No. 20-35028

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Eva Moore and Brooke Shaw
Plaintiffs-Appellants

v.

Mitzi Johnakneckt
Defendant-Appellee

On appeal from the U.S. District Court for the Western District of Washington (at Seattle), Hon. Thomas S. Zilly, U.S. District Judge,
Cause No. 2:16-CV-01123-TSZ

BRIEF OF AMICUS CURIAE NATIONAL HOUSING LAW PROJECT IN SUPPORT OF APPELLANTS EVA MOORE AND BROOKE SHAW

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CORPORATE DISCLOSURE STATEMENT

The National Housing Law Project (NHLP) is a nonprofit organization; NHLP has no parent corporation or any publicly held corporation that owns 10% or more of its stock. Amicus NHLP is not aware of any publicly traded corporation that has an interest in the outcome of this case.

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The National Housing Law Project (NHLP) is a nonprofit organization that advances housing justice for poor people and communities, predominantly through technical assistance and training to legal aid attorneys and through co-counseling on important litigation. NHLP works with organizers and other advocacy and service organizations to strengthen and enforce tenants' rights, increase housing opportunities for underserved communities, and preserve and expand the nation's supply of safe and affordable homes.

NHLP coordinates the Housing Justice Network, a collection of more than 1,600 legal services attorneys, advocates, and organizers from around the country. The network has actively shared resources and collaborated on significant housing law issues for over 40 years, including through a dynamic listserv, working groups, and a periodic national conference. The procedural due process rights of tenants facing eviction from rental housing is a fundamental concern of NHLP and of the HJN network, and a fixture in professional discussions and training workshops.

In addition to various other publications and training materials, since 1981 NHLP has published *HUD Housing Programs: Tenants' Rights.* Commonly known as the "Greenbook," this volume—now on its fifth edition and regularly supplemented between editions—is known as the seminal authority on HUD tenants and program participants' rights by tenant advocates and other housing

professionals throughout the country. The procedural rights and protections due to tenants facing eviction from HUD-subsidized housing are a central focus of the Greenbook and of the HJN and its member advocates generally.

NHLP recognizes that the outcome of this matter will significantly affect the procedural due process afforded to residential tenants in the state of Washington, and likely influence the development of eviction procedures throughout the country. For that reason, NHLP hopes the Court will accept and consider this brief of amicus curiae.

This amicus brief is filed without leave under FRAP 29(a)(2) because all parties have consented to the filing.

This brief was exclusively authored by the National Housing Law Project. No party's counsel participated in writing this brief. Neither any party nor any party's counsel contributed money related to the preparation or submission of this brief. No person other than amici curiae, their members, and their counsel contributed money related to the preparation or submission of this brief.

II. SUMMARY OF ARGUMENT

In Washington, a residential tenant facing eviction for nonpayment of rent "may answer, orally or in writing, and assert any legal or equitable defense or set-off arising out of the tenancy" to be heard by the court.[1] Yet many tenants are evicted without ever having such a hearing because they are separately served with a notice under RCW 59.18.375. Such a ".375 notice" requires the tenant either to pay into court the amount of rent claimed owing, or file a sworn statement denying that rent is owed.[2] Otherwise, the court clerk issues a writ of restitution (i.e., an order for the sheriff to perform the physical eviction). As the .375 notice warns:

> IF YOU FAIL TO DO ONE OF THE ABOVE ON OR BEFORE THE DEADLINE DATE, THE SHERIFF COULD EVICT YOU WITHOUT A HEARING EVEN IF YOU HAVE ALSO RECEIVED A NOTICE THAT A HEARING HAS BEEN SCHEDULED.[3]

Many tenants who are unable to deposit the claimed rent, especially those without legal representation, may struggle to meet the various procedural hurdles for responding to a .375 notice, such as setting forth reasons, providing a response that is separate from an answer to the complaint, or properly serving the response

[1] RCW 59.18.380.

[2] See RCW 59.18.375(2).

