THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

CYNTHIA EASLEY and TERRY EASLEY, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

TERESA HOWELL in her official capacity as PROSECUTING ATTORNEY FOR MALVERN/HOT SPRING COUNTY, MIKE CASH in his official capacity as HOT SPRING COUNTY SHERIFF,

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANT HOWELL'S AND DEFENDANT CASH'S MOTIONS TO DISMISS

Case No. 6:21-cv-06125-SOH
(Class Action)

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I. Introduction

Under Arkansas' Criminal Eviction Statute, a tenant "at once" loses their property interest upon not paying rent. Ark. Code § 18-16-101(a). This automatic forfeiture of their property interest is done without a willfulness requirement, without notice, and without an opportunity to be heard. Compounding the due process violations of this statute, once a tenant is unlawfully stripped of their property interest, the tenant can then face criminal charges for staying in her home, as she is now considered a trespasser. Ark. Code § 18-16-101(b). The entire statute is premised on stripping tenants of their property interest without due process and then criminalizing them for fighting for their property interest. Not only is Arkansas' criminal eviction process unlawful, it is also unnecessary; landlords have a civil eviction process to evict non-paying tenants — which is the method used by every other state in the nation and many counties within Arkansas.

The Criminal Eviction Statute is not, as Defendants falsely claim, a trespassing statute.[1] It has long been understood that this Jim Crow-era law provides for criminal evictions and criminalizes poverty. Doc. 2 at ¶¶ 15–16. In the words of State Representative and landlord Richard McGrew: "This law is really just used to get [tenants] out of the apartment . . . . [W]e just want them out of our apartment so we can re-rent it." *Id.* at ¶ 6. Defendants' own documents demonstrate that this law is about non-payment of rent. *See, e.g.*, Docs. 13-3 (Description of original law as: "Failure to pay rent on dwellings after ten days' notice a misdemeanor"); 15-1

[1] Plaintiffs challenge the use of the criminal process to address a landlord-tenant contract dispute. Plaintiffs' challenge is separate from, and does not impact, existing laws regarding "squatting," breaking and entering, and other forms of trespass onto private property. A holdover tenant is not a criminal trespasser, *Williams v. City of Pine Bluff*, 284 Ark. 551 (1985), and nothing in Plaintiffs' case would prevent prosecution of a genuine trespassing case. Plaintiffs and the class they represent are tenants, living in their homes and apartments, with keys to their properties, who are in dispute with their landlords over rent owed. This is a far cry from the types of scenarios that give rise to trespassing and breaking and entering and thus those scenarios — and their corresponding criminal statutes — are inapplicable here and are not challenged here.

(Describing the charge against Plaintiffs as "FAIL TO PAY RENT - REFUSAL TO VACATE UPON NOTICE"); 15-2 (Court docket describing Plaintiffs' charge as "FAIL TO PAY RENT - REFUSAL TO VACATE UPON NOTICE").[2] Defendant Cash also refers to the statute as the "municipal eviction statute." *See, e.g.*, Doc. 13-1 at 1.

There is no other scenario under which a late payment is criminalized. By Defendants' logic, the state can criminally prosecute a late car payment, a late mortgage payment, a late medical bill payment, or any other type of civil debt, because being one day late on payment means the buyer no longer has an interest in their property, whether it be a car, a home, or a medical device. By Defendants' logic, the government could criminally prosecute someone and seize their car, insulin pump, furniture, or anything else bought in installment simply because they were late in paying a bill. This slippery slope that Defendants argue for is frightening, dystopian, and illegal.

Given how Arkansas' Criminal Eviction Statute works, Defendants' arguments — both procedural and substantive — fail.

II. Defendants' Motion to Dismiss Should Be Denied

Defendants' motions to dismiss should be denied because (A) Plaintiffs have standing, and their case is ripe for review; (B) Defendant Howell is a proper party; and (C) Plaintiffs have sufficiently pled their claims.

A. Plaintiffs Have Standing, and Their Case is Ripe for Review

The circumstances that triggered Mr. and Mrs. Easley's criminal eviction case remain in effect to this day and thus Plaintiffs remain under threat of future prosecution. Mr. and Mrs. Easley have not been able to pay rent for over a year because of additional expenses they had to incur as

[2] Judges also accept CDC moratorium orders to stay criminal eviction cases, further demonstrating that these cases are treated as evictions. *See, e.g.*, *State v. Plummer*, HTC-20-5798 (Nov. 6, 2020) (Garland County); *State v. Arington*, HTS-20-7802 (Dec. 2, 2020) (Garland County). Plaintiffs also signed a CDC moratorium declaration because they qualified. Doc. 2-1 at ¶ 23.

a result of not having running water for over a year. Their landlord damaged the water system and has yet to fix it, despite the water system being condemned by the Arkansas Department of Health. Doc. 2-1 at ¶ 3, 8–9, 20. Mr. and Mrs. Easley are elderly, have disabilities, and live on a fixed income. *Id.* at ¶ 12–13. Mr. and Mrs. Easley have had to incur costs worth more than their rent to adapt to living without running water, including renting a portable toilet, buying bottled water, and using a laundromat. *Id.* at ¶ 14. Unable to afford rent, Plaintiffs remain in violation of the Criminal Eviction Statute, and they are thus still subject to immediate prosecution.

