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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**

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| IDAHO LEGAL AID SERVICES, INC.,<br><br>Plaintiff,<br><br>vs.<br><br>STATE OF IDAHO,<br><br>Defendant. | Case No. CV01-20-09078<br><br>**DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR EXPEDITED DECLARATION AND PRELIMINARY INJUNCTION** |

## I. INTRODUCTION

Plaintiff attempts to carve out an improper short-cut to not just the courthouse, but to judgment itself. First, instead of appearing before this Court with a tenant plaintiff who has actually been denied the right to a jury trial in the type of eviction proceeding at issue here, Plaintiff—a law firm—brings this suit on its own behalf. Plaintiff seeks to bypass the fundamental doctrines of justiciability that bind all litigants so it can obtain an advisory opinion

as to the facial constitutionality of Idaho Code § 6-311A and a mandatory injunction compelling the Idaho Supreme Court to change certain forms and instructions. If Plaintiff is allowed to proceed, this Court will unlock the courthouse doors to attorneys everywhere to file suit in their own names to preemptively obtain advisory opinions based on the interests of future potential clients and the citizenry of Idaho at large completely divorced from any actual controversy. Second, Plaintiff attempts to short circuit the judicial process by asking this Court for a declaratory judgment through a preliminary and interlocutory motion.

Moreover, Plaintiff cannot meet its burden of establishing that Idaho Code § 6-311A is facially unconstitutional and that the court forms and instructions that Plaintiff challenges violate due process. This Court should deny Plaintiff's wholly improper request for a declaratory judgment and a preliminary injunction.

## II. BACKGROUND

At the time the Idaho Constitution was adopted, Chapter 4 of title 3 of the Code of Civil Procedure, Revised Statutes of 1887, titled "Summary Proceedings for Obtaining Possession of Real Property," governed forcible entry and unlawful detainer actions and the remedies therefore. *See* R.S. §§ 5091-5109 (Br. in Supp. of Mot. for Expedited Decl. & Prelim. Inj. ("Pl.'s Br."), Ex. 1). In such proceedings, "[w]henever an issue of fact [was] presented by the pleadings, it must be tried by a jury, unless such jury be waived as in other cases." R.S. § 5103 (Pl.'s Br., Ex. 1).

By 1973, the Idaho Legislature had carved out a specific type of unlawful detainer action—an action exclusively for possession of a tract of land of five acres of less when the landlord sought possession on for nonpayment of rent—from those that were originally governed by Chapter 4 of title 3 of the Code of Civil Procedure, Revised Statutes of 1887 for an expedited eviction process. *See* S.L. 1973, ch. 261, §§ 2-5.

In pertinent part, this subset of unlawful detainer proceedings was codified at Idaho Code §§ 6-310 to 6-311B. Idaho Code § 6-311A addressed the procedure when the case was tried by a judge and Idaho Code § 6-311B addressed the procedure when the case was tried by a jury. *Id.* at §§ 4-5. In 1996, Idaho Code § 6-311A was amended to read "the action shall be tried by the court without a jury" and Idaho Code § 6-311B was repealed. S.L. 1996, ch. 169, §§ 1-2.

Over time, the legislature has added additional grounds for the use of this expedited unlawful detainer process. *See* S.L. 2001, ch. 203, § 4; S.L. 2006, ch. 248, § 3, eff. March 30, 2006. Amended by S.L. 2017, ch. 276, § 3, eff. July 1, 2017. This process currently applies to:

> [A]n action exclusively for possession of a tract of land of five (5) acres or less for the nonpayment of rent or on the grounds that the landlord has reasonable grounds to believe that a person is, or has been, engaged in the unlawful delivery, production, or use of a controlled substance on the leased premises during the term for which the premises are let to the tenant, or for forcible detainer, or if the tenant is a tenant at sufferance pursuant to subsection (11) of section 45-1506, Idaho Code[.]

Idaho Code § 6-311A.

Plaintiff, a law firm, now challenges Idaho Code § 6-311A as unconstitutional on the grounds that it unconstitutionally denies tenants their right to a jury trial. Plaintiff further alleges that certain court forms and instructions are unconstitutional as they deny unrepresented tenants due process under the Idaho and U.S. Constitutions. At the same time it filed its Complaint, Plaintiff filed the instant motion seeking a declaratory judgment and preliminary mandatory injunctions to change the status quo before Defendant could even file a motion to dismiss or answer the Complaint. Plaintiff's motion should be denied.

