IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

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

v. Case No. 6:21-cv-6125

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

ORDER

Before the Court is Defendant Mike Cash's ("Cash") Motion to Dismiss (ECF No. 13) and Defendant Teresa Howell's ("Howell") Motion to Dismiss (ECF No. 15). Plaintiffs have responded. ECF No. 19. Defendant Howell has replied (ECF No. 20) and Defendant Cash has replied (ECF No. 25). The Court finds the matter ripe for consideration.

I. BACKGROUND

In March 2019, Plaintiffs moved into a house in Malvern, Arkansas. They occupied the house pursuant to a month-to-month lease with a rent payment of $400 per month. Plaintiffs are disabled and their only income sources are social security disability payments totaling less than $1,200 per month.

In August 2020, Plaintiffs' landlord unsuccessfully attempted to replace the water tank on the property, and Plaintiffs ceased to have running water. In November 2020, the Arkansas Department of Health ("ADH") condemned the house's water distribution and heating system. The ADH further ordered that the water service to the property be terminated until necessary repairs were made to the water system. Plaintiffs' November 2020 rent was waived by their

landlord because of the water system failure. However, rental payments were reinstated beginning in December 2020. Plaintiffs stopped making new rental payments. Plaintiffs state that the additional expenses they incurred adapting to the lack of running water in their home, such as renting a portable toilet and buying bottled water, have left them unable to afford their rental payments. At the time Plaintiffs filed their complaint, they had lacked running water at their home since August 2020.

On April 8, 2021, a member of the Hot Spring County Sheriff's Office served Plaintiffs with a failure to vacate notice signed by their landlord. ECF No. 2-2. The notice informed Plaintiffs they had ten days from the service of the notice to vacate the property or be charged under Arkansas Code Annotated §18-16-101. *Id*. The notice stated that Plaintiffs' tenancy was being terminated for failure to pay rent and noncompliance with their rental agreement. *Id*. Arkansas Code Annotated §18-16-101 ("Rent Statute") is entitled "Failure to pay rent—Refusal to vacate upon notice—Penalty" and reads as follows:

> (a) Any person who shall rent any dwelling house or other building or any land situated in the State of Arkansas and who shall refuse or fail to pay the rent therefor when due according to contract shall at once forfeit all right to longer occupy the dwelling house or other building or land.
>
> (b)(1) If, after ten (10) days' notice in writing shall have been given by the landlord or the landlord's agent or attorney to the tenant to vacate the dwelling house or other building or land, the tenant shall willfully refuse to vacate and surrender the possession of the premises to the landlord or the landlord's agent or attorney, the tenant shall be guilty of a misdemeanor.
>
> > (2)(A) Upon conviction before any justice of the peace or other court of competent jurisdiction in the county where the premises are situated, the tenant shall be fined in any sum not less than one dollar ($1.00) nor more than twenty-five dollars ($25.00) for each offense.
> >
> > (B) Each day the tenant shall willfully and unnecessarily hold the dwelling house or other building or land after the expiration of notice to vacate shall constitute a separate offense.

Ark. Code Ann. §18-16-101. On May 18, 2021, a criminal case was opened against Plaintiffs under the Rent Statute. ECF No. 15-2.

On September 2, 2021, Plaintiffs filed their complaint in this Court on behalf of themselves and others similarly situated. ECF No. 2. Plaintiffs brought their claims against Defendants in their official capacities pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201. *Id*. at p. 9. Plaintiffs' various claims assert that the Rent Statute is unconstitutional. *Id*. at p. 29. Specifically, Plaintiffs bring claims that the Rent Statute violates their Fourteenth Amendment procedural due process rights, their Fourteenth Amendment right to equal protection, their Eighth Amendment right to be free from cruel and unusual punishment, and their Eighth Amendment right to be free from excessive fines. *Id*. at p. 32-34. Plaintiffs seek various forms of relief, most prominently an injunction enjoining Defendants' enforcement of the Rent Statute and a declaratory judgment that the Rent Statute is unconstitutional. *Id*. at p. 34-35. On September 14, 2021, a Motion to Nolle Prosequi was filed in the Hot Spring County District Court by Peyton Murphy, Deputy Prosecutor for the Seventh Judicial District. ECF No. 13-2. The Motion to Nolle Prosequi informed that court that the State had decided not to pursue charges against Plaintiffs under the Rent Statute for their failure to vacate their current rental house. *Id*.