Defendant Howell's decision to *nolle prosequi* Plaintiffs' criminal case does not moot their claims here. A defendant's voluntary cessation moots a case only when "subsequent events ma[k]e it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189 (2000); *see also Strutton v. Meade*, 668 F.3d 549, 556 (8th Cir. 2012). Such "absolute clarity" of "no reasonable expectation" of reoccurrence is absent here. First, all that Defendant Howell commits to is that she "*[c]urrently*" has "no plans" to pursue criminal eviction cases. Doc. 15-1 at 2 (emphasis added). Second, this analysis requires consideration of her future successors, who could decide to resume prosecutions. *See Karcher v. May*, 484 U.S. 72, 77–78 (1987) (quoting Fed. R. App. P. 43(c)(1) and holding that real party in interest in an official-capacity suit is the entity represented and not the individual officeholder such that when the individual officeholder leaves office, the "'action does not abate and the public officer's successor is automatically substituted as a party.'").

Third, Plaintiffs have standing as long as the statute of limitations is running. The statute of limitations for criminal eviction cases is one year, Ark. Code § 5-1-109(b)(3)(A). Thus, Defendant Howell has until September 14, 2022, to re-charge Plaintiffs with the same offense (one year past the date of *nolle prosequi*). Furthermore, each day that a tenant remains in her home past

the ten-day notice period is considered a separate criminal offense, Ark. Code § 18-16-101(b)(2)(B), and because Plaintiffs are still in their home today (*i.e.*, November 29, 2021 — the date of this filing), they risk being prosecuted at least until November 29, 2022. Plaintiffs' injury is ongoing and therefore Plaintiffs have standing.[3]

Defendant Howell's ability to *nolle prosequi* criminal eviction cases cannot be used as a shield against jurisdiction. Were it otherwise, no tenant could ever challenge this statute because all that the government needs to do upon the filing of a challenge is to dismiss the plaintiff's underlying criminal eviction case. Within days of Plaintiffs filing their federal class action suit, Defendant Howell *nolle prosequi*'d their criminal case (and another open criminal eviction case against a different person) in a transparent effort to moot Plaintiffs' claims.[4] The Supreme Court has determined that the use of such tactics does not defeat standing. Like the plaintiffs in *Dombrowski*, Plaintiffs challenge a criminal statute under which they are not currently being prosecuted. *Dombrowski v. Pfister*, 380 U.S. 479, 482 (1965). The Supreme Court found that plaintiffs still had standing and could enjoin future prosecutions because defendants "have invoked, and threaten to continue to invoke, criminal process without any hope of ultimate success,

[3] Plaintiffs' injury also continues because they cannot seal their records — which are publicly available via Arkansas' electronic court record system, Court Connect, www.caseinfo.arcourts.gov — until September 14, 2022, one year after the date their cases were *nolle prosequi*. Ark. Code § 16-90-1410(a)(1). Notably, cases that are resolved through *nolle prosequi* take the longest to be eligible for sealing. Criminal eviction cases that in acquittals or dismissals can be sealed immediately, Ark. Code § 16-90-1410(a)(2), (3), and cases that result in a conviction can be sealed immediately upon sentence completion and fine payment, Ark. Code § 16-90-1405(a). Only in *nolle prosequi* cases does the tenant have to wait an entire year to seal and thus have to suffer the collateral consequences of a criminal record for a minimum of an entire year.

[4] Defendant Howell was notified of Plaintiffs' challenge before it was filed and counsel for Plaintiffs provided her with a courtesy copy via email the day after the challenge was filed, on September 3, 2021. *See* Exhibit 1, Declaration of Amy Pritchard. That Defendant Howell was formally served with the complaint after she moved to *nolle prosequi* Plaintiffs' criminal eviction case is irrelevant to the fact that she knew of this challenge prior to her decision to *nolle prosequi* Plaintiffs' criminal eviction case.

but only to discourage appellants' civil rights activities." *Id.* at 490. Plaintiffs do not lose standing because they do not currently have an open matter against them, when landlords and prosecutors use the threat of prosecution to force tenants into giving up their property interests without due process. Defendant Howell's effort to prevent Plaintiffs from vindicating civil rights does not strip Plaintiffs of standing.

Relatedly, Plaintiffs have standing because the constitutional violations they challenge are capable of repetition but evade review. Plaintiffs meet this standing doctrine because "the challenged action is too short in duration for timely review, and a reasonable expectation exists that the complaining party will be subject to the same action again." *Republican Party of Minn., Third Cong. Dist. v. Klobuchar*, 381 F.3d 785, 790 (8th Cir. 2004). The time required to prosecute a criminal eviction case is far "too short in duration" to "timely review" a challenge to the Criminal Eviction statute. Even when months pass between the time a notice to vacate is served and when a criminal eviction case is resolved — as happened to the Easleys, who were served in April 2021 and had their case *nolle prosequi*'d in September 2021 — that is not enough time to litigate a federal class action suit. Plaintiffs also have a reasonable expectation that they will be subject to prosecution again because they remain in violation of the statute by not paying rent and remaining in their home. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n. 8, 109–10 (1983) (noting that being in violation of a law contributes to reasonable expectation of being prosecuted under the law and thus being injured under the law). Thus, Plaintiffs satisfy the "capable of repetition but evading review" doctrine.

Furthermore, Plaintiffs do not lose standing even without an open criminal eviction case against them because they are class representatives. *See, e.g., U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980) ("When the claim on the merits is capable of repetition, yet evading

review, the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation.").