## III. ARGUMENT

### A. Plaintiff lacks standing to bring this suit.

"Concepts of justiciability, including standing, identify appropriate or suitable occasions for adjudication by a court." *State v. Philip Morris, Inc.*, 158 Idaho 874, 881, 354 P.3d 187, 194 (2015) (citing *Miles v. Idaho Power Co.*, 116 Idaho 635, 639, 778 P.2d 757, 761 (1989); and then citing 13 CHARLES ALAN WRIGHT, ET AL. FED. PRAC. & PROC. § 3529 (3d ed. 2014)).

> The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests.... It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

*Phillip Morris*, 158 Idaho at 881 (citation omitted). "Justiciability is generally divided into subcategories—advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions." *Miles*, 116 Idaho at 639, 778 P.2d at 761.

This Court must address the standing question before it can reach the merits. *Phillip Morris*, 158 Idaho at 881. "[T]he Declaratory Judgment Act does not relieve a party from showing that it has standing to bring the action in the first instance." *Coal. for Agric.'s Future v. Canyon County*, 160 Idaho 142, 147, 369 P.3d 920, 925 (2016) (quoting *Schneider v. Howe*, 142 Idaho 767, 772, 133 P.3d 1232 (2006)).

In order to have standing, "a petitioner must 'allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury.'" *Coal. for Agric.'s Future*, 160 Idaho at 146 (quoting *Miles*, 116 Idaho at 641, 778 P.2d at 763). Two different standing analyses exist, commonly referred to as "traditional" and "relaxed." *Tucker v. State*, 162 Idaho 11, 19-26, 394 P.3d 54, 62-69 (2017)

The traditional standing analysis applies here. The "relaxed" standing analysis only applies when "no party could otherwise have standing to bring a claim." *Tucker*, 162 Idaho at

26, 394 P.3d at 69 (quoting *Coeur d'Alene Tribe v. Denney*, 161 Idaho 508, 514, 387 P.3d 761, 767 (2015)). Here, as Plaintiff points out, there are a myriad of nonparty tenants who could bring these constitutional claims. *See* Decl. of James A. Cook at ¶ 14.

Under the traditional standing analysis, Legal Aid must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'like[lihood]' that the injury 'will be redressed by a favorable decision. *Tucker*, 162 Idaho at 19, 394 P.3d at 62 (quoting *Phillip Morris*, 158 Idaho at 881, 354 P.3d at 194).

*1. Plaintiff cannot show the requisite injury in fact to proceed on any of its Counts*.

"Injury in fact requires the injury to 'be 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* (quoting *Phillip Morris*, 158 Idaho at 881, 354 P.3d at 194).

The Idaho Supreme Court's decision in *Tucker* demonstrates how far Plaintiff is from establishing the requisite injury in fact. In the *Tucker* decision, the plaintiffs were actual criminal defendants who alleged actual denials of counsel because they were not represented by counsel at their initial appearances and, because they could not afford to post bail, they spent time in jail. *Id.* at 19-20, 394 P.3d at 62-63. The Idaho Supreme Court found that the plaintiffs satisfied the injury in fact requirement as to their claims that systemic deficiencies in Idaho's public defense standard denied them their rights to constitutionally adequate public defense under the Sixth Amendment and article I, section 13 of the Idaho Constitution." *Id.* at 20, 394 P.3d at 63.

In stark contrast, Legal Aid, the sole Plaintiff here, is a law firm. This lawsuit turns on the alleged deprivation of the right to a jury trial under article I, section 7 of the Idaho Constitution caused by Idaho Code § 6-311A. *See* Compl. at ¶¶ 1-5. But Legal Aid is bound by

the obvious truth that an attorney does not have a constitutional right for its client to have a jury trial. Further, Legal Aid cannot assert some sort of third-party standing on behalf of some amorphous unidentified group of nonparty clients or unrepresented tenants. Such an argument is foreclosed by U.S. Supreme Court precedent. *See Kowalski v. Tesmer*, 543 U.S. 125, 134 (2004) ("we hold that the attorneys do not have third-party standing to assert the rights of" defendants denied constitutional rights). S*ee also Lambert v. Turner*, 525 F.2d 1101, 1102-03 (6th Cir. 1975) (citation omitted) ("[t]he plaintiffs, as Legal Services attorneys, had no standing to sue on behalf of 'future juvenile clients, or potential juvenile clients'"); *Reynolds v. Roberts*, 207 F.3d 1288, 1299 (11th Cir. 2000) (holding the attorneys for the plaintiffs in an underlying proceeding who "proceed[ed] strictly on their own" in seeking a preliminary injunction "abused the judicial process" and "lacked standing" "[b]ecasue they had suffered no injury that would warrant relief"). The Idaho Supreme Court has found the U. S. Supreme Court's analysis of standing instructive. *See Koch v. Canyon County*, 145 Idaho 158, 161, 177 P.3d 372, 375 (2008).