On November 8, 2021, Defendant Cash filed his Motion to Dismiss. ECF No. 13. Cash argues that the Plaintiffs have failed to properly state a claim that the Rent Statute is facially unconstitutional under either the Fourteenth or Eighth Amendment. Cash also argues that Plaintiffs lack standing and that their claims are moot, and thus the Court lacks subject matter jurisdiction over Plaintiffs' claims.

On November 10, 2021, Defendant Howell filed her Motion to Dismiss. ECF No. 15. Howell argues that the Court lacks subject matter jurisdiction because Plaintiffs' claims are moot.

Howell also argues that she, as a state official, is entitled to sovereign immunity under the Eleventh Amendment against Plaintiffs' official capacity claims. Lastly, Howell argues that Plaintiffs have failed to state a claim and that this case should be dismissed.

On November 29, 2021, Plaintiffs responded to both motions to dismiss. ECF No. 19. Plaintiffs argues that they have standing and that their claims are not moot because the threat of prosecution under the Rent Statute remains. Plaintiffs also argue that Defendant Howell is a proper defendant in her official capacity as a state official because Plaintiffs seek prospective relief from ongoing violations of federal law. Plaintiffs then argue that each of their claims against the constitutionality of the Rent Statute are sufficiently stated.

Each Defendant replied, generally reiterating their prior arguments and addressing the arguments in Plaintiffs' response. ECF Nos. 20, 25. Defendant Cash in a later filing argued that the Plaintiffs' change of residence[1] to Michigan in May 2022 further supports the argument that Plaintiffs' claims are moot. ECF No. 45. Plaintiffs responded to that filing by arguing that the threat of prosecution remains and thus their claims are not moot. ECF No. 46.

II. LEGAL STANDARD

A pleading must "contain a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This standard "does not require 'detailed factual allegations,' but it demands more that an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). While factual allegations in a complaint are presumed true, unsupported legal conclusions presented as facts are

[1] At the time the instant motions to dismiss were filed and all initial responses and replies were submitted, Plaintiffs resided at the rented house in Arkansas. However, Defendant Cash informed the Court in his supplement (ECF No. 45) to his response to Plaintiffs' Motion to Certify Class (ECF No. 34) that Plaintiffs had moved to Michigan. In responding to Defendant Cash's supplement, Plaintiffs confirmed that they left their Arkansas residence in May of 2022 and currently reside in Michigan. ECF No. 46.

not sufficient to show a pleader is entitled to relief. *See id*. (citations omitted). There must be factual allegations underlying a complaint such that the claim of misconduct is sufficiently plausible on its face and not merely a possibility. *See id*. at 678-79 (citations omitted). Upon motion, a party against whom a claim for relief is sought may assert the defense that the claim is not one upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). In evaluating a motion to dismiss pursuant to Rule 12(b)(6), the Court evaluates the complaint in the light most favorable to the non-moving party. *Carton v. Gen. Motor Acceptance Corp.*, 611 F.3d 451, 454 (8th Cir. 2010) (citations omitted).

A pleading must also contain "a short and plain statement of the grounds for the court's jurisdiction." Fed. R. Civ. P. 8(a)(1). A party against whom a claim for relief is asserted may offer the defense that the court lacks subject-matter jurisdiction over the claim. Fed. R. Civ. P. 12(b)(1). "Dismissal under Rule 12(b)(1) of the Federal Rules of Civil Procedure is appropriate if the party asserting jurisdiction has failed to satisfy a threshold jurisdictional requirement." *Wright v. Family Support Div. of Mo. Dep't of Soc. Servs.*, 458 F. Supp. 3d 1098, 1104-05 (E.D. Mo. May 1, 2020) (citing *Herden v. United States*, 726 F.3d 1042, 1046 (8th Cir. 2013)). "Because jurisdiction is a threshold question, the court may look outside the pleadings in order to determine whether subject matter jurisdiction exists." *Green Acres Enterprises, Inc. v. U.S.*, 418 F.3d 852, 856 (8th Ci. 2005) (citing *Osborn v. U.S.*, 918 F.2d 724, 728-30 (8th Cir. 1990)). When reviewing a challenge to the existence-in-fact of subject-matter jurisdiction, a court does not presume the truthfulness of the allegations in a plaintiff's complaint. *See Branson Label, Inc. v. City of Branson, Mo.*, 793 F.3d 901, 914-15 (8th Cir. 2015) (citations omitted). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ P. 12(h)(3).