Plaintiffs also maintain standing without an open prosecution against them because it is "not required that a party expose herself to arrest or prosecution under a criminal statute in order to challenge the statute in federal court." *Arkansas Right To Life State Pol. Action Comm. v. Butler*, 972 F. Supp. 1187, 1191 (W.D. Ark. 1997). Plaintiffs are the "target or object" of the Criminal Eviction Statute because they are tenants who are not paying rent. Thus, there is "little question" that the statute "cause[s] [them] injury," because it deprives them of their property interest and puts them at risk of arrest, jail, fines, and a criminal record, and a "judgment preventing" enforcement of the Criminal Eviction Statute would "redress" their injury. *Id.* (quoting *Minnesota Citizens Concerned for Life v. Federal Election Commission*, 113 F.3d 129, 131 (8th Cir. 1997)).

Plaintiffs were being prosecuted at the time they filed their challenge, are still in violation of an unconstitutional law, and still remain under an ongoing threat of prosecution. Plaintiffs represent all Arkansans who are going through or will go through the criminal eviction process during the class period. Plaintiffs have standing and their case is ripe for review.

B. Howell is a Proper Party as a State Official Sued in Her Official Capacity for Prospective Relief for Ongoing Violations of Federal Law

As Defendant Howell concedes, per *Ex Parte Young*, "a private party can sue a state officer in his official capacity to enjoin a prospective action that would violate federal law." *Church v. Missouri*, 913 F.3d 736, 747 (8th Cir. 2019) (cleaned up).[5] Plaintiffs seek prospective relief because they seek an injunction enjoining the enforcement of the Criminal Eviction Statute. Doc. 2 at pp. 34–35. Plaintiffs do not seek damages or retrospective relief. *Id.* Defendant Howell's recent

[5] A state official sued in her official capacity for prospective relief is a "person" for purposes of Section 1983 claims. *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 n.10 (1989).

initiation of three criminal eviction cases, Doc. 15-1 at pp. 3–5, demonstrates that she is engaged in ongoing violations of federal law.[6] That Defendant Howell has no "current" plans to bring new criminal eviction cases, Doc. 15-1 at p. 2, does not lessen her ongoing violations of federal law. Plaintiffs have sued Defendant Howell in her official capacity as a state official for prospective relief against ongoing violations of federal law; therefore, Defendant Howell is a proper party.

C. Plaintiffs' Have Stated Claims Upon Which Relief May Be Granted Under Due Process, Equal Protection, and the Eighth Amendment

Plaintiffs present both a facial and as-applied challenge to Arkansas' Criminal Eviction Statute. Doc. 2 at ¶ 115. The statute (i) violates due process (Counts One and Two), (ii) violates equal protection (Count Three), (iii) criminalizes poverty such as to inflict cruel and unusual punishment (Count Four), and (iv) allows for excessive fines (Count Five).

i. Arkansas' Criminal Eviction Statute Violates Due Process

Arkansas' Criminal Eviction Statute deprives tenants of their property interests without due process. Tenants have a property interest in their homes. *Green v. Lindsey*, 456 U.S. 444 (1982); *cf. Park Village Apartment Tenants Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1159 (9th Cir. 2011) (holding tenants' loss of housing is irreparable injury); *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 297 (5th Cir. 2012) ("'The deprivation of an interest in real property constitutes irreparable harm.'") (quoting *Third Church of Christ, Scientist, of N.Y.C. v. City of New York*, 617 F.Supp.2d 201, 215 (S.D.N.Y. 2008), *aff'd*, 626 F.3d 667 (2d Cir. 2010)). "The Due Process Clause of the Fourteenth Amendment requires that a State, prior to taking an action affecting an interest in property, provide notice that is reasonably calculated, under all the

[6] As further evidence of the ongoing violations of federal law, per electronic court records available via Court Connect at www.caseinfo.arcourts.gov, the three cases that Defendant Howell highlights are three out of twenty-six criminal eviction cases filed in Hot Spring County between January–November 2021. Additionally, 30 criminal eviction cases were filed in Hot Spring County in 2020, also during Defendant Howell's tenure as county prosecutor.

circumstances, to apprise interested parties of the pendency of that action." *Kornblum v. St. Louis Cty., Mo.*, 72 F.3d 661 (8th Cir. 1995); *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (holding government must provide *pre*-deprivation notice and an opportunity to be heard to satisfy due process). No notice is given before the Criminal Eviction Statute "affects the property interest" of tenants. Doc. 2 at ¶¶ 37–38, 46 n. 20, 65. The fact that the tenant is given a 10-day notice period and hearing *after* they have been deprived of their property interest does not compensate for the lack of pre-deprivation due process, because "[i]f the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). Without notice or an opportunity to be heard, nor even a willfulness requirement, the Criminal Eviction Statute automatically strips tenants of their property interest upon not paying rent. Ark. Code § 18-16-101(a); *see also* Def. Mot. Dis. 13-1 at 5 ("Under the Municipal Eviction Statute, a tenant who fails to pay rent immediately when due forfeits the right to occupy the rental property.").[7]

Arkansas' criminal eviction process, for offering no due process before stripping tenants of their property interests, stands in stark contrast to the main civil eviction process, which is known as the "unlawful detainer" eviction. Doc. 2 at ¶ 2. In the "unlawful detainer" civil eviction process, Ark. Code § 18-60-307, a landlord must first serve the tenant with a notice of intent to file an eviction suit. If the tenant has not moved out within three days, the landlord must then file a case in circuit court. Ark. Code §§ 18-60-304(3); 18-60-306. Then, the landlord must serve the tenant with notice of the case. Ark. Code § 18-60-307(a). The tenant then has five days to file an objection or written response with the court. *Id.* at (a)–(c). The tenant also has 30 days to file an

