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State of Virginia
In the Supreme Court

In re Shakori Edwards)
)
Petitioner) No. _____
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_____)

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

I. Introduction

The economic impacts of the Covid-19 pandemic have been truly and broadly devastating. More than 625,000 Virginians have applied for unemployment insurance since March 15, 2020--almost one of every seven people who were employed in February, and nearly five-times the prior seven-week record. Only this Court's cessation of state eviction dockets from March 16 to the present has avoided those extensive job losses from translating into massive homelessness. While the purpose of that order may have been to protect court staff, litigants, and members of the public from disease transmission at courthouses and in the course of legal activities, its effect has been to enable hundreds of thousands of Virginia families to remain safe in their homes and observe the social

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distancing practices that public health imperatives demand--even as their incomes may have been disrupted, diminished, or disappeared altogether.

This Court has now authorized local jurisdictions to resume in-person hearings for non-emergency cases starting on May 18. One practical effect of this order will be to enable residential eviction lawsuits to proceed. But this Court imposed important conditions on resuming such in-person hearings, including limiting who may enter the courthouse, complying with the Office of Executive Secretary's manual entitled "Pandemic Continuity of Operations Planning: Reconstitution" (hereafter "OES transition guidance"), and entering a formal order giving notice of new protocols and schedules. In addition, the U.S. Congress has since enacted restrictions that prohibit the filing of evictions in a significant percentage (at least 28% based on financing alone) of rental units.

For courts resuming their eviction dockets, compliance with both the conditions imposed by this Court, due process requirements set forth in the Virginia and United States Constitution, as well as the new restrictions enacted by Congress, are essential to hold back the terrible tsunami of evictions building on the horizon. While the CARES Act expressly blocks some evictions, this Court's emergency order and the OES transition guidance include policies and procedures

designed to afford fair and accurate notice to litigants and witnesses and ensure that tenants facing eviction receive procedural due process.

Despite this urgent imperative, the Petersburg General District Court has announced plans to resume in-person hearings in civil cases on May 20 without having entered any order: setting forth new safety protocols; informing court users who is allowed to enter the courthouse; for procedures for persons who may be excluded from the courthouse; or adopting policies or procedures necessary to comply with the OES transition guidance or the CARES Act restrictions. Such proceedings, being inconsistent with this Court's May 6 order and highly likely to violate the federal CARES Act, are beyond the jurisdiction of a general district court. This Court should issue a writ of prohibition disallowing such proceedings until the necessary corrective measures are adopted.

II. Background Facts

Petitioner is a resident of Petersburg, Virginia. Petitioner Shakori Edwards' landlord filed a summons for unlawful detainer (Case Number GV-20-001817-00) action against her on April 23, 2020. This unlawful detainer case is set to be heard in Petersburg General District Court on May 20, 2020 at 8:30 A.M.

Petitioner received the Summons for Unlawful Detainer, which directs her to appear at the court at the time of the hearing. However, Petitioner has received no

information from the Court about options for remote hearings, or about safety protocols or procedures that may be in place.

III. Issues Presented

1. A writ of prohibition is appropriate to restrain a lower court from acting without or in excess of its jurisdiction. The Petersburg General District Court intends to resume in-person hearings on residential eviction cases on May 20 without having complied with this Court's May 6 order or the referenced Office of Executive Secretary's transition guidance, despite compliance with such conditions being required to resume such in-person hearings. Should this Court restrain such proceedings as beyond the lower courts' jurisdiction until they comply with the May 6 order and OES transition guidance?

2. The federal CARES Act prohibits the filing of certain residential eviction lawsuits through July 24, 2020. The Petersburg General District Court intends to resume in-person hearings on residential eviction cases on May 20 but has not established any procedures for preventing the filing of cases prohibited by the CARES Act or identifying and dismissing improperly-filed cases. Without such procedures, the Petersburg General District Court is extremely likely to hear and rule on eviction cases barred by the CARES Act. Should this Court restrain the

Petersburg General District Court from resuming eviction hearings as beyond their jurisdiction until it establishes procedures for complying with the CARES Act?

IV. Argument

The Petersburg General District Court has not adopted policies or procedures for complying with either this Court's May 6 order or the OES transition guidance referenced in that order, or with the federal eviction restrictions imposed under the CARES Act. The Petersburg GDC will undoubtedly violate both authorities should it resume hearing eviction cases on May 20. This Court should restrain such proceedings as beyond the jurisdiction of the Petersburg General District Court.