[3] RCW 59.18.375(5)(f) (ALL CAPS in original).

to the correct people. But perhaps most significantly, the .375 notice requires a tenant to swear, under penalty of perjury, that the claimed rent "is not owed."[4]

The fact of a tenant's rent delinquency does not automatically entitle the landlord to possession of the premises.[5] Indeed, many of the most common and most effective defenses to a non-payment eviction are exist irrespective of whether rent "is owed." Yet the statutory form .375 notice presents only two options for avoiding immediate eviction:

1. PAY RENT INTO THE COURT REGISTRY; OR
2. FILE A SWORN STATEMENT THAT YOU DO NOT OWE THE RENT CLAIMED DUE.[6]

A tenant who neither deposits or denies owing the claimed rent still has a right to "seek a hearing on the merits" at which to argue that the landlord is "not entitled to possession of the property based on a legal or equitable defense arising out of the tenancy," and can potentially obtain a stay of the writ of restitution until that hearing.[7] But the .375 notice makes not mention of this procedure, or how to take pursue it.[8] Thus, the overall effect of the .375 notice is to deter tenants who

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[4] See RCW 59.18.375(2).

[5] See *Heaverlo v. Keico Indus., Inc.,* 80 Wn. App. 724, 730–31; 911 P.2d 406 (1996) ("if rent has not been paid, the question is whether there is any legal justification for nonpayment").

[6] RCW 59.18.375(5)(f) (ALL CAPS in original).

[7] RCW 59.18.375(4).

[8] See RCW 59.18.375(f)(5).

do owe rent from understanding that defenses to eviction may still be available, or from asserting those defenses and contesting eviction.

Misleading tenants in this manner increases the likelihood of tenants being improperly evicted from their homes, while serving no legitimate public purpose. This makes the .375 procedure irreconcilable with the Fourteenth Amendment Due Process Clause.

III. ARGUMENT

The RCW 59.18.375 procedure systematically deprives residential tenants of their housing without procedural due process because the statutory form summons is misleading and deters tenants from contesting eviction for non-payment of rent. The Court should declare the procedure unconstitutional and enjoin further its use.

A. The fact of a rent delinquency is not dispositive in a residential unlawful detainer action.

Nearly 50 years ago*,* the U.S. Supreme Court decided that the (14th Amendment) Due Process Clause did not require an eviction court to hear claims regarding a *landlord's* breach of the rental agreement if, under state law, such a claim would not relieve or diminish a tenant's obligation to pay rent. See *Lindsey v. Normet,* 405 U.S. 56, 68-69 (1972). A forceful dissent criticized this holding as

an artifact of feudalism,[9] but the majority held a state could require such claims, "if cognizable at all, [to] be litigated in separate tort, contract, or civil rights suits." *Lindsey* at 69.

Perhaps in a regime that still adheres to such obsolete notions of landlord-tenant law, there could be no defense to eviction for a tenant who fails to pay rent—though even this much is suspect, as defenses under federal law could yet exist. See *Lindsey* at 89 (Douglas, dissenting). But if not, then there might not be anything left to adjudicate where a tenant cannot truthfully deny owing the amount claimed—and a law such as RCW 59.18.375 (or something like it) might conceivably pass muster. See generally *Boddie v. Connecticut,* 401 U.S. 371, 378 (1971) (due process does not require an evidentiary hearing in every civil case). This scenario emphatically does not exist in Washington, however.

On the contrary, Washington has long rejected the "feudal" approach to residential landlord-tenant law set forth in *Lindsey.* See *Foisy v. Wyman,* 83 Wn.2d 22, 27; 515 P.2d 160 (1973) ("Any realistic analysis of the lessor-lessee or landlord-tenant situation leads to the conclusion that the tenant's promise to pay rent is in exchange for the landlord's promise to provide a livable dwelling."); see

[9] "The ancient notion that a lease is a conveyance of an 'estate in land,' in which the respective covenants—a tenant's to pay rent, the landlord's to repair—were deemed independent of each other … was appropriate in the feudal culture in which property law evolved [but] has not been a realistic approach to landlord-tenant law for many years." *Lindsey* at 86-87 (Douglas, J., dissenting).

also *Faciszewski v. Brown,* 187 Wn.2d 308, 323-24; 386 P.3d 711 (2016) (tenants who claimed landlords were evicting them in violation of local ordinance could raise the ordinance as a defense and were not limited to pursuing post-eviction damages remedy). With a wide range of defenses to eviction potentially available even to tenants who are delinquent in rent, there can be plenty to decide in such a proceeding—hence the subject matter of a non-payment eviction in Washington is best summarized as "whether the rent has been paid on the property the lessee occupies. And, if rent has not been paid, the question is whether there is any legal justification for nonpayment." *Heaverlo,* 80 Wn. App. at 730–31; citing *Andersonian Inv. Co. v. Wade,* 108 Wash. 373, 378; 184 P. 327 (1919).