"Legislatures are ordinarily assumed to have acted constitutionally." *Clements v. Fashing*, 457 U.S. 957, 963 (1982). A facial challenge to a statute is the most difficult to stage because it must establish that the law is invalid under any set of circumstances. *See Americans for Prosperity Found. v. Bonta*, 141 S.Ct. 2373, 2387 (2021) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). A statute is also facially invalid if it is shown that the statute lacks "a plainly legitimate sweep." *Bonta*, 141 S.Ct. at 2387 (quoting *Wash.n State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)). That a statute might "operate unconstitutionally under some conceivable set of circumstances, is insufficient to render it wholly invalid." *Salerno*, 481 U.S. 745.

An as-applied challenge to a statute asks a court to declare a statute unconstitutional "on the facts of a particular case" because its "application to a particular person under particular circumstances deprived that person of a constitutional right." *United States v. Adams*, 914 F.3d 602, 605 (8th Cir. 2019) (quotations omitted). "If an as-applied challenge is successful, the statute may not be applied to the challenger, but is otherwise enforceable." *Republican Party of Minn., Third Congressional Dist. v. Klobuchar*, 381 F.3d 785, 790 (8th Cir. 2004) (citing *City of Lakewood v. Plain Dealer Pub Co.*, 486 U.S. 750, 758-59 (1988)). A challenge will be considered facial, and not as-applied, when a plaintiff's claim and the relief sought "reach beyond the particular circumstances of these plaintiffs." *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010).

III. DISCUSSION

A. Justiciability Issues

1. Standing

The Court finds that Plaintiffs had standing at the time of the complaint and at the time the instant motions to dismiss were filed.

Defendant Cash's motion to dismiss argues that Plaintiffs lack standing in this matter and that there is no adversity. ECF No. 13, p. 3. Cash contends that Plaintiffs lack the injury or threatened injury necessary to establish standing. ECF No. 13-1, p. 33-34. Cash notes that the State of Arkansas, through the Motion to Nolle Prosequi, has indicated that it does not intend to prosecute Plaintiffs for their violations under the Rent Statute. *Id*. Citing to *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289 (1979) and *Poe v. Ullman*, 367 U.S. 497 (1961), Cash also notes that the threat of injury does not exist when there is no reasonable belief that prosecution under an existing statute is imminent. ECF No. 13-1, p. 33. Similarly, with no threat of prosecution, Cash argues that the Plaintiffs are not adverse to any party in this matter and their threatened injury is purely hypothetical. *Id*. at p. 35.

In response, Plaintiffs argue that they have standing because the imminent threat of injury remains. ECF No. 19, p. 2-4. Plaintiffs note that all circumstances that make them subject to the Rent Statute still exist. *Id*. at p. 2-3. Plaintiffs further note that the Rent Statute makes every day in which Plaintiffs remain on the rental property beyond the ten-day notice period a separate offense. *Id*. at p. 3-4. Plaintiffs contend that because every day is a separate offense with a separate statute of limitations, they are continually under threat of prosecution. *Id*. Thus, Plaintiffs argue that the Motion to Nolle Prosequi regarding their older offenses is inadequate to remove the threat of prosecution because they can be subject to prosecution for any of the days they have remained on the property. *Id*.

In his reply, Defendant Cash simply references and incorporates his arguments regarding the lack of any threat of prosecution and the accompanying lack of imminent injury. ECF No. 25, p. 23-24.

The Constitution limits a federal court's jurisdiction to "actual cases or controversies." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016) (quotation omitted). "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Id*. at 338. To have standing to sue, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id*. (citation omitted). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id*. at 339 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

"A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (citation omitted). To contest the constitutionality of a criminal statute, a plaintiff does not actually need to be arrested or prosecuted before being able to bring a challenge to the statute. *See id*. (citations omitted). So long as a plaintiff alleges that their conduct is proscribed by statute and impacts a constitutional interest, there must simply be a credible threat of prosecution that goes beyond speculation or remote possibility. *See id*. at 298-99 (citations omitted).