[7] None of the cases that Defendants cite to suggest this case is settled grapple with this point. Those cases assume, without deciding, that it is lawful to strip tenants of their property interests without due process.

answer. If a tenant files an objection, the court will set an initial hearing. *Id.* at (c). If the tenant wins the initial hearing, then the tenant can stay in their home until trial. If the tenant loses, then the court will issue a writ of possession to the landlord, allowing the sheriff to remove the tenant after 24 hours and the landlord must hold the tenant's property in storage until trial. *Id.* at (d)(1)(B). Even if the tenant loses the initial hearing, the tenant can ask the court to set "adequate security," meaning the sum of money the tenant must pay to remain in their home until trial. *Id.* at (e). For as minimal as these due process protections are, the civil eviction process provides something, in comparison to *nothing* under the Criminal Eviction Statute, before the tenant is deprived of their property interest. For providing zero due process before stripping a tenant of his property interest, the Criminal Eviction Statute violates the Constitution.

The risk of erroneous deprivations of tenants' property interests is exacerbated by the criminal eviction process because only the landlord can initiate criminal proceedings for breach of the landlord-tenant contract, whereas the tenant only has recourse to the civil system. *See Mathews*, 424 U.S. at 335 (must consider "risk of an erroneous deprivation of [property] interest through the procedures used" when determining whether process violates due process). Landlords are allowed to criminalize a tenant's breach of the rental contract, but tenants are not allowed to criminalize a landlord's breach. Unlike civil landlord-tenant court, where both landlords and tenants can bring claims, in the criminal eviction context, only the landlord can bring a case. Doc. 2 at ¶¶ 2, 50–53, 70. In the words of Pulaski County prosecutor Larry Jegley, tenants "are being charged with the crime of basically not paying rent. . . . Allowing one class of businesspeople to avail themselves of criminal process for breach of contract is just fundamentally unconscionable." *Id.* at ¶ 70. This imbalance also contributes to how the Criminal Eviction Statute violates due process.

Relatedly, only the landlord has the choice to pursue criminal and/or civil eviction against a tenant who is not paying rent, Doc. 2 at ¶¶ 50–53, increasing the risk of erroneous deprivation of plaintiffs' property (and liberty) interests because each system carries vastly different consequences for tenants. Notably, the United States Department of Housing and Urban Development ("HUD") forbids the use of the Criminal Eviction Statute in HUD-funded rental housing, while allowing for civil methods of eviction, because criminal evictions do not meet the basic elements of due process. *Id.* at ¶ 56. The tenant automatically loses their property interest by not paying rent in a criminal eviction case, whereas the tenant has the right to notice and an opportunity to be heard before being dispossessed of that interest in the civil context. *Id.* at ¶ 2; Ark. Code §§ 18-60-304(3); 18-60-306; 18-60-307. Furthermore, the criminal context carries the threat of jail, fines, and a criminal record, whereas the civil context does not. Doc. 2 at ¶¶ 80, 102. Thus the landlord gets to decide if the tenant, for the same conduct (*i.e.* not paying rent), gets no due process (criminal eviction) or some (civil eviction) and what kinds of consequences the tenant will suffer (civil eviction or criminal record). What is more, a holdover tenant in the civil eviction context is not considered a criminal trespasser. *Williams v. City of Pine Bluff*, 284 Ark. 551 (1985). Yet according to Defendants, in the criminal eviction context, a holdover tenant's continued presence in their home is a criminal trespass. That landlords get to decide whether a tenant receives due process and is treated as a trespasser further demonstrates the unconstitutionality of this statute.

Further tipping the scales of justice in the landlord's favor, and increasing the risk of erroneous deprivation of tenants' property interests, is the fact that the Criminal Eviction Statute is initiated solely on the landlord's statement. Doc. 2 at ¶¶ 49, 68, 130. Landlords sometimes lie, Doc. 2 at ¶ 68, yet can start criminal proceedings anyway because all it takes is their word to start the process. If the landlord says the tenant has not paid, then the court system recognizes the tenant

as having no more property interest and thus can be prosecuted for remaining in their home. Tenants have no opportunity to weigh in prior to the first hearing, Doc. 2 at ¶¶ 37–38, as happens in the civil context, and inability to pay cannot be raised as a defense, *id.* at ¶ 77, as Defendant Cash concedes.

The Criminal Eviction Statute also violates due process by including no cap on the number of criminal charges or excessive fines. Doc. 2 at ¶ 69, 71, 130. Absent any limitation on the number of convictions a prosecutor may pursue in this effort to evict tenants, outcomes under the statute are dictated by the vagaries of the criminal process. Factors such as how long it takes the landlord to serve the notice to vacate, the date of the initial appearance, the date and length of trial — all factors outside of the tenant's control — will ultimately decide the potential number of charges and fines. *Id.* at ¶ 69. A tenant who wishes to present a defense has no ability to safely remain at home while doing so because potential criminal exposure increases with each day. *Id.* at ¶ 72.

The statute further increases the risk of erroneous deprivation of tenants' property interests by providing no mechanism to restore those interests in the event of wrongful prosecution. Doc. 2 at ¶ 69 n. 26. Defendants state that a tenant who wins her criminal eviction case could file a malicious prosecution suit, yet that does nothing to restore the tenant's interest in the property of which she was wrongly dispossessed. In contrast, under Arkansas' unlawful detainer civil eviction statute, a tenant wrongfully evicted can obtain a writ of restitution to return to her home. *See id.*; Ark. Code § 18-60-309(d)(2).