1. Basic procedural defenses to eviction for non-payment of rent.

Summary eviction proceedings, such as those authorized by Washington's Unlawful Detainer Act, provide a number of distinct advantages to landlords. See RCW 59.12 et seq. One is speed— in Washington, cases are usually heard within seven days of filing, and must be heard within 30 days. See RCW 59.18.380. Another is simplicity (and the consequent lack of cost); unlawful detainers are limited to the sole question of whether the landlord is entitled to possession of the premises, meaning most counterclaims are disallowed. See *Munden v. Hazelrigg,* 105 Wn.2d 39, 45; 711 P.2d 295 (1985) ("to protect the summary nature of the unlawful detainer proceedings, other claims, including counterclaims, are generally

not allowed," though recognizing exception for claims "based on facts which excuse the tenant's breach."), citing *First Union Mngmt., Inc. v. Slack,* 36 Wn. App. 849, 854; 679 P.2d 936 (1984). Summary eviction proceedings also afford certain tactical advantages to landlords, such as the choice of when to file and o schedule hearings, and the minimal time tenants have to secure representation or prepare for their hearings. See *Lindsey*, 405 U.S. at 85 ("Finding a lawyer in two days, acquainting him with the facts, and getting necessary witnesses make the theoretical opportunity to be heard and interpose a defense a promise of empty words."). Formal discovery is allowed, but seldom practical—with some procedures effectively unavailable by incompatible response deadlines. See CR 33-34, 36 (30 days to answer most written discovery requests).

To avail themselves of these significant advantages, landlords must comply, often strictly, with the statutory notice requirements for terminating a tenancy and commencing an unlawful detainer action. See *Everett Hous. Auth. v. Terry,* 114 Wn.2d 558, 564; 789 P.2d 745 (1990); see *Sowers v. Lewis,* 49 Wn.2d 891, 894; 307 P.2d 1064 (1957). Accordingly, many of the most fundamental defenses to eviction for nonpayment of rent relate to these statutory notice requirements.

To terminate a residential tenancy in Washington for nonpayment of rent, a landlord must give fourteen days notice in which to either pay the delinquent rent or quit the premises. RCW 59.12.030(3). Such a notice is not effective if given

before the tenant has actually become delinquent. See *Bernard v. Triangle Music Co.,* 1 Wn.2d 41, 53; 95 P.2d 43 (1939). The notice must state the amount due, identify the premises, and state a clear deadline for compliance (no sooner than the statutory minimum time). See *Metcalfe v. Heslop,* 161 Wn.2d 106, 107; 296 P. 151 (1931); see also *Sowers* at 895. The notice must be served properly, usually requiring at least an attempt at personal delivery. See RCW 59.12.040.

Only if the tenant fails to pay or vacate within the required time may the landlord may bring an unlawful detainer action. See *Christensen v. Ellsworth,* 162 Wn.2d 365, 372; 173 P.3d 228 (2007). The action may not be filed unless and until the tenant holds over in possession after the time to vacate has expired. See *Community Inv. v. Safeway Stores, Inc.,* 36 Wn. App. 34, 37; 671 P.2d 289 (1983). Additional requirements govern the form and content of the summons, as well as its manner of service. See *Truly v. Heuft,* 138 Wn. App. 913, 918; 158 P.3d 1276 (2007) (failure to inform tenant of right to respond through methods other than personal delivery rendered summons invalid), abrogated on other grounds by *MHM & F, LLC v. Pryor,* 168 Wn. App. 451, 277 P.3d 62 (2012).

Failure to comply with these procedural requirements generally requires dismissal of an unlawful detainer action. See *Terry,* 114 Wn.2d at 563. This is true irrespective of whether the tenant may actually owe the rent claimed due. See *Wooding v. Sawyer,* 38 Wn.2d 381, 387; 229 P.2d 535 (1951) ("tenant, though in

arrears in his rent, is rightfully in possession" until lease is properly terminated through expiration of proper notice). Hence a tenant who is served a pay-or-vacate notice that does not state the amount due, or that provides fewer than 14 days in which to cure the default, or that simply instructs the tenant to vacate without offering the option to cure, or that is served before the tenant has actually fallen behind in rent, or that is not served in the proper manner, would have a defense to eviction—even if that tenant owed every penny of the rent claimed owing.