The Court finds that Plaintiffs established standing in this matter. At the time of the complaint and these instant motions, Plaintiffs faced a genuine threat of prosecution as they remained on the property and accrued additional potential charges. The statute makes clear that every day a tenant stays on a property beyond the ten-day notice is a separate offense. Ark. Code § 18-16-101(b)(2)(B). Furthermore, the Motion to Nolle Prosequi only lists April 19, 2021, as the date of violation, with no clarity provided as to whether days beyond that could be considered

separate offenses that are exempt from the decision not to prosecute Plaintiffs. ECF No. 13-2. The Court is not persuaded by Defendant Cash's citation to *Poe v. Ullman*, 367 U.S. 497 (1961) to support the argument that Plaintiffs' standing is defeated by the decision not to prosecute them. ECF No. 13-1, p. 33. The Supreme Court in *Poe v. Ullman* noted that the state of Connecticut had determined to never enforce the statute at issue in that matter, and thus there was no genuine threat of injury under the statute to confer standing to challenge it. 367 U.S. 508, 507-09. That court emphasized that the long standing practice and "undeviating policy of nullification" in not enforcing the challenged statute eliminated the genuine threat of prosecution. Those are not the circumstances of the instant matter. The Court views the instant situation, with its compiling separate offenses, as one which creates a genuine threat of prosecution under the challenged statute that is not mere speculation. *See United Farm Workers*, 442 U.S. 289, 298-99. Accordingly, the Court finds that Plaintiffs sufficiently alleged a realistic threat of imminent injury to establish standing for their claims under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.[2]

2. Mootness

Though the Court finds that Plaintiffs had standing at the commencement of this action and at the time the instant motions were filed, the Court finds that Plaintiffs' claims are currently moot.

Defendant Cash argues that Plaintiffs' standing to sue ceased once the Motion to Nolle Prosequi was filed. ECF No. 13-1, p. 34-35. Similar to his arguments regarding standing, Cash contends that whatever threat that may have existed when Plaintiffs filed suit disappeared with the decision not to prosecute them, and thus there is no longer any case or controversy. *Id*. Cash

[2] Though Defendants did not challenge the other pillars of standing, the Court finds that Plaintiffs have adequately established that their imminent injury is traceable to Defendants' enforcement of the Rent Statute and that their injury would be redressed by a favorable ruling enjoining its enforcement and declaring it unconstitutional. Thus, Plaintiffs have fully established the three initial aspects of standing. *See Spokeo, Inc.*, 578 U.S. at 338.

further contends that the circumstances of this matter do not fall into the "capable of repetition, yet evading review" exception for cases that would typically be moot but still have standing. *Id*.

Defendant Howell similarly argues that the Motion to Nolle Prosequi has rendered Plaintiffs' claims moot. ECF No. 16, p. 5-7. Howell notes that a defendant's voluntary cessation of challenged activity can render a properly alleged claim moot. *Id*. at p. 5-6. Howell further notes that arguments by governmental defendants regarding voluntary cessation are given more weight by courts. *Id*. at p. 6-7. Howell points to her affidavit (ECF No. 15-1) that states she directed that Plaintiffs not be prosecuted by her office and that "Currently, there are no plans to pursue any cases pursuant to Ark. Code Ann. § 18-16-101." ECF No. 16, p. 7.

Plaintiffs argue in their response that their claims are not moot. ECF No. 19, p. 3-6. Regarding the Motion to Nolle Prosequi and Defendant Howell's affidavit, Plaintiffs contend that these do not meet the burden of clearly showing that the threat of prosecution cannot reasonably be expected to occur. *Id*. at p. 3. Plaintiffs note that Defendant Howell's affidavit simply says there are "no plans" to pursue charges under the Rent Statute and does not establish the certainty necessary to show mootness. *Id*. at p. 3. Combined with the fact that every day they remain on the property is a new offense, Plaintiffs contend that the threat of prosecution is ever present and that their claims have not become moot because of Defendant Howell's actions. *Id*. at p. 3-5. Plaintiffs further contend that even if their claims are moot, this matter falls into an exception to mootness because it is "capable of repetition, yet evading review." *Id*. at p. 5. Plaintiffs also argue that their status as class representatives for others potentially subject to the Rent Statute allows this matter to go forward, even without Plaintiffs having personal standing. *Id*. at p. 5-6.