Defendant Howell's argument that there is no due process violation because the Criminal Eviction Statute is a law of general applicability also fails. Plaintiffs' case is not about what process is due before the legislature or other governing body passes a law or ordinance, which was the case in *Bi-Metallic Inv. v. State Bd. of Equalization*, 239 U.S. 441 (1915). Defendant Howell's

additional citation to *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) for her general applicability argument is curious, as *Logan* also stands for the principal that "'*some* form of hearing' is required before the owner is finally deprived of a protected property interest. . . . *To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.*" *Logan*, 455 U.S. at 433–34 (quoting *Board of Regents v. Roth*, 408 U.S. 564, 570–71 n.8 (1972) (first italics in original)). The Criminal Eviction Statute does not provide this due process, hence why Plaintiffs have brought a challenge. Like the plaintiff in *Logan*, the Plaintiffs here are challenging "procedural limitation[s] on [their] ability to assert [their] rights," not whether they should have been consulted before the legislature passed this law. *Id.* at 433. *Foster v. Hughes*, 979 F.2d 130 (1992) is also inapplicable because unlike the law in dispute in *Foster*, the law here "depend[s] upon facts and circumstances surrounding each" tenant, *id.* at 132, such as if and when the tenant moves out of the property and whether the tenant is indigent.

The Criminal Eviction Statute also creates the risk of erroneous deprivation of tenants' liberty interests, in addition to their property interests. Doc. 2 at ¶¶ 65–67. The Criminal Eviction Statute does not actually authorize eviction. *Id.* at ¶ 60. Whereas courts are authorized to issue a writ of possession in an unlawful detainer case to dispossess a tenant of their property, Ark. Code § 18-60-307(d)(1)(B), no such authority rests with the criminal court. Without such authority, tenants are scared into self-evicting through threats of arrest, jail, fines, and criminal records. Doc. 2 at ¶¶ 6–8, 60; *see also* Arkansans for Stronger Communities — Repeal Arkansas's Criminal Eviction Law Interview with Wilma Young (Jan. 19, 2021), https://youtu.be/topm98AoeZI (Ms. Young describing how she was arrested and jailed under the same criminal eviction statute as it stands today). Between 2018 and November 2020, 45 people were arrested exclusively for failing

to pay rent and not leaving their homes. Doc. 2 at ¶ 112. In a sampling of over 100 criminal eviction cases in March through December of 2020, tenants were ordered to be arrested (as opposed to being issued summonses or citations) in 6% of cases.[8]

The risk of erroneous deprivation of tenants' liberty interests extends beyond arrests and jailing at the time the notice to vacate is served to court hearings. Plaintiffs, class members, and Defendants are aware that in court, judges tell tenants that they must move out or be jailed for contempt of court. Doc. 2 at ¶ 8; Doc. 13-1 at p. 22. The contempt of court (and resulting jail time) is integrally tied to the statute because the "contempt" is staying in one's home, *i.e.*, violating the statute, not some separate court order. Furthermore, if a tenant misses a criminal eviction court hearing, they can also be arrested and jailed for failure to appear. Doc. 2 at ¶ 113. In the same sampling of over 100 criminal eviction cases in March–December 2020, tenants failed to appear in 28% of the cases.[9] Arrest and jail time for failure to appear does not occur in civil eviction cases; failing to appear in a civil proceeding is not a crime.[10] What is more, in the civil context, a judge cannot issue a contempt order resulting in jail time if the tenant does not have the means to comply with the court's order, *see, e.g.*, *Griffith v. Griffith*, 225 Ark. 487 (1955), whereas in the criminal context, the judge can issue such an order because ability to pay is not considered. The inherent nature of criminal court — which allows for jail time to be applied to procedural failings as well as to actual crimes — allows landlords, prosecutors, and sheriffs to use the threat of jail time to coerce tenants into self-evicting without due process. Doc. 2 at ¶ 6–8, 72. While the statute may

[8] Lynn Foster, *Arkansas Eviction Report December 2020*, Arkansans for Stronger Communities (Jan. 13, 2021), https://www.arkstrongcommunities.com/december-eviction-report/ (last visited November 18, 2021). For an example of an arrest warrant from Hot Spring County during this time period, *see* Exhibit 2.
[9] *Id.*
[10] *Id.*

no longer have explicit language around jail time, jail time is still used to enforce the statute, creating further due process violations in the form of debtors' prisons. *Id.* at ¶ 112–113.[11]

For these reasons, the Criminal Eviction Statute violates due process and Plaintiffs have properly pled their due process claims.

ii. Arkansas' Criminal Eviction Statute Violates Equal Protection

Arkansas' Criminal Eviction Statute violates equal protection by not considering tenants' ability to pay before criminalizing their non-payment of rent. Doc. 2 at ¶ 133. In cases involving "the treatment of indigents in our criminal justice system," *Bearden v. Georgia*, 461 U.S. 660, 664–65 (1983), courts must conduct "a careful inquiry into such factors as" (1) "the nature of the individual interest affected," (2) "the extent to which it is affected," (3) "the rationality of the connection between legislative means and purpose," and (4) "the existence of alternative means for effectuating the purpose." *Id.* at 666–67. All four *Bearden* factors weigh in favor of finding Defendants' lack of an indigence exception constitutionally impermissible.