The only injury Legal Aid alleges that relates to its own interests is "[h]aving to repeatedly file legal briefs and argue whether I.C. § 6-311A is constitution [sic] in eviction cases across the state," "incurring needless time and expense to make the same argument." Compl. at ¶ 27; Pl.'s Br. at 9. This is not sufficient to establish an injury-in-fact for the purposes of standing.

It cannot be an injury for an attorney to have legal work to perform. Giving the same legal advice, making already-researched and crafted arguments, and filing similar legal briefs is not injurious to an attorney or a law firm. This argument is akin to a reporter claiming an injury under the First Amendment because she repeatedly reports that protestors are being denied their right to protest. The protestor has suffered the injury in fact, not the reporter.

Moreover, the injury that Legal Aid alleges is purely speculative. It assumes that courts across the state will repeatedly require education in Legal Aid's theory as to the right of a jury trial in unlawful detainer cases. Thus, Legal Aid's only alleged personal injury is based on speculation as the future need for its legal services. "A speculative harm is not sufficient to confer standing." *Coal. for Agric.'s Future.*, 160 Idaho at 148, 369 P.3d at 926 (citation omitted).

The argument that Legal Aid makes, if adopted, has the potential to upend the doctrine of standing and render it meaningless. Attorneys everywhere would automatically have standing to argue disputed questions of laws on purely hypothetical fact patterns. This is the very sort of "generalized grievance" for which standing is not appropriate. *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013) ("We have repeatedly held that . . . a 'generalized grievance,' no matter how sincere, is insufficient to confer standing."). "A litigant 'raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.' *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-574 (1992) (remaining citations omitted)). Notably, the Ninth Circuit has relied on this principle to conclude an attorney lacked standing to "advance due process and equal protection claims because of the City's apparent failure to follow its civil codes[.]" *Kinney v. State Bar of Cal.*, 676 F. App'x 661, 663 (9th Cir. 2017) (unpublished) (citation omitted). Legal Aid cannot be found to have suffered an injury in fact for the purposes of standing on any of the counts stated in the Complaint.

2. *Plaintiff cannot establish the necessary causal connection between its alleged injury and the challenged action to establish standing as to Counts 3 and 4.*

Causation for the purposes of the standing analysis "requires the injury to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action

of some third party not before the court. '" *Tucker*, 162 Idaho at 21, 394 P.3d at 64 (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)).

Legal Aid cannot establish traceability as to Counts 3 and 4. It does not and cannot argue that court forms and instructions intended to assist unrepresented litigants cause any injury to it when those documents do not advise individuals of a right to a jury trial. Legal Aid is not an unrepresented litigant and it is quite obviously aware that it believes that defendants in unlawful detainer proceedings have a right to a jury trial. It therefore cannot plausibly allege that it has an injury stemming from the content of those forms and instructions. And all allegations related to unidentified, nonparty unrepresented litigants are not relevant to this standing analysis.

3. *Plaintiff cannot establish the necessary redressability as to its alleged injury as to Counts 3 and 4.*

"Standing's redressability element ensures that a court has the ability to order the relief sought, which must create a substantial likelihood of remedying the harms alleged." *Tucker*, 162 Idaho at 24, 394 P.3d at 67 (citation omitted). "[R]edressability analyzes the connection between the alleged injury and the requested judicial relief." *Id.* A claim fails if it is merely "speculative that a favorable decision will redress the injury." *Id.* (citation omitted).

Legal Aid seeks the following relief: (1) a declaratory judgment; (2) preliminary and permanent injunctions prohibiting the State of Idaho from enforcing Idaho Code § 6-311A; and (3) preliminary and permanent injunctions "making clear in any summons issued in those actions that defendants may file a written response or otherwise demand a jury trial," "providing a place in any approved court forms for unlawful detainer actions, including approved complaint and answer forms, for any party to demand a jury trial," and "providing appropriate references to a party's right to demand a jury trial in the approved Court Assistance Office instructions for those actions." Compl. at 10, Prayer for Relief, A-F.

Plaintiff cannot establish redressability. Were the requested relief ordered as to Counts 3 and 4, there is not a substantial likelihood that the alleged injury to Legal Aid of having to argue that the individuals it represents in unlawful detainer proceedings are entitled to a jury trial would be remedied. Legal Aid is aware of its argument in favor of a jury trial. Thus, any change to court forms to inform individuals as to the right to a jury trial would be meaningless to it. And as before, Legal Aid's allegations related to unidentified, nonparty unrepresented tenants are irrelevant.