A. Writ of prohibition is appropriate to restrain general district courts from acting beyond their jurisdiction.

The writ of prohibition, codified at Va. Code § 8.01-644 through 653.1, is "an extraordinary remedy employed 'to redress the grievance growing out of an encroachment of jurisdiction.'" *In re Commonwealth's Attorney for City of Roanoke,* 265 Va. 313, 316, 576 S.E.2d 458 (2003), quoting *Elliott v. Great Atlantic Management Co., Inc.,* 236 Va. 334, 338, 374 S.E.2d 27 (1988). Its function is not to correct erroneous rulings, "but only to prevent exercise of the jurisdiction of the court by the judge to whom it is directed when the judge either has no jurisdiction or is exceeding his/her jurisdiction." *In re Commonwealth's*

Attorney, 265 Va. at 316-17, citing *In re Department of Corrections,* 222 Va. 454, 461, 281 S.E.2d 857 (1981).

This Court has previously defined "jurisdiction" as "the power to adjudicate a case upon the merits and dispose of it as justice may require." *Commonwealth's Attorney* at 317, quoting *Tazwell County School Bd. v. Snead,* 198 Va. 100, 104–05, 92 S.E.2d 497 (1956). Trial courts ordinarily acquire jurisdiction over cases within their territories by statute, coupled with proper service of process (or consent) upon the parties whose rights are to be adjudicated. *See Tazwell School Bd.,* 198 Va. at 107 (distinguishing jurisdiction from venue). A general district court ordinarily has jurisdiction over unlawful entry and detainer actions from Va. Code § 16.1-77(3), provided that personal jurisdiction is first obtained over the defendant in accordance with Va. Code § 8.01-126.

Nevertheless, this Court may order the suspension of any proceedings in a general district court during a time of judicial emergency under Va. Code § 17.1-330(C). The suspension of a court's proceedings necessarily concerns its jurisdiction, since such a suspension naturally deprives the court of its power to adjudicate and dispose of cases on the merits. *See generally Commonwealth's Attorney* at 317.

This Court declared a statewide judicial emergency on March 16, and that emergency remains in effect (currently through June 7, 2020). The initial emergency orders suspended in-person hearings for, inter alia, residential eviction cases. Supreme Court of Virginia, Order Declaring Judicial Emergency, "First Emergency Declaration Order" ¶ 1. *See also* Supreme Court of Virginia, Order Extending Declaration of Judicial Emergency, "Second Emergency Declaration Order" ¶ 1. Now that the order has been modified to conditionally allow such hearings, compliance with those conditions must constitute a prerequisite to the exercise of such jurisdiction. *See* Supreme Court of Virginia, Fourth Order Modifying and Extending Declaration of Judicial Emergency, "Fourth Emergency Declaration Order" ¶ 4.

B. Compliance with this Court's May 6 order and the OES transition guidance is mandatory to resume in-person hearings.

This Court's order authorizing lower courts to resume in- person hearings for non-emergency cases expressly conditioned that resumption upon compliance with the OES transition guidance. *See* Supreme Court of Virginia, Fourth Order Modifying and Extending Declaration of Judicial Emergency, "Fourth Emergency Declaration Order" ¶ 4. In unlawful detainer cases, compliance with the OES transition guidance requires the preparation and service of new notice materials to defendants. *See* OES transition guidance at p. 7.

In the same Order, this Court stated that "[a]ll courts should enter orders consistent with [the May 6] Order to advise their court users of new protocols and schedules consistent with this Order." Fourth Order Modifying and Extending Declaration of Judicial Emergency in Response to Covid-19 Emergency, ¶ 11 (May 6, 2020). The Petersburg General District Court has not entered any such order, even though--at minimum--the court must exclude certain persons from entering the courthouse, establish remote hearing options for those who cannot (or, perhaps, are not willing to) enter, and give notice of those policies and procedures. *See Id.* at ¶ 5.

C. Compliance with May 6 Order, the OES transition guidance, and Constitutionally mandated due process requires adopting additional notice procedures.

In an unlawful detainer action, tenants are first served with a form summons which states the name and address of the court and directs the tenant to appear at a specific time to answer the claim. *See* Form DC-421; *see also* Va. Code § 8.01-126. In ordinary circumstances, a defendant may appear in person and the summons form directs defendants when and where to do so.