First, the nature of the individual interest affected is a fundamental one, as the Criminal Eviction Statute targets tenants' property interests in their housing. As Defendants state, private property interests are very important, particularly when the property in question is one's home. *Green*, 456 U.S. at 450–51. Also, tenants' liberty interests are affected by the threat of jail time

[11] Defendant Cash notes that many criminal statutes also have civil counterparts to argue that there is nothing unusual about the Criminal Eviction Statute existing when a civil eviction process exists. This does not render the criminal eviction statute lawful. Defendant Cash fails to note, for example, that both the federal Constitution and Arkansas' state constitution prohibit debtors' prisons. *See, e.g., Bearden*, 461 U.S. at 667 (1983) (defendant cannot have his probation revoked for being too poor to pay restitution); *Tate v. Short*, 401 U.S. 395, 398 (1971) ("[T]he Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full) (quotations omitted); Ark. Const. Art 2, § 16 ("No person shall be imprisoned for debt in any civil action . . . unless in case of fraud."). By having a criminal counterpart to the civil eviction process, which authorizes debtors' prisons by sending tenants to jail for a civil debt, Arkansas violates its own laws as well as the federal Constitution.

that is inherent to criminal proceedings, which criminal eviction proceedings are. Liberty interests are also fundamental. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment — from government custody, detention, or other forms of physical restraint — lies at the heart of the liberty that [the Due Process] Clause protects."); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.")

As to factor two, the Criminal Eviction Statute affects tenants' property interests in their entirety. On the word of a landlord claiming that a tenant has not paid, the tenant is automatically stripped of *all* of their interest in the property they rent — and is then criminally prosecuted for defending that interest. If a tenant is arrested and jailed, then their liberty interest has also been significantly affected.

As to the third *Bearden* factor, Defendants' scheme does not rationally promote any legitimate government interest. The Criminal Eviction Statute has been upheld for as long as it has because it is "less costly" to landlords than the civil eviction process because landlords have to pay for a lawyer to go through the civil eviction process. Doc. 2 at ¶ 10. As William Jones, President of the Landlords Association of Arkansas, has testified, using the Criminal Eviction Statute allows for "effective eviction[s]" that do "not require an attorney which saves me (landlords) a considerable amount of money." *Id.* Defendants do not have a legitimate interest in enforcing a law that punishes tenants for being indigent to save landlords money. *Id.* at ¶¶ 11–13, 99, 102. Defendants want the government to pay for landlords' representation in criminal eviction cases (through the publicly-funded prosecutor) while not offering the same to tenants (who are almost always unrepresented, Doc. 2 at ¶¶ 2, 8) and subjecting tenants to criminalization. Arkansas Supreme Court Justice Purtle's dissent in *Duhon* is illustrative on this point:

> Due Process and Equal Protection are not the property of any one group of people, but are the rights of all citizens. In the present case the state has simply lent her hands to landlords by enacting this 1901 statute. It criminalizes a breach of contract for failure to pay a debt. Criminal sanctions should properly be as applicable to property line disputes and other breaches of contract as to agreements between landlord and tenant. The weak and the strong do not stand upon "equal terms" when the state is on the side of one or the other. *Duhon v. State*, 299 Ark. 503, 513 (1989).

The protection of the private property interests of landlords (and therefore the state's police power to protect those interests) is sufficiently satisfied through the civil eviction process. The Criminal Eviction Statute — and Defendants' defense of it — also completely ignores that tenants have private property interests (which the state's police power should also protect) and that the law strips tenants of those interests without hesitation. The law also only allows landlords to weaponize the criminal process in response to a contract breach, whereas tenants cannot. The criminal nature of this statute allows landlords to coopt the taxpayer-funded criminal court system to resolve a private contract dispute and evade the due process protections of the civil eviction process.

In addition to tipping the scales of justice too far in landlords' favor, the Criminal Eviction Statute also treats indigent and non-indigent tenants differently, further demonstrating the irrationality of this law. Doc. 2 at ¶¶ 48, 83–85, 139. The Criminal Eviction Statute criminalizes the non-payment of rent; it does not distinguish between willful and non-willful non-payment of rent. Defendants claim that the Easleys have willfully not paid their rent and willfully stayed on property to which they are no longer entitled. This incorrect assessment ignores the fact that the Criminal Eviction Statute does not require willful non-payment of rent. *Id.* at ¶ 48; Ark. Code § 18-16-101(a). Defendants' incorrect assessment also ignores the fact that even if there were a willfulness requirement to part (a) of the statute, Plaintiffs' non-payment of rent was not willful. Ark. Code § 18-16-101(b). Plaintiffs do not have the money to pay rent and their other necessary expenses *because* of their landlord.

Unlike the Easleys, non-indigent tenants have, for all practical purposes, the benefit of a willfulness standard before their non-payment of rent is criminalized. Like the Easleys, indigent tenants who cannot afford rent engage in non-willful non-payment; their non-payment is not a willful action but rather an involuntary consequence of their poverty. Doc. 2 at ¶ 87. Yet the statute does not require willfulness to strip a tenant of their property interest, and by not considering ability to pay at any stage of the process, *id.* at 78, the statute also does not require willfulness before a tenant can be convicted of the criminal offense of non-payment.