**B. Plaintiff's claims are not justiciable because Plaintiff seeks an advisory opinion.**

Plaintiff's claims do not involve an actual case and controversy and are therefore not justiciable. As discussed above, none of Plaintiff's claims involve an actual case or controversy. Plaintiff is merely asking this Court for an impermissible advisory opinion.

While "[d]eclaratory judgments by their very nature ride a fine line between purely hypothetical or academic questions and actually justiciable cases," *State v. Rhoades*, 119 Idaho 594, 598, 809 P.2d 455, 459 (1991), *aff'd sub nom. Rhoades v. Henry*, 598 F.3d 511 (9th Cir. 2010), "a declaratory judgment can only be rendered in a case where an actual or justiciable controversy exists." *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984) (citations omitted). The one case that Plaintiff cites, the 1941 decision by the U.S. District Court for the District of Idaho, does not contradict this. *See Sunshine Mining Co. v. Carver*, 41 F.Supp. 60, 63 (D.Idaho 1941) (finding a "real and substantial controversy between the parties having adverse legal interest appropriate for judicial determination" allowing a plaintiff employer who was subject to the terms of the Fair Labor Standards Act to obtain a declaratory judgment as to its application and interpretation).

A declaratory judgment is only appropriate when it is based on "some specific adversary question or contention based on an existing set of facts, out of which the alleged 'rights, status and other legal relations' arise[.]" *Rhoades*, 119 Idaho at 598, 809 P.2d at 459 (1991) (quoting *State v. State Bd. of Educ.*, 56 Idaho 210, 217, 52 P.2d 141, 144 (1935)). "Only those to whom a statute applies and who are adversely affected by it can draw into question its constitutional validity in a declaratory judgment proceeding[.]" *Greer v. Lewiston Golf & Country Club*, 81 Idaho 393, 395-96, 342 P.2d 719, 720-21 (1959) (citation omitted); *see also Selkirk-Priest Basin Ass'n, Inc. v. State ex rel. Batt*, 128 Idaho 831, 833–35, 919 P.2d 1032, 1034–36 (1996).

The statute challenged here—Idaho Code § 6-311A—does not apply to Legal Aid in the context of this litigation. Legal Aid does not argue that the law firm itself is subject to an eviction proceeding pursuant to the statute; therefore, Legal Aid cannot seek a declaratory judgment as to its validity. Legal Aid's repeated references to the interests of an amorphous group of unidentified unrepresented tenants demonstrate clearly that this lawsuit does not arise out of an existing set of facts. Plaintiff does not provide this Court with any specific facts out of which this controversy allegedly arises beyond the existence of unlawful detainer proceedings on court dockets. This is not sufficient.

At least one other court has concluded that an attorney could not seek a declaratory judgment in the context of his representation of his client because no actual case or controversy existed even though that request for a declaratory judgment was much closer to an actual set of facts than what is presented here. *See Johnston v. Swing*, No. M2012-01760-COA-R3CV, 2013 WL 3941026, at *6 (Tenn. Ct. App. Jul. 26, 2013) (holding an attorney seeking a declaratory judgment failed to establish the existence of an actual case or controversy or that he had a real interest in the question to be decided in his argument that a local rule that prevented him from

speaking on behalf of his client was ineffective). No actual case or controversy exists to render Plaintiff's claims justiciable, including Plaintiff's request for a declaratory judgment.

**C. Plaintiff is not entitled to a declaratory judgment.**

Plaintiff's request for a declaratory judgment is premature. Asking for a declaratory judgment at this stage of the proceedings is really a disguised motion for summary judgment, which is prematurely filed here. Plaintiff has not complied with the time requirements of Rule 56; thus, its request for an "expedited declaration" in the form a declaratory judgment should be denied. Plaintiff's motion was not filed after 21 days from Defendant being served, and the hearing was not set within 28 days of the filing of Plaintiff's motion and brief. Idaho R. Civ. P. 56(b)(1), (2). Plaintiff's request for a declaratory judgment must be denied on this ground alone.

**D. Plaintiff is not entitled to a preliminary injunction.**

Plaintiff argues it is entitled to a preliminary injunction under Idaho Rule of Civil Procedure 65(e)(1) or (2) arising out of the Declaratory Judgment Act. Pl.'s Br. at 8-9. Even before considering the specific standards under which a preliminary injunction may issue, Plaintiff's request must be denied because the injunctive relief it seeks is not appropriate for a preliminary injunction.

