 (1972). There, considering the "Forcible Entry and Wrongful Detainer" (FED) proceedings provided in Oregon, the Court noted that early trial in actions involving alleged nonpayment of rent did not present significant trial preparation problems for defending tenants—due to the simplicity of those cases. It noted specifically that "the simplicity of the issues in the typical FED action will usually not require extended trial preparation and litigation." *Id.* at 65. But the Court noted that the Oregon FED procedures could "be applied so as to deprive a tenant of a proper hearing in specific situations." In particular, the Court based its holding on the fact that "[t]enants would appear to have as much access to relevant facts as their landlord" in ordinary nonpayment of rent cases. *Id.* at 65. That is not so during this pandemic and especially with a new federal law, the CARES Act, imposing a broad 120-day eviction moratorium in cases where any federal assistance is involved.

Indeed, where issues are not as simple as in the typical nonpayment of rent eviction action, due process requirements change. Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314

(1950). The Court further held there that "the notice . . . must afford a reasonable time for those interested to make their appearance." *Id.* at 314. The Idaho Court of Appeals, considering *Mullane*, explained: "In other words, meaningful notice consists of both substantive and *temporal* components. . . . [N]otice must be provided at a time which allows the person to reasonably be prepared to address the issue." *State v. Doe (In re Doe)*, 147 Idaho 542, 546, 211 P.3d 787, 791 (Ct. App. 2009).

Numerous circumstances related to the COVID-19 pandemic itself impede the court from fulfilling these essential procedural due process requirements. Obviously, tenants who become infected or hospitalized themselves may be unable to respond to complaints, seek legal help, gather evidence and relevant documentation, prepare any affirmative legal or equitable defenses, appear in court, or otherwise participate in their defense. Tenants who are elderly or otherwise at high risk of death if infected with COVID-19 face similar difficulties. Tenants and counsel will have trouble investigating claims or obtaining documents because many government offices, businesses, and other services are closed or functioning at limited capacity. Disruptions in staffing or relevant supply chains may produce delays incompatible with eviction case timelines. Witnesses may not appear at hearings due to infection or fear of exposure to COVID-19, and serving subpoenas may be difficult or impossible. Social distancing requirements may limit the ability to interview witnesses in person or obtain declarations or documentary evidence.

Telephonic or video-conference hearings are also not accessible for many low-

income tenants or may not be appropriate in many cases, such as for trials with documentary evidence or any kind of hearing that calls for language interpretation. Many low-income tenants rely on outdated or damaged mobile devices, lack consistent internet access, have only pay-as-you-go mobile plans or face tight data limits, and endure shut-offs or account closures for non-payment. Many low-income individuals also rely on public resources, such as library computers or free wifi provided by cafeterias or coffee shops, to access the internet—and those resources may be unavailable during the pandemic. Excluding the public from observing these proceedings also has a deleterious effect on the quality or integrity of judicial proceedings held during pandemic conditions.

The federal CARES Act (Coronavirus Aid, Relief, and Economic Security Act), https://www.congress.gov/bill/116th-congress/house-bill/748/text#toc-H5FCB77F196104E7394A52A8F1DC5D1C2, enacted on March 27, 2020, even further compounds these due process problems. The CARES Act contains a 120-day eviction moratorium. The eviction moratorium prohibits landlords of covered properties from filing new eviction actions for non-payment of rent or other charges and fees. The moratorium also prohibits "charg[ing] fees, penalties, or other charges to the tenant related to such nonpayment of rent." Sec. 4024(b). A landlord of a covered property cannot evict a tenant after the moratorium expires except on 30 days' notice—which may not be given until after the moratorium period. *See* Sec. 4024(c).

The scope of the properties covered by the Act's eviction moratorium is

sweeping. It covers any property that either: (1) participates in a "covered housing program" as defined by the Violence Against Women Act (VAWA) (as amended through the 2013 reauthorization); (2) participates in the "rural housing voucher program under section 542 of the Housing Act of 1949"; (3) has a federally backed mortgage loan; or (4) has a federally backed multifamily mortgage loan. *See* Sec. 4024(a)(2). "Covered housing programs" under VAWA include a whole panoply of federal subsidy and tax credit programs. Properties with a federally backed mortgage loans covered by the Act include loans "made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by [HUD] or a housing or related program administered by any other such officer or agency, or is purchased or securitized by the Federal Home Loan Mortgage Corporation [Freddie Mac] or the Federal National Mortgage Association [Fannie Mae]." Sec. 4024(a)(4).

Tenants do not have ready access to records necessary to determine whether the property they live in is a VAWA property or involves a loan that has been "assisted in any way" by any federal program or was purchased or securitized by Freddie Mac or Fannie Mae. *Id.*; *see* "Mortgages," USA.gov ("Together, Fannie Mae and Freddie Mac own nearly half of all mortgages in the U.S."), https://www.usa.gov/mortgages. Tenants and courts will not be able to test a landlord's representations about whether a property is covered by the CARES Act without document and other fact discovery, including subpoenas and depositions in

some cases. Based on any relevant facts the landlord asserts about CARES Act coverage, plus facts and records the tenant gather through investigation and discovery, the Court may then be presented with novel and difficult legal issues in construing the Act's meaning and application. A tenant cannot test or challenge any claimed exemption from the CARES Act eviction moratorium if the tenant first learns about it at the hearing.