During the judicial emergency, however, a defendant's ability to appear in person may not be assumed. This Court's emergency order prohibits a person from entering a court if they have, within the preceding 14 days:

i. traveled internationally;

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ii. been directed to quarantine, isolate, or self-monitor;

iii. been diagnosed with, or have had contact with anyone who has been diagnosed with, COVID-19;

iv. experienced a fever, cough, or shortness of breath; or

v. resided with or been in close contact with any person in the above-mentioned categories.

Fourth Order Modifying and Extending Declaration of Judicial Emergency in Response to Covid-19 Emergency, ¶ 11 (May 6, 2020).

Any unlawful detainer defendant could belong to one or more of these categories. Similarly, a witness or other person a tenant might wish to attend the hearing might likewise be excluded. And membership in these categories is hardly static--a tenant, witness, or other hearing participant could wake up the morning of her case with a fever or cough, or be exposed to a high-risk person at any moment.

Despite this high risk of being denied entry to a court, however, nothing in the form summons, or any other document ordinarily required to accompany the summons or otherwise be served to the tenant, informs of these limitations on court access. Nothing in the form summons informs the tenant how to appear or otherwise protect his or her rights if the tenant cannot enter the court. Nothing in the form summons advises the tenant of alternatives for appearing remotely or having witnesses do so, or how to take advantage of those alternatives.

These problems threaten the core due process rights of tenants who are notified of their cases through only the usual form summons. *See generally Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339 (1940). *See also Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314–15, 70 S. Ct. 652, 657–58, 94 L. Ed. 865 (1950). The OES transition guidance anticipates this problem and thus recommends that courts take specific steps to ensure meaningful notice to persons whose cases will be heard in-person:

> Consider attaching notices to summonses, witness subpoenas, notices of hearing and show causes which provide the following information:
>
> - Only parties and witnesses will be allowed in the courtroom and the number of persons allowed in the courtroom at the same time will be limited.
>
> - If you have been ill or are currently experiencing symptoms such as shortness of breath, cough, or a fever, or if you have been exposed to someone who has been diagnosed with the coronavirus, please contact the clerk's office to reschedule your hearing.
>
> -The court is conducting hearings by telephone and/or video conferencing. To request a remote hearing, please file a motion with the clerk's office.

Office of Exec Sec. of Virginia Sup. Ct., Pandemic Continuity of Operations Planning: Reconstitution, p. 7 (May 2020). The OES transition guidance also contains a form "Motion for Remote Hearing" which requires the movant to ensure all parties and witnesses to agree to a remote hearing. *Id.* at 22.[1]

[1] The Court's May 12, 2020 amendment to the Fourth Emergency Declaration Order eliminated the requirement that all parties must agree to a motion for a remote hearing: "Whether criminal or civil, whether the case is one handled in person or video or telephone, it is not necessary for a party to obtain the agreement

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The OES transition guidance was not written in mandatory language, and thus compliance with that guidance need not require strict adherence to every suggestion. Indeed, the OES recommendations probably do not go far enough--understating the full extent of the limitations on court access, for instance. But substantial compliance with the OES guidance should at least mean informing parties and witnesses, in a meaningful and effective way, (i) the restrictions on court access, (ii) the alternatives available to those who cannot enter, and (iii) how to take advantage of those alternatives. And this is what appears to be specifically required by order in paragraph 11 of this Court's May 6 order. *See* Fourth Order Modifying and Extending Declaration of Judicial Emergency in Response to Covid-19 Emergency, ¶ 11 (May 6, 2020).

The Petersburg General District Court's failure to inform parties and witnesses as outlined above goes to the core of the due process rights that courts must afford litigants under the Constitutions of the United States and Virginia.[2] The Supreme Court of the United States in *Mullane* declared: "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

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of any other party to bring a pre-trial motion before the court or set a non-jury trial. Thus, the form motion in the OES transition guidance is obsolete.

[2] The due process clause of Article I Section 11 of the Virginia Constitution is coextensive with the due process guarantees of the U.S. Constitution. *Bragg Hill Corp. v. City of Fredericksburg*, 297 Va. 566, 585, 831 S.E.2d 483, 493 (2019) (citing *Willis v. Mullett*, 263 Va. 653, 657, 561 S.E.2d 705 (2002)).