The purpose of a preliminary injunction "issued before an adjudication of the case on the merits" is "to maintain the status quo until judgment." *Wolford v. Montee*, 161 Idaho 432, 442, 387 P.3d 100, 110 (2016). But the relief Plaintiff seeks here would alter the status quo by enjoining a statute prior to a determination on the merits. And Plaintiff's request for a preliminary injunction "prohibiting the State . . . from failing to inform parties" by changing a variety of forms and instructions, Compl. at 10 ¶ D, seeks a preliminary mandatory injunction, which is held to a higher standard, as discussed below.

*1. Plaintiff is not entitled to a preliminary injunction under Rule 65(e)(1).*

Even if Plaintiff was seeking the sort of relief for which a preliminary injunction might be appropriate, Plaintiff has not met its burden of proof to establish entitlement to such relief under Rule 65(e)(1). A preliminary injunction may be issued under Rule 65(e)(1) "when it appears by the complaint that the plaintiff is entitled to the relief demanded and that relief, or any part of it, consists of restraining the commission or continuance of the acts complained of[.]" This "entitled to the relief demanded" language has been restated as "substantial likelihood of success." The Idaho Supreme Court has held that Plaintiff, as the moving party, must:

> Demonstrate that based on their complaint, they were entitled to the relief they demanded, and as such were likely to prevail at trial. The substantial likelihood of success necessary to demonstrate that . . . [the moving party is] entitled to the relief . . . demanded cannot exist where complex issues of law or fact exist which are not free from doubt.

*Gordon v. U.S. Bank Nat'l Ass'n*, 166 Idaho 105, 455 P.3d 374, 384 (2019) (quoting *Harris* 106 Idaho 513, 518, 681 P.2d at 993 (analyzing an earlier yet substantively identical version of Rule 65(e)(1)). In other words, injunctive relief is appropriate only upon presentation of the clearest evidence, free from doubt. *Id.*

Plaintiff has not met its burden of establishing the requisite substantial likelihood of success. At the outset, as discussed above, there are substantial questions as to whether Plaintiff has standing to bring this lawsuit and, thus, whether this case is even justiciable. This alone precludes the issuance of the requested preliminary injunction under Rule 65(e)(1). Moreover, Plaintiff cannot meet its burden of demonstrating a substantial likelihood of success on its fundamental argument that Idaho Code § 6-311A is facially unconstitutional under article I, section 7 of the Idaho Constitution.

a. <u>Plaintiff cannot demonstrate a substantial likelihood of success on the merits as to Count 2 of their Complaint</u>.

The right to a jury trial conferred by article I, section 7 of the Idaho Constitution is determined in reference to the "right of jury trial as the same existed at the time of the adoption of the Constitution[.]" *Portneuf Irrigating Co. v. Budge*, 16 Idaho 116, 100 P. 1046, 1049 (1909); *Temperance Ins. Exch. v. Carver*, 83 Idaho 487, 493, 365 P.2d 824, 827–28 (1961) ("[T]he constitutional provisions, art. 1, § 7, art. 5, § 1, secure the right of trial by jury as it existed under common law and territorial statutes in effect at the time of the adoption of the Constitution.").

"Idaho's unlawful detainer statutes have been codified since 1881 and appeared in Idaho's first publicly available compilation of Idaho laws." *Caldwell Land & Cattle, LLC v. Johnson Thermal Sys., Inc.*, 165 Idaho 787, 800, 452 P.3d 809, 822 (2019) (citing R.S. 1887 § 5093). These statutes were intended to provide a "summary method" to allow a landlord to recover defaulted rent and the possession of property. *See Hunter v. Porter*, 10 Idaho 72, 81, 77 P. 434, 437 (1904). Plaintiff correctly argues that, at the time of adoption of the Idaho Constitution, the right to a jury trial in unlawful and forcible detainer proceedings was set out by Section 5103 of the Revised Statutes of Idaho Territory: "[w]henever an issue of fact is presented by the pleadings, it must be tried by a jury, unless such jury be waived as in other cases." Pl.'s Br., Ex. 1 (R.S. 1887 § 5103).

But the very statute that Plaintiff concedes establishes the right to a jury trial makes clear that Plaintiff is incorrect in arguing that a right to a jury trial exists in *every* eviction proceeding. Revised Statutes § 5103 (1887) unequivocally established that the right to a jury trial only existed at the time of the adoption of the Idaho Constitution—and thus only exists now—when "an issue of fact is presented on the pleadings." *Id.* The Sixth Judicial District decision that Plaintiff offers in support of its Brief further supports this conclusion. There, the court correctly noted that a jury trial is available in the unlawful detainer proceedings at issue here if requested

"upon a showing of a dispute of fact." Mem. Decision & Order, *S. Idaho Props. v. Wallace*, No. CV03-19-4458, slip op. 3 (Idaho 6th Dist. Feb. 12, 2020) (attached as Ex. 4 to Pl.'s Br.). The only constitutional clarification to the Sixth Judicial District decision is that that there is only a right to a jury trial when that disputed fact is "presented by the pleadings." Pl.'s Br., Ex. 1 (R.S. 1887 § 5103).