The Arkansas Supreme Court has twice struck down statutes that criminalized a non-fraudulent breach of contract, which is what happens in criminal eviction cases because the only breach of contract that can be prosecuted in criminal eviction cases is non-payment of rent. Doc. 2 at ¶ 70 (citing *State v. Riggs*, 305 Ark. 217 (1991) (invalidating statute criminalizing contractor's failure to pay for materials where statute required knowing or willful failure to pay); *Peairs v. State*, 227 Ark. 230 (1957) (striking down statute criminalizing a contractor's failure to discharge a laborer's lien without element of fraud)). Indigent tenants do not act "without justification" when they breach the rental contract by not paying rent, *Munson v. Gilliam*, 543 F.2d 48, 53 (8th Cir. 1976), *Duhon*, 299 Ark. at 509, yet the Criminal Eviction Statute provides no means to present that justification. Doc. 2 at ¶¶ 9, 133. Such an irrational scheme does not pass constitutional muster for treating similarly-situated individuals differently.

Under the fourth and final *Bearden* factor, alternatives exist that would promote both tenant and landlord property interests. As discussed above, Arkansas has a civil eviction process. Landlords can use the unlawful detainer civil eviction process, and in some parts of the state, they can also use Ark. Code § 18-17-901 to evict to a tenant (what is colloquially known as 2007 Act

eviction). Doc. 2 at ¶¶ 2, 52. Thus landlords have alternatives to the criminal eviction process to protect their property interests.

Outcomes in the criminal system cannot turn on an individual's ability to purchase them. *See Griffin v. Illinois*, 351 U.S. 12 (1956) (plurality opinion) (state may not condition criminal defendant's right to appeal on ability to pay for trial transcript); *see also id.* at 19 ("[T]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has"); *Bearden*, 461 U.S. at 667 (individual cannot have his probation revoked for being too poor to pay restitution). Without an exception for indigence, penalties for nonpayment are unconstitutional and therefore the Criminal Eviction Statute must be struck down.

iii. Arkansas' Criminal Eviction Statute Criminalizes Plaintiffs' Poverty in Violation of the Eighth Amendment

As Defendant Cash aptly states, "states may not criminalize involuntary conduct derivative of a cognizable status," Def. Mot. Dis. at 15, yet Arkansas does so through the Criminal Eviction Statute. Doc. 2 at ¶ 141. The Eighth Amendment's prohibition on cruel and unusual punishment (incorporated against the states via the due process clause of the Fourteenth Amendment) prohibits punishing someone's status — such as being alcoholic, *see Robinson v. California*, 370 U.S. 660 (1962), or unhoused, *see Martin v. City of Boise*, 920 F.3d 584, 616-17 (9th Cir. 2019) — and punishing involuntary acts associated with that status. *See Powell v. State of Tex.*, 392 U.S. 514, 550 n.2 (1968) (White, J., concurring) (the "proper subject of inquiry is whether volitional acts brought about the 'condition' and whether those acts are sufficiently proximate to the 'condition' for it to be permissible to impose penal sanctions on the 'condition.'")

Plaintiffs' non-payment of rent is involuntary and derivative of their indigent status. Doc. 2 at ¶ 87. Defendants misconstrue Plaintiffs' claims as saying indigent persons cannot be prosecuted. What Plaintiffs do argue is that an indigent person cannot be prosecuted *for being*

indigent, just as a person cannot be prosecuted for being unhoused or being addicted to alcohol. *See also Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 282-83 (4th Cir. 2019) (addiction cannot be criminalized); *Driver v. Hinnant*, 356 F.2d 761, 765 (4th Cir. 1966) (same); *Blake v. City of Grants Pass*, No. 1:18-CV-01823-CL, 2020 WL 4209227, at *6 (D. Or. July 22, 2020) (appeal to 9th Cir. filed Oct. 8, 2020) (homelessness cannot be criminalized); *Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218, 1230 (E.D. Cal. May 20, 2009) ("[T]he involuntariness of the act or condition the City criminalizes is the critical factor delineating a constitutionally cognizable status, and incidental conduct which is integral to and an unavoidable result of that status, from acts or conditions that can be criminalized consistent with the Eighth Amendment."); *Wheeler v. Goodman*, 306 F.Supp.58, 62 (W.D.N.C. 1969) (homelessness cannot be criminalized). Plaintiffs consistently paid their rent until the landlord's errors caused them to incur expenses that left them without the means to continue paying rent. Doc. 2-1 at ¶¶ 3–20. Prosecuting them via criminal eviction without considering their ability to pay is punishing them for their poverty.

Defendant Cash misconstrues Plaintiffs' claims to suggest that the relief Plaintiffs seek is to force landlords into housing tenants indefinitely even if they cannot pay rent. Plaintiffs seek no such relief; Plaintiffs seek an end to landlords' ability to wield the weight of the criminal system to resolve their own private contract disputes. Doc. 2 at ¶ 70. In the words of State Representative Jimmy Gazaway, this law is "an abuse of the criminal process"; it uses the "coercive power of the criminal process and the coercive power of the state to essentially evict someone on a civil debt or a civil contract." *Id.* at ¶ 12. Landlords can still evict non-paying tenants through the civil eviction

process — as is the case throughout the entire state of Arkansas as well as in every other state in the United States.[12]

An indigent tenant who cannot afford rent but remains in her home is not like a person stealing food from a store, contrary to Defendant Cash's assertion. Unlike the tenant, the person stealing food from a store has no pre-existing property interest in those specific food items. Tenants have property interests, which the Criminal Eviction Statute unlawfully takes from them. Whereas the person stealing food is prosecuted for theft because the specific food items did not belong to them, a tenant prosecuted under the Criminal Eviction Statute is being prosecuted not for trespass but for being poor. There is no failure to vacate unless the tenant has not paid rent and that prosecution is done without any consideration of the tenant's ability to pay. Indigent persons are not insulated from prosecution, but they are insulated from prosecution of their poverty.