To determine whether this Court may force tenant defendants to litigate over possession of their home and shelter in an extraordinarily compressed time frame, it must weigh the "interest of the individual, the risk of an erroneous deprivation of the individual's interest, and the interest of the government . . . ." *Lowder v. Minidoka County Joint Sch. Dist. No. 331*, 132 Idaho 834, 840, 979 P.2d 1192, 1198 (1999) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976)); *see also Connecticut v. Doehr*, 501 U.S. 1, 11 (1991). The interest of these defendants is grave and substantial: they risk not only losing their shelter, as do all unlawful detainer defendants, but also being homeless and unsheltered during a global, airborne pandemic. That result not only threatens the health and well-being of tenants and their families, but also risks further spread of COVID-19 in the broader community. Because of the much greater complexity of legal and factual issues in all evictions under the CARES Act, plus the high and sometimes impossible practical hurdles of litigation in an expedited proceeding while the pandemic affects the ordinary course of business and government across the world, the risk of erroneous deprivation of the defendants' interest is great as well. And

the government interest in preserving safe shelter for these defendants, decreasing need to access a taxpayer funded safety net to prevent homelessness and assuage the impact on families of sudden displacement and further spread of COVID-19, is large compared to any additional burden from placing these proceedings on the regular civil calendar, alerting defendants to free legal services available in the community, and proceeding to trial only after defendants have a meaningful opportunity to develop and present their cases.

3. "Statements of the Landlord" About the CARES Act Exacerbate the Other Due Process Problems and Are Inadmissible.

Not even 24 hours ago, the Idaho Supreme Court announced an order "In Re: Eviction Moratorium Under the CARES Act." Amended Order (Idaho May 4, 2020), https://isc.idaho.gov/EO/eviction-order.pdf/. That order requires a "Statement of Landlord Regarding CARES Act Eviction Moratorium" (Statement of the Landlord) to be filed in any currently pending eviction action. *Id.* at ¶ 4. The Statement of the Landlord form included in the order neither provides enough information to the Court to determine whether the CARES Act applies nor—especially for unlawful detainer proceedings scheduled for this week—provides sufficient notice to the tenant to investigate the landlord's allegations on the form. While the form is required to be filed in order to proceed with an unlawful detainer trial, given the expedited nature of the proceeding, in many cases it will not have been served prior to the trial. The form is also inadmissible as evidence to prove a plaintiff's case.

The form does not provide enough information for the Court to determine whether the CARES Act applies because it is truncated and abbreviated compared

to the Act itself. The form asks whether a property "is characterized by or subject to" a federally backed mortgage loan. But the CARES Act is far broader. Under the Act, it does not matter how the property is "characterized" or whether the property is "subject to" a federally backed mortgage loan; rather the CARES Act applies to any property that "has" "any loan" that "is assisted in any way" by the federal government. Sec. 4024(a)(2)(B), (a)(4)(B), (a)(5)(B). The form similarly asks whether the rental property is "characterized by or subject to" any of several federal programs, despite that the CARES Act applies to any property that even "participates in" any of those programs. Sec. 4024(a)(2)(A). And the form goes on to ask whether the rental property is subject to a loan "owned, insured or guaranteed by" HUD, the VA, the USDA, or Freddie Mac or Fannie Mae. But the CARES Act is again broader: it applies to loans not just that are owned, insured, or guaranteed by those particular entities, but to any loan even "supplemented, or assisted in any way" by ***any*** federal agency. Sec. 4024(a)(4)(B), (a)(5)(B). Thus, although the Court can determine that the CARES Act likely applies if a box besides "none of the above" is checked on the Statement of the Landlord form, the Court cannot determine that the Act does not apply if the landlord checks only the "none of the above" boxes.

Even if a completed Statement of the Landlord form provided sufficient information to determine whether the CARES Act's sweeping eviction moratorium applied, the Court cannot rely on it because it would violate due process to consider it in an expedited unlawful detainer action where the defendant has had no or

almost no notice of its contents. For the same reasons that proceeding with an expedited unlawful detainer action violates due process because of the complex factual and legal issues that the CARES Act injects, proceeding based on the truncated and incomplete Statement of the Landlord form that plaintiff landlords filed hours before the hearing is additionally unconstitutional.

The form is also inadmissible as evidence because:

- It is hearsay without an exception. IRE 802.
- It is unsupported by original documents that establish the property's current financing and other assistance. Those documents are what must establish the truth of most of the assertions in the Statement to avoid hearsay about what's contained in those documents. IRE 1002.
- The allegations in it lack foundation because the form does not establish the declarant's personal knowledge of what programs the property participates in and how the property is currently financed. IRE 602.

The Court cannot proceed based on the Statement of the Landlord form at this time. It must give the defendants adequate notice of the form's contents, must ensure the defendants have adequate time to probe the allegations on the form through discovery, and then must require the plaintiff prove the case with admissible evidence of CARES Act compliance.

CONCLUSION

Proceeding in this case today to default, trial, judgment, or writ of restitution

will violate the United States and Idaho constitutions. It will expose the defendant tenants to the risk of homelessness during a pandemic. It will expose the plaintiff landlord to frustration and liability for proceeding in violation of tenants' rights. It will risk the health of sheriff's deputies executing any writ and provide a cause of action to enjoin the execution of the writ.

The Court should not proceed to hear or resolve this action today. Instead, it should quash all summonses that do not provide advance notice of remote proceedings and place this action on the regular civil calendar, allowing defendants twenty one days to answer the complaint and then to conduct fact discovery on the CARES Act issues. It should also alert all defendants in unlawful detainer actions that legal help may be available through Idaho Legal Aid Services and other services in the community.

Dated: May 4, 2020.

Respectfully submitted,

ACLU OF IDAHO FOUNDATION

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of May, 2020, a true and correct copy of the foregoing document was filed with the Clerk of the Court using the iCourt E-File system which sent a Notice of Electronic Filing to the following persons:

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