Plaintiff's facial challenge to Idaho Code § 6-311A cannot stand. "For a facial constitutional challenge to succeed, the party must demonstrate that the law is unconstitutional in all of its applications." *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res*., 143 Idaho 862, 870, 154 P.3d 433, 441 (2007) (citation omitted). "In other words, 'the challenger must establish that no set of circumstances exists under which the [law] would be valid.'" *Id.* (quoting *State v. Korsen*, 138 Idaho 706, 712, 69 P.3d at 132 (2003)).

In most circumstances, then, Idaho Code § 6-311A is constitutional. Defendants infrequetly file answers in forcible and unlawful detainer proceedings and, as a result of the extremely limited set of facts at issue in unlawful detainer claims, the facts are rarely contested. *See* Declaration of Steven L. Olsen and attached Exhibits. In other words, defendants rarely have a right to a jury under article I, section 7 of the Idaho Constitution; thus, Idaho Code § 6-311A is rarely constitutionally problematic. The law is not unconstitutional in all of its applications.

The Idaho Supreme Court's decision in *Loughery v. Weitzel*, 94 Idaho 833, 836, 498 P.2d 1306 (1972) does not compel an alternative conclusion. The Court did not analyze whether the defendant had right to a jury trial in an unlawful detainer proceeding in that case. *Loughery*, 94 Idaho at 836, 498 P.2d at 1309. Instead, the court held the probate court had not committed reversible error by denying a defendant's motion for a jury trial because the defendant could

have had a jury trial in a de novo appeal to the district court. *Id.* This is made evident by the court's careful language "any failure to obtain a jury in the probate court is not now reversible error on appeal." *Id.* The court neither said that the probate court erred nor that there was a right to a jury trial in unlawful detainer proceedings. For this reason, the 2019 Attorney General Opinion that relied on the decision in *Loughery* also cannot be given any weight.

Plaintiff incorrectly contends that the common law action of ejectment separately establishes that a right to a jury trial existed for unlawful detainer actions at the time the Idaho Constitution was adopted. The sentence that Plaintiff relies upon from *Anderson v. Whipple*, 71 Idaho 112, 121, 227 P.2d 351, 356 (1951), is *dicta* as to the question before this Court. In the *Anderson* decision, the Idaho Supreme Court analyzed whether there was a right to a jury trial in a suit to quiet title—not ejectment. *See id.* at 121-123, 227 P.3d at 356-358. Moreover, the Idaho case that the Idaho Supreme Court cited in *Anderson* in support its two sentences of *dicta* suggesting that an action for ejectment might be an action at law—*Burke v. McDonald*—did not address an unlawful detainer action. *Burke v. McDonald*, 2 Idaho 310, 13 P. 351 (1887), addressed a suit to determine the rights of adverse claimants under R.S. §§ 2325 and 2326 to certain mining ground.

As discussed above, the unlawful detainer actions affected by Idaho Code § 6-311A are a subset of the unlawful detainer procedures that were specifically governed by R.S. § 5103 at the time the Constitution was adopted. As the Idaho Supreme Court has recognized "Chapter 4 of title 3 of the Code of Civil Procedure, Revised Statutes of 1887," titled "Summary Proceedings for Obtaining Possession of Real Property" "treats *exclusively* of forcible entry and unlawful detainer, and the remedies therefore." *Hunter*, 10 Idaho at 86, 77 P. at 437 (emphasis added). Therefore, R.S. § 5103 controls the constitutionality of Idaho Code § 6-311A. Plaintiff cannot

demonstrate the necessary substantial likelihood of success on its facial challenge to Idaho Code § 6-311A as there are circumstances in which this statute is constitutional.

b. Plaintiff cannot demonstrate a very clear right and irreparable injury as to Counts 3 and 4 of its Complaint.

When the double negatives are untangled, Plaintiff actually seeks a mandatory injunction compelling the district court to order its superior to take action as to Counts 3 and 4. Mandatory injunctions order a "party to 'take action.'" *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (citation omitted). "'[A] preliminary mandatory injunction only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal.'" *Farm Serv., Inc. v. U. S. Steel Corp.*, 90 Idaho 570, 587, 414 P.2d 898, 907 (1966) (quoting *Evans v. District Court*, 47 Idaho 267, 270, 275 P. 99, 100 (1929)). The standard stated by Rule 65 does not apply.