2. Common substantive defenses to eviction for non-payment of rent.

Even if a landlord gives the tenant an appropriate pay-or-vacate notice and brings a proper unlawful detainer action, a tenant can still have a defense on the merits to eviction for non-payment of rent—again, even if the rent is owed. These substantive defenses usually arise under equitable doctrines or statutes at various levels of government.

One such defense is waiver, which can apply where a landlord attempts to evict a tenant based on rent from an earlier month despite accepting rent from a later month. See *Wilson v. Daniels,* 31 Wn.2d 633, 639, 198 P.2d 496 (1948) ("If the landlord accepts rent with full knowledge of a breach of the terms of a lease, he waives his right to declare a forfeiture for such breach."). Where the waiver doctrine applies, the tenant still owes the rent—the landlord merely waives the right to evict the tenant for not having paid it. See *MH2 Co. v. Hwang,* 104 Wn.

App. 680, 684; 16 P.3d 1272 (2001). Landlords can avoid the application of the waiver doctrine through the use of a proper "non-waiver" lease clause, or through certain accounting methods. See, e.g., *Housing Resource Grp. v. Price,* 92 Wn. App. 394, 402; 958 P.2d 327 (1998). But this is not easily done, and many landlords prefer to guard against the waiver defense by simply declining to accept any rent at all once a default occurs. Tenants who attempt to tender rent in such cases are often confused about whether or how much rent "is owed" when their funds are refused or returned.

Another equitable defense to non-payment of rent is constructive trust. See generally *Snuffin v. Mayo,* 6 Wn. App. 525, 528; 494 P.2d 497 (1972) (proper to hear constructive trust argument in unlawful detainer action if resolution bears on right to possession). A common scenario where constructive trust applies in a residential tenancy involves tenants with certain governmental housing subsidies, such as Section 8 housing choice vouchers. See 24 C.F.R. § 982.1 et seq. The rules of such programs generally restrict landlords from charging tenants more rent than approved under the contract. See 24 C.F.R. § 982.451(b)(4)(ii). Yet some landlords extract improper "side payments" from tenants.[10] A landlord who

[10] See 73 Fed. Reg. 39712, 39713 (Jul. 10, 2008) ("Improperly requiring tenants to pay rent in excess of what is authorized by the applicable HAP contract represents both an actionable offense … and deplorable behavior directed towards the very persons whom the HCV program was designed to serve … OIG will not tolerate

collects such unlawful payments holds them in constructive trust for the tenant—and if the tenant later defaults in the monthly rent, the accumulation of side payments in constructive trust may supply a defense to eviction. Again this makes ambiguous what rent "is owed."

A similar defense is breach of the implied warranty of habitability. See *Foisy,* 83 Wn.2d at 31-32. Technically, a landlord's failure to deliver habitable premises discharges a tenant's duty to pay some or all of the rent. See *Foisy* at 34. In practice, however, the tenant will often have paid full rent for some number of months despite the uninhabitable conditions, and the court will order a rent abatement retroactive to the onset of the habitability violation. This results in the landlord holding the abated rent in constructive trust, which may then be offset against the claimed arrearage. See *Foisy* at 34 ("If the finder of fact determines that the entire rental obligation is extinguished by the landlord's total breach, then the action for unlawful detainer based on nonpayment of rent must fail."). Again, whether or which rent "is owed" becomes ambiguous—especially before the court has heard the claim or actually relieved the tenant of any rent obligation.

Finally, a broad constellation of statutes supply substantive defenses to eviction—including for nonpayment of rent. At the time of this writing, in fact, an

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such conduct, and rather will cooperate with efforts to bring offending landlords to justice and to remedy their wrongs.").

act of Congress has imposed a federal moratorium on residential evictions for non-payment of rent (or other fees or charges) from properties participating in certain federal housing programs or having federal-backed mortgage loans due to the Covid-19 pandemic. See Pub.L. 116-136 ("Coronavirus Aid, Relief, and Economic Security Act" or "CARES Act"), § 4024(b). The CARES Act also bars eviction for non-payment in properties that benefit from mandatory forbearances on federally-related mortgage loans, *Id*., § 4023, and exists in addition to state and local orders within Washington also restricting residential evictions. See, e.g., Wash. Gub. Proclamation 20-19.1. And while these moratoria will be lifted some day, similar emergency moratoria could be adopted in response to future crises.