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interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Cent. Hanover Bank & Tr. Co., supra,* 339 U.S. at 314, 70 S. Ct. at 657, 94 L. Ed. 865 (1950) (citations omitted). Moreover, "when notice is due, notice that is a mere gesture is not sufficient." *Id.* Thus, notice merely posted on an apartment door, for example, has been previously found to be insufficient to summon a tenant to court. *Greene v. Lindsey,* 456 U.S. 444, 453–54, 102 S. Ct. 1874, 1879–80 (1982).

The sole notice given by the Petersburg General District court concerning its resumption of hearing non-emergency matters barely rises to that of a gesture. That notice, buried as a link[3] in a 63-page document found on the website of Virginia's Judicial System, says only the following:

NOTICE

> As of Monday, May 18th the Petersburg General District Court will begin to hear scheduled cases. Social distancing will be required and face covering requested. The clerks' office will be open for the filing of pleadings/emergency motions only. Preliminary protective orders will be done by affidavit.

This "Notice" conveys very little information, and surely, falls short not only of the OES transition guidance, but the due process requirements set forth in *Mullane*. Specifically, this "Notice" provides no information about any restrictions on entry into the court and alternatives means for attending court by use of remote hearings

[3] http://vacourts.gov/news/items/covid/2020_0515_petersburg_gd.pdf

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and how to request remote hearings. Without this information, litigants are deprived of their "opportunity to present their objections" as *Mullane* requires.

Courts could seemingly devise numerous methods for communicating the necessary information to parties and witnesses about court access and alternatives to appearing in-person. For instance, courts could develop forms containing the pertinent information and serve those forms upon all parties and witnesses. Or, courts could require plaintiffs to serve such forms upon defendants, and parties to serve the notices to any witnesses or other relevant third-parties. Or, courts could simply adopt rules prescribing the information to be communicated, the persons entitled to receive the information, the manner in which the information must be provided, and relevant deadlines--and then direct plaintiffs or other litigants to serve the information using their own forms or materials.

Still other methods for giving the types of notices advised in the OES transition guidance may exist beyond even these. But until a court adopts *some* reliable method of giving those notices, that court cannot be said to be in compliance with the guidance and thus lacks jurisdiction for the resumption of in-person hearings. Yet the Respondent General District Court has not announced any new forms, issued any new rules, or otherwise taken steps to provide the

contemplated notices. Had it done so, these would need to have been set forth in an order, but no such order has been issued.

D. Compliance with CARES Act eviction restrictions is jurisdictional.

The federal CARES Act, which took effect on March 27, 2020, restricts lessors of "covered dwellings" from filing new eviction actions for non-payment of rent or other fees or charges during the first 120 days thereafter (i.e., until July 25, 2020). *See* Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub.L. 116-136,1 § 4024(b)(1). A "covered dwelling" means substantially any type of residential tenancy, so long as the tenant actually occupies the unit and the unit is in a "covered property." *See* § 4024(a)(1)(A). Accordingly, the CARES Act effectively deprives state courts of jurisdiction to adjudicate eviction lawsuits based on nonpayment of rent or other charges that pertain to covered dwelling units, if filed on or after March 27, 2020.

a. General district courts that resume eviction cases are destined to violate CARES Act unless they adopt procedures to comply.

The CARES Act defines "covered property" to include any properties that participate in a housing program covered under the Violence Against Women Act (VAWA) or the rural housing voucher program, or that have federal backed mortgage loans or multifamily mortgage loans. *See* CARES Act, § 4024(a)(2). This definition reaches an extensive amount of rental housing--though

precisely which or how many properties this definition covers is unknown and there is no apparent way to find out.

By one estimate, approximately 12.3 million rental housing units (28% of the 43.8 million overall U.S. units) are covered properties by virtue of having federally-backed mortgage loans. The U.S. has about seven million rental units assisted by housing vouchers or other federal subsidies that are covered through VAWA or the rural voucher program (though some of these units would overlap with federally-backed financing). There also more than 3.1 million low-income housing tax credit units--also covered via VAWA, though again some of those units could overlap with coverage through financing or other federal programs. And in addition to these millions of units, non-participating housing units can be covered dwellings if in properties where some units have vouchers or participate VAWA-covered programs. *See* CARES Act, § 4024(a)(2)(A).

