



October 12, 2020

Chief Justice Patience D. Roggensack  
Justice Ann Walsh Bradley  
Justice Annette Kingsland Ziegler  
Justice Rebecca Grassl Bradley  
Justice Jill Karofsky  
Justice Rebecca Frank Dallet  
Justice Brian Hagedorn

Wisconsin Supreme Court  
110 E. Main St., Suite 440  
Madison, WI 53703

via email:

*clerk@wicourts.gov*

*Supreme\_Court\_Commissioners@wicourts.gov*

Re: Memorandum in Reply to Response to the Requested Emergency Order/s in the Matter of  
CDC Eviction Moratorium Compliance for Eviction Filings

To the Honorable Justices of the Supreme Court of Wisconsin:

#### INTRODUCTION

In their response, the Apartment Association of Southeastern Wisconsin and the Wisconsin Apartment Association ask this Court to make substantial changes to the CDC Order because, in essence, the Order is unfair to landlords. However, this Court does not have authority to expand the CDC Order. This Court must abide by the Order, as is. The only appropriate question before the Court is: what process will ensure that circuit courts across Wisconsin consistently and efficiently apply this Order?

#### ARGUMENT

The CDC Order is clear and direct: a landlord cannot proceed with an eviction if a tenant provides a declaration to the landlord. The apartment associations try to change the substance of the Order by redefining “covered person.” They would require tenants to provide supporting documentation when challenged, allow courts to hold evidentiary hearings to develop a payment plan, and allow landlords to proceed with an eviction when the tenant fails to make payments according to the payment plan. None of this is consistent with the Order. The purpose of the Order is to prevent homelessness and overcrowding as a public health measure. To that end, the CDC intended for the declaration to immediately halt eviction proceedings altogether, *not* to trigger an evidentiary hearing. The Order expressly provides that the remedy for a tenant lying on a declaration is prosecution for

perjury, not eviction. Finally, requiring tenants to provide proof for the facts underlying the declaration and allowing courts to evaluate tenants' ability to pay rent raises issues of access to justice for tenants.

**1. The plain language of the CDC Order and sample declaration do not require additional documentation or facts to support the statements in the declaration.**

To invoke the eviction protection, the CDC Order requires that a tenant provide to a landlord a declaration—and nothing else. The Order defines a “covered person” who is protected from eviction as “any tenant, lessee, or resident of a residential property who provides to their landlord, the owner of the residential property, or other person with a legal right to pursue eviction or a possessory action, a declaration under penalty of perjury.” Under penalty of perjury, the tenant indicates that the five elements of the declaration are met. 85 Fed. Reg. 55,293 (Sept. 4 2020) (emphasis added). No part of the Order indicates that tenants must present facts or documentation to support their declarations. The apartment associations ask the courts to proceed from the baseless assumption that many, if not most, of the tenants swearing out these declarations will, in fact, have committed perjury.

By allowing circuit courts to inquire into a tenant's ability to pay and then enter payment plans for the tenant, this Court would constrict the CDC's definition of a “covered person” and defeat the purpose of the Order. The CDC did not define a “covered person” as a tenant whose Declaration withstands a court challenge and who adheres to a court-ordered payment plan. Instead, the CDC wrote the Order to apply broadly to any tenant who certifies under penalty of perjury that he meets the terms of the declaration and provides that Declaration to his or her landlord.

Notwithstanding that there are many, possibly even some within the Agency itself, who wish the Order had been written less expansively, the language actually used in the Order is both plain and clear. Whether the CDC should have written the Order a different way and whether the CDC Order burdens landlords are not the questions in front of the Court. Nor are the questions of how unpaid rent during the pendency of the Order will be paid, or by whom. These are important questions for the state and federal legislatures to consider. But they are not addressed in the CDC Order, and are outside the Order's scope and purpose. It would exceed the Court's authority to decide these policy questions by way of implementing the CDC's Order.

The CDC provided a sample declaration that may be used by tenants to become “covered persons.” 85 Fed. Reg. 55,293, 55,297 (Sept. 4 2020). The Declaration makes an individual “covered” simply by one “indicating that” the prescribed elements are met. 85 Fed. Reg. 55,293, 55,296 (Sept. 4 2020).

There are no fields on the declaration for the tenant to list facts that apply to their situation. If the CDC had created a fill-in-the-blank declaration, that might have indicated that the CDC intended for tenants to have to prove the individual elements in the declaration. This requirement for additional information would allow the landlord or fact finder to raise questions as to whether each individual declaration is compliant, and sufficient to trigger the Order's protections.