Civil rights statutes can supply defenses to eviction for non-payment of rent. See *Josephinium Assocs. v. Kahli,* 111 Wn. App. 617, 626; 45 P.3d 627 (2002) ("Discrimination may be a defense that arises out of the tenancy. When it does, the statute permits a tenant to assert the defense and requires the court to consider it."). For example, certain disabilities can interfere with a tenant's ability to pay rent—whether directly (such as a hospitalization or condition that prevents a tenant from actually tendering funds) or indirectly (such as a condition that affects a tenant's income or disrupts other resources from which rent would be paid). But problems such as these can often be overcome through payment plans or changes in due dates, assistance from of third-party aides, and so forth. See, e.g., *Fair Hsg. Rights*

Ctr. v. Morgan Properties Mngmt. Co., 2018 WL 3208159 at *7 (E.D.Pa. June 29, 2018) (landlord could be required to change rent due date to accommodate tenants' receipt of disability checks). Where such an accommodation may be necessary to enable a tenant with a disability to retain housing, and does not impose unreasonable costs or burdens on the landlord, it is a "reasonable accommodation" to which the tenant is entitled by law. See 42 U.S.C. 3604(f)(3)(B).

The denial of such a reasonable accommodation is a cognizable defense to eviction where the rent default is related to the disability. See *Kahli*, 111 Wn. App. at 626. But the rent still "is owed." A landlord may be required to accommodate times and methods of payments, but not to simply forgive or forego the rent. See *Giebeler v. M & B Assocs.,* 343 F.3d 1143, 1157 (9th Cir. 2003).

A similar defense against eviction for non-payment of rent may be available to tenants in federally-related housing covered by the Violence Against Women Act, and who fail to pay rent for reasons related to being a survivor of gender-based violence. See 34 U.S.C. § 12491(b)(1); see *Boston Hous. Auth. v. Y.A.,* 482 Mass. 240, 246; 121 N.E.3d 1237 (2019) (VAWA-covered housing program required to consider payment plan for tenant whose non-payment of rent resulted from domestic violence).

"Source of income discrimination" laws, such as RCW 59.18.255, can supply defenses to eviction for non-payment of rent. Such laws generally prohibit

landlords from refusing to allow tenants to pay their rent with particular type of (lawful) income, such as housing vouchers or other public benefits. Thus, a tenant whose landlord refused to accept rent based on the source of the payment might still owe that rent—but could not lawfully be evicted for that reason. See, e.g., RCW 59.18.255(1)(b).

Some consumer protection laws also protect against evictions based on non-payment of rent. For example, RCW 59.18.363 requires "both an automatic stay of the [unlawful detainer] action and a consolidation of the action with a pending or subsequent quiet title action when a defendant claims that the plaintiff acquired title to the property through a distressed home conveyance." This provision was designed to prevent scam artists from using summary eviction proceedings to evict former homeowners without the court being able to examine the legitimacy of the underlying transaction—which may have been purposefully designed to obscure and confuse the consumer as to the amounts owed and whether such amounts constitute rent, interest, repayment of principal, or other items. See, e.g., *Hoover v. Bouffleur,* 74 Wash. 382, 386; 133 P. 602 (1913).

Some tenants may have additional protections against eviction for non-payment of rent based on their rental agreements. See *Indigo Real Estate Servs., Inc. v. Wadsworth,* 169 Wn. App. 412, 422; 280 P.3d 506 (2012) ("where a lease provides the tenant with greater protection than he or she would receive under the

unlawful detainer statute, the landlord must comply with the lease in any eviction action"). Many subsidized housing tenants, for instance, have rights to administrative hearing procedures prior to being judicially evicted, see, e.g., 24 C.F.R. § 966.4(n), and failure to afford those hearing procedures correctly can require dismissal of an unlawful detainer action. See *Seattle Housing Auth. v. Bin,* 163 Wn. App. 367, 371; 260 P.3d 900 (2011); *King County Hous. Auth. v. Saylors,* 19 Wn. App. 871, 875; 578 P.2d 76 (1978).