Plaintiff also cannot demonstrate a very clear right as to its claims for injunctive relief under Counts 3 and 4 of the Complaint. It appears that Count 3 argues that the form complaint and answer and the instructions approved by the Idaho Supreme Court for unlawful detainer actions and the form summons for eviction proceedings issued pursuant to IRCP 4(a)(3)(A) and Appendix B violate the due process rights of unidentified nonparty unrepresented tenants under article I, section 13 of the Idaho Constitution by failing to inform them or suggest to them that they have a right to a jury trial. *See* Compl. at ¶¶ 39-48. Setting aside the fatal justiciability issues discussed above, Plaintiff's due process claim under article I, section 13 of the Idaho Constitution lacks merit.

Article I, section 13 of the Idaho Constitution states that no person shall be "deprived of life, liberty or property without due process of law." "The right to procedural due process guaranteed under both the Idaho and United States Constitutions requires that a person involved

in the judicial process be given meaningful notice and a meaningful opportunity to be heard." *Rudd v. Rudd*, 105 Idaho 112, 115, 666 P.2d 639, 642 (1983) (first citing *Fuentes v. Shevin*, 407 U.S. 67 (1972); then citing *Boddie v. Connecticut*, 401 U.S. 371 (1971); and then *Mays v. District Court*, 34 Idaho 200, 200 P. 115 (1921)).

Plaintiff argues that the procedural due process rights of unidentified nonparty tenants in Idaho Code § 6-310 eviction proceedings are being violated because certain court forms and instructions do not inform them of their right to a jury trial. *See* Compl. at ¶¶ 43-46. But the right to a jury trial is not among the interests protected by procedural due process. As the Idaho Supreme Court has demonstrated, the rights to a jury and to procedural due process are analytically distinct. *See Rudd*, 105 Idaho at 115-16, 666 P.2d 639, 642-43. Deprivation of a jury trial does not establish a procedural due process violation. *Id.* It is beyond dispute that an individual can meaningfully be heard by a court for the purposes of satisfying due process protections. *Id.* at 115, 666 P.2d at 642. This is further demonstrated by the fact that the form summons endorsed by Rule 4(a)(3)(B) for other civil proceedings, just like the form summons endorsed by Rule 4(a)(3)(A) for use in eviction proceedings that Plaintiff seeks to enjoin, does not make reference to a right to a jury trial.

Notably, Plaintiff fails to cite to any case that establishes that deficiencies in notice as to any advisement about right to a jury trial implicates a tenant's due process. The only case that Plaintiff cites that is specific to deficiencies in court forms held that the plaintiffs' service of process was ineffective because they failed to serve a summons at all and instead served a copy of a court order to show cause along with their original complaint. Compl. at 11 (citing *Osrecovery, Inc. v. One Grp. Int'l, Inc.*, 234 F.R.D. 59, 60 (S.D.N.Y. 2005)). Similarly, *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950), *Green v. Lindsey*, 456 U.S.

444 (1982), and *Jones v. Flowers*, 547 U.S. 220, all addressed the method by which service was made. *See* Compl. at 10-11.

As demonstrated by the repeated disclaimers in the forms and instructions promulgated by the Court Assistance Office that Plaintiff challenges, these forms and instructions cannot possibly construed as notices promulgated by the State. For example, on the form answer made available by the Court Assistance Office, there is a large paragraph with a bold heading that states "Talk to An Attorney, If Possible. . . . These instructions are not a substitute for legal advice. The laws and court rules are complex and following these instructions will not guarantee that your rights are protected…. You should always talk to a lawyer about your legal problems before filing any legal paperwork." CAO UD Instruction 3-1 Answer to Eviction Compl. at 1 (Jul. 1, 2017), https://courtselfhelp.idaho.gov/docs/forms/CAO_UD_Instr_3-1.pdf (last visited Jun. 25, 2020). In short, even under the framework that Plaintiff argues and without conceding that it applies, there is no reasonable "risk of an erroneous deprivation of an individual's interest" based on this disclaimer. The State's statutes and court rules are its notices of as to the content of the law.

It appears that Count 4 is a claim under 42 U.S.C. § 1983 alleging that these form documents violate the due process rights of those same unidentified nonparty unrepresented tenants under Section 1 of the Fourteenth Amendment of the United States Constitution. Compl. at ¶¶ 40-48. Plaintiff does not have a "very clear right" as to this claim.