Defendants argue that just because Arkansas is the only state to use criminal evictions, the law is neither unusual nor cruel. Federal courts do consider state trends when evaluating Eighth Amendment claims, as well as local trends. *See* Doc. 2 at ¶ 92; *Solem v. Helm*, 463 U.S. 277, 290 (1983) (in conducting Eighth Amendment proportionality analysis, court should consider "the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."); *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (explaining that because "the words of the [Eighth] Amendment are not precise" and "their scope is not static[,] [t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"). The Eighth Amendment's prohibition on cruel and

[12] Defendant Cash argues (wrongly) that Plaintiffs are seeking to have private landlords assume the government responsibility of providing housing to low-income residents. What both Defendants want is for the government to assume landlords' responsibility to resolve private contractual disputes. Rather than this being a case of having private landlords assume a government duty, what Defendants want is for the government to assume a private responsibility.

unusual punishment and status-based punishment recognizes that mores and standards of decency change. There are many practices that were once legal — and legal for centuries — that were later found to not be, such as slavery, denying the right to vote on the basis of race or gender, and the death penalty for children. Decisions that once upheld this statute may no longer be applicable in the modern day.

In recognition of this evolution, many counties in Arkansas have stopped using criminal evictions. Doc. 2 at ¶ 57. *State v. Smith*, Pulaski County Circuit Court Case No. 2014-2707 (2015); *State v. Jones*, Poinsett County Circuit Court Case No. 2014-389; and *State v. Bledsoe*, Woodruff County Circuit Court Case No. 2014-77-2 may have been county-specific decisions, but they invalidated the statute in its entirety, *including the provisions that remain in effect today*. A bipartisan, non-legislative commission charged by the legislature in 2012 with examining the Criminal Eviction Statute recommended its full repeal, *including all provisions that remain in effect today*. Doc. 2 at ¶ 55.

Arkansas' Criminal Eviction Statute criminalizes tenants' status as indigent tenants by not considering ability to pay. It exacts punishment — the stripping of a tenant's property interest, the imposition of a criminal record, arrest, fines, and jail time — without considering ability to pay and is therefore unconstitutional.

iv. Arkansas' Criminal Eviction Statute Allows for Excessive Fines

When a law targets indigent persons who have no means to pay any fine, any fine is excessive because the fine functions as a form of punishing the person's indigence. It is this very form of punishment-because-of-poverty that *Bearden* and related cases, as well as Arkansas law[13],

[13] *See, e.g.*, Arkansas constitutional ban on debtors' prisons, Ark. Const. Art 2, § 16, and ban on civil contempt orders where defendant does not have financial means to comply, *Griffith v. Griffith*, 225 Ark. 487 (1955).

prevents. Doc. 2 at ¶¶ 60, 80, 97. "[I]n the case of fines . . . the defendant's ability to pay is a factor under the Excessive Fines Clause," *U.S. v. Lippert*, 148 F.3d 974, 978 (8th Cir. 1998); *see also U.S. v. Aleff*, 772 F.3d 508, 512 (8th Cir. 2014) (same), yet ability to pay is not included in determining criminal eviction fines, hence their excessive nature. Doc. 2 at ¶¶ 101, 144.

The fine is further excessive for being imposed on what is essentially a private and civil landlord-tenant contract dispute. Doc. 2 at ¶¶ 96, 144. Failure to pay rent is traditionally a civil offense, yet Arkansas stands alone in allowing this contract breach to also be criminalized. Given that the only way a tenant who is behind on rent can avoid these fines is for the tenant to abandon her home without due process, *Id.* at ¶ 100, to charge a tenant these fines is to inflict "punishment [that] is more criminal than the crime." *Mills v. City of Grand Forks*, 614 F.3d 495, 501 (8th Cir. 2010).

That the fines bear some relationship to average rents in Arkansas, yet are not applied to alleged owed rent, also speaks to their excessive nature. Tenants in criminal eviction proceedings already cannot pay rent. Tenants are then charged fines in amounts ranging from $1–25 *per day*, Doc. 2 at ¶ 98, even though the fines do not go back to the landlord to compensate for alleged rent owed, as Defendant Cash concedes, and landlords are not required to accept any tenant offer of rent at criminal eviction hearings. Doc. 2 at ¶¶ 9, 79 n. 29. *Cf. Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 625 (1988) ("If the relief provided [in a contempt proceeding] is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court."). Tenants are being charged more money even though the fine does not go towards rent. Put plainly, the Criminal Eviction Statute "fin[es] someone who is already broke . . . . It just doesn't make any sense."[14]

[14] Arkansas Circuit Judge Andy Riner, as quoted in Maya Miller and Ellis Simani, *A Deputy Prosecutor Was Fired for Speaking Out Against Jail Time for People Who Fall Behind on Rent*,

III. Conclusion

For the reasons above, Plaintiffs respectfully request that this Court deny Defendants' motions to dismiss.

Respectfully submitted,

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ProPublica (Nov. 27, 2020), https://www.propublica.org/article/a-state-prosecutor-was-fired-for-speaking-out-against-jail-time-for-people-who-fall-behind-on-rent.

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2021, I electronically filed the above document with the Clerk of the Court using the ECF System, which will provide electronic copies to the counsel of record.

/s/ Natasha Baker
Attorney for Plaintiffs