Federal agencies and private organizations have created some resources that may be used to find out whether their property has a federally-backed multifamily mortgage loan or participates in certain site-based subsidy programs covered by VAWA. However, many tenants live in small (1-4 unit) rental properties, and the Freddie Mac and Fannie Mae on-line lookup tools for finding out whether a 1-4 unit property has a federally-backed mortgage loan may only be used by the

borrower, not tenants, advocates, or courts. And there are no such tools for finding out whether housing vouchers are present in a multifamily property--indeed, privacy protections would likely restrict voucher administrators from disclosing the locations of their tenants. *See, e.g.*, 5 U.S.C.A. § 552a(b) (2014).

Given the massive number of units subject to the CARES Act moratorium and the difficulty of determining which rental properties are covered and which are not, it is highly probable--indeed, inevitable--that some landlords will try to file eviction and prosecute eviction cases prohibited by the CARES Act in Virginia general district courts. Unless those courts adopt procedures designed to avoid those filings, or to quickly detect and dismiss improper filings, those courts will hear and decide matters outside their jurisdiction and contrary to federal law.

b. Compliance with CARES Act requires additional procedures which the Respondent has not adopted.

While residential eviction proceedings remain suspended in many states due to the ongoing pandemic, a number of states that have continued to allow evictions have adopted rules requiring unlawful detainer plaintiffs to submit declarations or otherwise affirmatively verify that the landlord has made a diligent inquiry and confirmed that the disputed premises are not in a covered property (Idaho, Arkansas, Michigan, South Carolina, and Texas). These requirements are necessary to comply with the CARES Act for two basic reasons.

For one, requiring the landlord to affirmatively plead or otherwise establish non-applicability of the CARES Act moratorium is necessary because--as discussed above--a tenant may not know, and may not have access to the information necessary to find out, whether a property has federally-backed financing or participates in a federal housing program. Particularly in summary eviction proceedings where ordinary civil discovery is made unavailable by rule or simply impractical due to incompatible deadlines, relying on tenants to find out, plead, and prove coverage under the CARES Act would not be a reliable way of avoiding improper evictions. Such reliance on defendants to detect and assert CARES Act coverage in defense to eviction proceedings is further unreliable in light of the restrictions on courthouse access and impediments to appearing or defending, as discussed above.

Second, prohibiting the filing of such cases is necessary to fully effectuate the public health purposes behind the CARES Act. Were it necessary for tenants to respond to such complaints, appear in court and move for dismissal based on the moratorium, then the necessary personal contacts and interactions would expose tenants, court personnel, and other members of the public to heightened and unnecessary risk of infection and disease transmission during the pandemic.

Virginia has not adopted statewide procedures for ascertaining whether eviction cases may be subject to the CARES Act and the Respondent General District Court has not adopted such procedures locally. Since a resumption of eviction proceedings in the absence of such procedures will almost certainly result in prohibited cases being heard in violation of the CARES Act and outside those courts' jurisdiction, this Court should restrain the Respondent from resuming their eviction hearings until such procedures are devised and implemented.

V. Conclusion

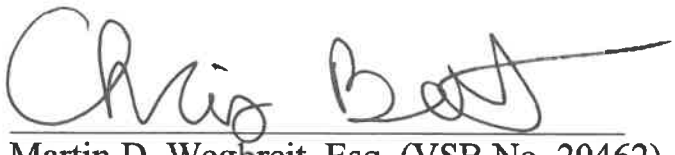
For all of the foregoing reasons, this Court should issue a writ of prohibition directing the Respondent General District Court not to resume any in-person hearings of unlawful detainer actions until each such court proves to this Court's satisfaction that all of the following have occurred:

a. Appropriate procedures for informing all parties, witnesses, and other relevant persons of the restrictions on court access, the availability of alternatives to in-person appearances, and how to utilize such alternatives have been developed and implemented; and

b. Appropriate procedures for denying the filing of eviction cases prohibited under the CARES Act, or for promptly detecting and dismissing any such cases improperly filed, have been developed and implemented; and

c. All such new procedures have been disseminated to all parties, witnesses, counsel, and the general public and made available on court websites, clerk's offices, and other such locations and through such channels as such courts customarily use to distribute new polices, rules, and notices.

Respectfully submitted this 18th day of May, 2020, by:



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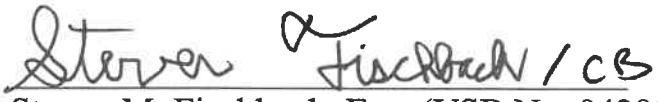

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