B. Requiring a tenant to declare under penalty of perjury that rent is not owed in order to have a hearing before they being evicted deters tenants with meritorious defenses from contesting eviction.

The above is only a partial list of the defenses potentially available to a residential tenant facing eviction for non-payment of rent in Washington. Yet there can be no serious doubt that residential eviction defense is a sophisticated area of law where the outcome, even in a non-payment of rent case, turns on far more than simply whether the claimed rent was paid. The question truly is whether, if the rent was not paid, "there is any legal justification for nonpayment." *Heaverlo* at 730.

The statutory .375 notice, however, suggests otherwise. See RCW 59.18.375(5)(f). A tenant must either escrow the rent or deny owing it. See *Id*. A reasonable tenant reading that notice could easily conclude there is no defense to eviction unless the rent is "not owed," and would logically be deterred from

attempting to contest eviction—or even responding to the .375 notice—unless she could truthfully deny owing the rent.

In this way, the .375 notice misleads tenants and likely causes many to move out, settle on unfavorable terms, or otherwise abandon meritorious legal positions. Such a misleading notice cannot be reconciled with procedural due process requirements. See *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) (notice must be "reasonably calculated, under all the circumstances, to apprise [tenants] of the action and afford them an opportunity to present their objections").

A tenant "may provide as a reason that the rent alleged due in the notice is not owed based upon a legal or equitable defense or set-off arising out of the tenancy." RCW 59.18.375(2). Yet this text does not appear in the .375 notice. Even if it did, this provision does not enable the tenant to avoid the issuance of a writ by presenting a defense to eviction irrespective of whether rent is owed.

Rather, to contest the eviction on the basis of a legal justification for nonpayment requires the tenant to affirmatively "seek a hearing on the merits and an immediate stay of the writ of restitution." RCW 59.18.375(4). Nothing in the .375 notice informs a tenant such a procedure is available or how to pursue it—and these omissions are fatal under basic principles of procedural due process. See *Mullane* at 314 (notice must be of such nature as reasonably to convey the required

information), citing *Grannis v. Ordean,* 234 U.S. 385, 394 (1914). Such a stay is not guaranteed, and appears to requiring a superior court motion—a procedure beyond the capacities of many unrepresented tenants. See RCW 59.18.375(4); see also, c.f., *Goldberg v. Kelly,* 397 U.S. 254, 268-69 (1970) (due process requires "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.").

Perhaps worst of all, requiring that tenants to swear that they do not owe rent under penalty of perjury, likely exacerbates the .375 procedure's deterrent effect even further. A tenant who hopes to assert a breach of the implied warranty of habitability, for instance, or defend on a reasonable accommodation ground, might well have a good faith legal basis on which to assert that the claimed rent is "not owed." See, e.g., *Foisy* at 34. Yet the ambiguities surrounding whether or how much rent "is owed" in such cases might make a tenant reluctant to file a statement denying that rent is owed in such a case, particularly as the statute explicitly raises the specter of criminal prosecution for perjury. See RCW 59.18.375(2), (5)(f).

There is no apparent justification for requiring a sworn statement rather than a statement submitted under the ordinary good-faith, reasonable inquiry standard Washington superior courts require under CR 11. Rather, the function of the "sworn statement" requirement looks to be nothing other than raising the stakes and intimidating tenants—including those with meritorious defenses. Deterring

tenants from contesting evictions in this way likewise offends basic notions of procedural due process. See *Fuller v. Oregon,* 417 U.S. 40, 54 (1974) (imposing cost or risk upon the exercise of the right to a hearing impermissible if purpose is to chill exercise of the right).

IV. Conclusion

For all of the foregoing reasons, the Court should find that RCW 59.18.375 is inconsistent with the 14th Amendment Due Process Clause and enjoin further enforcement of the statute.

Respectfully submitted this 20th day of April 2020,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

The undersigned hereby certifies that this brief contains fewer than 6,500 words, as permitted by FRAP 32(a)(7)(B), exclusive of items exempt under FRAP 32(f). An electronic word count performed on the final version of the text reported 4,433 words.