But, by prescribing a declaration without demanding additional qualifying details, the CDC chose to maximize the ambit of its Order and prevent landlords from moving forward with eviction because

landlords considered a tenant’s declaration form “insufficient.” Again, this broad ambit is in furtherance of the Order as a public health protection measure.

This is in keeping with other COVID-related protections. For example, the CARES Act requires banks to grant forbearances on federally backed mortgages when homeowners experience financial hardship due to the pandemic. Banks cannot challenge the homeowner’s attestation. The servicer cannot demand anything “other than the borrower’s attestation to a financial hardship caused by the COVID-19 emergency.” See CARES Act § 4022(c)(1). Once the homeowner submits an attestation, the servicer *must* provide the forbearance. Homeowners are eligible “regardless of delinquency status.” CARES Act § 4022(b)(1). The Act states:

Upon receiving a request for forbearance from a borrower under subsection (b), the servicer shall *with no additional documentation required* other than the borrower’s attestation to a financial hardship caused by the COVID–19 emergency and with no fees, penalties, or interest (beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract) charged to the borrower in connection with the forbearance, provide the forbearance for up to 180 days.

CARES Act § 4022(c)(1)(emphasis added).

The same can be implied for the CDC Order, which serves the same purpose as the CARES Act: to reduce pandemic-inflicted homelessness, in the most direct and simple way possible. Is there any reason that the federal government would trust the attestations of homeowners but not renters?

This Court cannot change the substance of the Order for any reason, even if the apartment associations think it is unfair.

## **2. The CDC Order immediately halts any eviction proceeding.**

The Order aims to simply and directly halt all eviction proceedings. Nothing in the Order suggests a court may hold an evidentiary hearing to question the validity of the tenant’s declaration and develop a payment plan. The Order does not intend to further burden circuit courts and extend eviction proceedings. Quite the contrary—the CDC intended for the declaration to preclude landlords from commencing any action to evict and *immediately halt any pending court proceeding*.

Once a landlord receives a tenant’s declaration, the Order prohibits the landlord from continuing any efforts to evict a tenant. “[A] landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action, *shall not evict any covered person...*” 85 Fed. Reg. 55,293, 55,296 (Sept. 4 2020) (emphasis added). The words “evict” and “eviction” are defined broadly, as “*any action* by a landlord, owner of a residential property, or other person with a legal right to pursue eviction or a possessory action, to remove or cause the removal of a covered person from a residential property.” 85 Fed. Reg. 55,293 (emphasis added).

Since the landlord is prohibited by the Order from taking “any action” to “cause the removal of a covered person,” the landlord is prohibited from filing, arguing, or executing a court action if the tenant has delivered the declaration. Under the terms of the Order, a covered person still owes rent and must still follow the terms of her rental agreement. 85 Fed. Reg. 55,296. The landlord may

continue to charge rent and even late fees and interest. 85 Fed. Reg. 55,296. What the landlord may *not* do is make the tenant homeless between September 4 and December 31, 2020. The Order simply and plainly removes the remedy of eviction as against any covered person.

By continuing to pursue an eviction after receiving a tenant's declaration, a landlord violates the CDC's Order. Holding an inquisitorial hearing on whether the contents of the declaration are sufficiently supported by evidence contravenes the express procedure of the Order, and frustrates the purpose of the Order, which is to protect the public from further spread of the virus. Moreover, the request of the apartment associations that covered tenants be evicted upon default of a court-imposed payment plan directly contradicts the Order's language, intent, and purpose. A tenant who becomes homeless due to default on a payment plan presents the exact same public health threat as a tenant who becomes homeless due to a default in paying rent.

### **3. Small Claims Court should not adjudicate claims that a tenant lied on a declaration.**

The CDC Order expressly states the remedy for lying on a declaration: prosecution for perjury. Every tenant who signs the CDC Declaration does so under penalty of perjury. The CDC order imposes criminal penalties for violation of the Order and states that the "U.S. Department of Justice may initiate court proceedings as appropriate seeking imposition of these criminal penalties." 85 Fed. Reg. 55,296. The CDC's Order's only provisions for enforcement are through specific statutes and a regulation which authorize criminal or financial penalties, with certain other unspecified assistance from state and local authorities which the federal Secretary may "accept." *Id.*, at 55,297 – 55,298.