Defendant Howell's reply reiterates her arguments regarding voluntary cessation. ECF No. 20, p. 3-4. Howell also contends that Plaintiffs have not met their burden of showing how this

matter is "capable of repetition, yet evading review," which would confer standing despite this matter being moot under typical considerations. *Id*. at p. 4-5. Defendant Cash's reply incorporates his arguments from his motion to dismiss, reiterating that there is no longer an imminent threat of injury to Plaintiffs, and therefore there is no case or controversy giving this Court jurisdiction over this matter. ECF No. 25, p. 23-24.

A later filing by Defendant Cash further argues that this action is moot because Plaintiffs moved out of Arkansas in May 2022 and now reside in Michigan. ECF No. 45. In a supplement (ECF No. 45) to his earlier response (ECF No. 37) to Plaintiffs' Motion to Certify Class, Defendant Cash notes that Plaintiffs have relocated to Michigan and that the threat of prosecution has become even more remote. *Id*. at p. 3-4. Therefore, Defendant Cash contends that this further demonstrates that there cannot be any threatened injury to Plaintiffs that could be considered imminent. *Id*. at p. 4.

Plaintiffs' reply to Defendant Cash's supplement argues that the threat of prosecution remains regardless of their change in residency and that their claims are not moot. ECF No. 46. Plaintiffs acknowledge that they moved out of their prior rental house in May 2022 and now reside in Michigan. *Id*. at p. 1-3. Plaintiffs contend that the possibility of prosecution generally remains because of the one-year state of limitations for violations under the Rent Statute and the possibility of the Plaintiffs being extradited to Arkansas to face charges for their violations of the Rent Statute. *Id*. at p. 2-3. Plaintiffs also contends that this action still falls into the "capable of repetition, yet evading review" exception to mootness despite their relocation to Michigan. *Id*. at p. 3-9. Plaintiffs further contend that the enforcement of the statute is the type of "transitory" harm that courts acknowledge will conclude before a suit challenging the practice can be completed or before a proposed class can be certified, and thus mootness should be evaluated at the time the suit is

filed. *Id*. Plaintiffs note that the "transitory" exception to mootness often applies when the named plaintiff is no longer subject to alleged unlawful statute or practices, but other similarly situated individuals may soon be subject to the same challenged action. *Id*. at pp. 3-4, 7-10.

"A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Davis v. Morris-Walker, LTD*, 922 F.3d 868, 870 (8th Cir. 2019) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)). Mootness can be viewed as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 397 (1980) (quotation omitted). When issues in a case "lose their life" because of changed circumstances and a court can no longer grant relief, the case is moot and a court must dismiss for lack of jurisdiction. *Ali v. Cangemi*, 419 F.3d 722, 723-24 (8th Cir. 2005) (citation and quotation omitted). "Resolution of the mootness question requires attention to the particular circumstances of the case." *Hawse v. Page*, 7 F.4th 685, 692 (8th Cir. 2021).

A defendant's voluntary cessation of challenged activity can possibly moot a case because it has changed the circumstances and potentially provided relief to a plaintiff. *See Prowse v. Payne*, 984 F.3d 700, 702 (8th Cir. 2021) (citations omitted). Voluntary cessation does not automatically moot a matter because a defendant may then be given free reign to continue with the challenged activity after the matter is discarded from a court. *See Nike, Inc.*, 568 U.S. at 91 (citations omitted). Therefore, a defendant bears the "heavy burden" of establishing that its voluntary cessation has mooted a matter. *See Prowse*, 984 F.3d at 702-03 (quotation omitted). The burden of establishing mootness through voluntary cessation is less onerous when a defendant

is a governmental entity. *Id*. at 703 (citation omitted). However, any defendant putting forth a voluntary cessation argument must show that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Nike*, *Inc.*, 568 U.S. at 91 (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000)).