In addition to the flaws in Plaintiff's due process argument discussed above, the Idaho Supreme Court, interpreting U.S. Supreme Court precedent, has made it clear that a § 1983 suit cannot be brought against the State as the State is not a "person" within the meaning of 42

U.S.C. § 1983.[1] *Arnzen v. State*, 123 Idaho 899, 903-04, 854 P.2d 242, 246-47 (1993) ("in Idaho, the State, for purposes of 42 U.S.C. § 1983, is not a 'person'"); *Merritt for Merritt v. State*, 108 Idaho 20, 26, 969 P.2d 871, 877 (1985) (interpreting *Quern v. Jordan*, 440 U.S. 332 (1979) and affirming the trial court's dismissal of a claim "on the grounds that the State of Idaho is not a person under 42 U.S.C. § 1983"). Thus, Plaintiff cannot meet its burden of proving a substantial likelihood of success on its § 1983 claim as it cannot prevail on its § 1983 claim against the State.

*1. Plaintiff is not entitled to a preliminary injunction under IRCP 65(e)(2).*

Plaintiff has also not met its burden to establish entitlement to a preliminary injunction under Rule 65(e)(2). A preliminary injunction may be issued under Rule 65(e)(2) "when it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff." The Idaho Supreme Court has interpreted this standard as requiring a showing that (1) the "right is very clear" and (2) that "irreparable injury" to the Plaintiff "will flow from its refusal." *See Harris*, 106 Idaho at 518, 681 P.2d at 993 (interpreting the predecessor to Rule 65(e)(2)); *Planned Parenthood of Idaho, Inc. v. Kurtz*, No. CVOC0103909D, 2001 WL 34157539, at *4 (Idaho Dist. Aug. 17, 2001).

As discussed above, the right here is not very clear. Further, Plaintiff incorrectly assumes that it only needs to show that injury to the interest to any Idahoan, not to its specific interests.

[1] 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Pl.'s Br. at 8-9. Plaintiff is incorrect. Under the governing legal standard, Plaintiff must show irreparable injury to *its* interests. Plaintiff's discussion regarding alleged injury to the constitutional rights of unidentified nonparty tenants is irrelevant. Plaintiff's alleged interest and potential injury here is needing to repeatedly argue the legal issue of a right to a jury trial. *See* Compl. at ¶ 27. As it cannot possibly be an irreparable injury for an attorney to perform routine legal work, Plaintiff cannot establish the irreparable injury necessary to obtain a preliminary injunction on this ground.

**E. If the Court were to grant the requested injunction, an injunction bond is appropriate.**

Under Rule 65(c), "[t]he court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages, including reasonable attorney's fees, sustained by any party found to have been wrongfully enjoined." While the federal courts have interpreted the federal counterpart to IRCP 65(c) as discretionary, the Idaho Supreme Court has held that

> before an injunction is issued under Rule 65 the giving of security by the applicant for the payment of costs, damages and attorneys fees as provided in Rule 65(c) is mandatory, unless the trial court makes a specific finding based upon competent evidence that no such costs, damages or attorneys fees will result to the restrained party as a result of a wrongful issuing of the injunction or restraining order.

*Hutchins v. Trombley*, 95 Idaho 360, 364, 509 P.2d 579, 583 (1973); *see also Miller v. Bd. of Trs.*, 132 Idaho 244, 247, 970 P.2d 512, 515 (1998). Here, the State will suffer attorney's fees and costs at the very least if the injunction is wrongfully issued.

Even if the considerations that Plaintiff argues in support of its position factored into the analysis, *Plaintiff's* constitutional rights are not at stake and Plaintiff cannot assert the constitutional rights of some amorphous, unidentified group of nonparty unrepresented tenants.

Just like in work-a-day contract or commercial litigation where bond must be posted, the only interests at stake are Plaintiff's financial interests. Plaintiff is incorrect in its efforts to carve out an exemption to Rule 65(c)'s bond requirement.

## IV. CONCLUSION

This Court lacks the jurisdiction necessary to hear this claim as it is not justiciable as pled. Plaintiff's request for a declaratory judgment is premature and cannot be granted. Moreover, Plaintiff cannot establish the necessary substantial likelihood of success/very clear right (required by the respective governing standards) to obtain the requested preliminary injunctions. Plaintiff's fundamental contention that Idaho Code § 6-311A is facially unconstitutional lacks merit. Nor can Plaintiff establish the necessary irreparable harm to its interest to obtain the requested injunctive relief. Plaintiff's request for a declaratory judgment and preliminary injunction should be denied.

DATED: June 26, 2020.

By: */s/ Megan A. Larrondo*
MEGAN A. LARRONDO
Deputy Attorney General

## CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2020, I filed the foregoing electronically through the iCourt system, which cause the following party or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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