Perjury in Wisconsin is defined as "a false material statement which the person does not believe to be true" made under specific circumstances, and it is a Class H Felony. Wis. Stat. §946.31. A private citizen, namely a landlord, does not have the authority to charge another private citizen with a felony. Only a prosecutor can bring such a charge.

The CDC order does *not* delegate investigation and enforcement authority to civil courts. In Wisconsin, Small Claims Court is a court of limited jurisdiction, which does not include criminal matters. Wis. Stat. §799.01. Accusations that parties to a small claims case have committed crimes, such as perjury, should not be adjudicated in Small Claims Court. Civil courts may not take this power into their own hands by challenging tenants on the contents of their declarations, which are signed under penalty of perjury.

The Declaration includes multiple warnings about the consequences to the tenant of falsely signing it. None of these warnings include the possibility of eviction during the period of the moratorium. 85 Reg. 55,292.

Moreover, the Declarations are not evidence in any small claims trials, such that they might be accepted or rejected by the courts under a credibility determination. The declaration is not a defense to an eviction action. Rather, as soon as a tenant signs it under penalty of perjury and delivers it to their landlord, she becomes a "covered person" who cannot be evicted except for the reasons enumerated in the CDC Order. Therefore, the only relevant inquiries in an eviction action are: 1) what is the basis for the eviction? 2) did the tenant sign the declaration under penalty of perjury? and 3) did the tenant deliver the declaration to her landlord? Once those questions are answered, all the relevant

evidence is in. Our request to the Court is merely that, in the event that the answers to questions two and three are “not yet,” the small claims courts be instructed to promote judicial economy by providing the form declaration for the tenant to sign and deliver to the landlord without delay. In the event the tenant can sign his name to the declaration under penalty of perjury, then upon delivery to the landlord, the case must be dismissed. If the tenant cannot swear to the declaration under penalty of perjury, the case may proceed.

**4. Requiring tenants to provide additional proof of the elements of the declaration will result in more evictions, and disproportionately for unrepresented tenants.**

It is fundamentally unfair and contrary to the purpose of the Order to require tenants to provide additional evidence in support of the elements of the declaration when nothing in the CDC order or on the CDC declaration form indicates the need for additional evidence. Requiring tenants to prove the authenticity of their declaration would limit the Order’s protection to tenants who can access the court and, oftentimes, to tenants who can also find an attorney. If landlords could challenge declarations, some tenants would be evicted, even if eligible for protection, simply because they could not navigate court procedures. In many counties right now a court appearance requires not only internet access but also the ability to use Zoom, register as an electronic party, and upload electronic exhibits. As this Order is specifically targeted to protect tenants who cannot even afford their rent and face homelessness if evicted, it should go without saying that the technological requirements will be out of reach for the most vulnerable among us—the poor, those with disabilities, and senior citizens.

Moreover, without notice of an additional requirement that is not express in the order, tenants are deprived of the ability to prepare a defense. Why would the CDC go to such great lengths to help tenants—providing a form declaration that requires no additional support—but then fail to notify tenants about the potential need to defend their declaration in court and the evidence needed to do so? This would result in one of two bad outcomes. Either covered persons would be evicted notwithstanding the protections of the Order because they were unprepared to prove the elements of the declaration with anything other than their sworn word. Or, small claims courts would have to adjourn the proceedings, perhaps multiple times, to fairly allow tenants to gather the documents, witnesses, and evidence necessary to overcome the presumption that they lied under oath in signing the declaration.

**CONCLUSION**

Allowing landlords to challenge the veracity of a tenant’s declaration, thereby proceeding with an eviction action, would contradict express procedures in the Order, frustrate the purpose of the Order, clog the courts with messy disputes, and place the Small Claims Judge, or even Commissioner, in the position of adjudicating a criminal matter. Far from making this Order easier and more uniform to implement, the apartment associations propose changes to the Order that complicate its implementation and require an enormous amount of resources. Courts will fill with evidentiary hearings regarding the truthfulness of tenants declarations and how much each covered tenant can afford to pay each month, and whether circumstances have changed from month-to-month, tenant-to-tenant, such that a different amount is now “as much as the tenant can afford

given their individual circumstances.” The Order was clearly drafted to avoid precisely this circumstance.

Respectfully submitted on behalf of  
Legal Action of Wisconsin and Wisconsin Judicare

/s/ Chris Donahoe  
Chris Donahoe, Housing Priority Coordinator  
Legal Action of Wisconsin