A court may have subject matter jurisdiction over an action that would otherwise be considered moot if that action is "capable of repetition, yet evading review." *Abdurrahman v. Dayton*, 903 F.3d 813, 817 (8th Cir. 2018) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007)). This exception to mootness is applicable when "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id*. (quotation omitted). "The party asserting jurisdiction bears the burden of showing the presence of both requirements." *Id*.

Typically, a class action should be dismissed when a named plaintiff's claims become moot and the court has not certified a class. *See Potter v. Northwest Mortg., Inc.*, 329 F.3d 608, 611 (8th Cir. 2003) (noting that a named plaintiff's settlement of claims should lead to dismissal of the whole action when a class has not been certified) (citation omitted). However, another exception to mootness applies to class actions when a challenged activity is "inherently transitory" and it is unlikely that a motion for class certification will be adjudicated before a named plaintiff's claims are rendered moot.[3] *See G.R.X Through H.R.X. v. Foxhoven*, 2018 WL4701869 at *2 (S.D. Iowa June 28, 2018) (citing *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 399 (1980)). "Whether claims are inherently transitory is an inquiry that must be made with reference to the claims of the

[3] Cases that have fallen into the "inherently transitory" exception to mootness "frequently involve classes consisting of rotating populations like those in jails, detention centers, or nursing homes." *GRX*, 2018 WL4701869 at *2 (collecting cases).

class as a whole as opposed to any one individual claim for relief." *Id*. (quotation omitted). The purpose of the exception is to relieve the uncertainty of whether any named plaintiff's claim would survive up to the adjudication of a motion for class certification. *Id*. at *3.

The Court finds that Plaintiffs' claims are ultimately moot as a result of their relocation to Michigan. The Court is not persuaded by the arguments that Defendants initially made regarding mootness due to voluntary cessation. The Court views mootness at the time Plaintiffs were still in their rental house similarly to the way it views the issue of standing. Every day Plaintiffs remained at the property past the notice period is a separate offense under the Rent Statute. Ark. Code Ann. § 18-16-101(b)(2)(B). The Motion to Nolle Prosequi only lists April 19, 2021, as the date of violation. ECF No. 13-2. This creates uncertainty as to whether any dates beyond April 19, 2021, fall outside the reach of the Motion to Nolle Prosequi. Also, the affidavit from Defendant Howell does not provide certainty as to her intentions with the Rent Statute. There is little assurance in the affidavit beyond tersely stating that there are currently "no plans" to enforce it. ECF No. 15-1. Even with the greater leeway courts must give to voluntary cessation arguments from governmental entities, *See Prowse*, 984 F.3d at 703, this tepid and non-committal statement does not come close to making it "absolutely clear" to the Court that Plaintiffs could not reasonably expect to be prosecuted again under the Rent Statute. *Nike*, *Inc.*, 568 U.S. at 91. Howell's statement is a far cry from an "undeviating policy of nullification" that removes the threat of prosecution under a statute. *Poe*, 367 U.S. at 502-04. The Court fears that this could be the situation in which a defendant stops the challenged activity once sued and begins anew after it has shaken off judicial scrutiny. *See Nike*, *Inc.*, 568 U.S. at 91. Also of note is Defendant Howell's status as an elected official in her position as Prosecuting Attorney for the Seventh Judicial District.

Any replacement or successor in that position could reverse whatever weak commitment currently exists in that office to not enforce the Rent Statute.

However, the Court finds that Plaintiffs' relocation to Michigan does moot their claims and necessitates dismissal of this action. While the Court viewed the threat of prosecution as sufficiently imminent while Plaintiffs remained on the property and within the state, their relocation out of state strikes too large a blow to the likelihood of prosecution for the Court to find that there does exist a live case or controversy. *See Davis*, 922 F.3d at 870. Plaintiffs' arguments regarding the looming one-year state of limitations and the possibility of extradition are not persuasive. The statute of limitations for any potential charge under the Rent Statute will elapse by May 2023 and prosecution would require extradition from Michigan, which the Court does not view as probable. Accordingly, the Court does not view this circumstance as one within the "capable of repetition, yet evading review" exception because Plaintiffs cannot reasonably expect to be subject to prosecution under the Rent Statute at this time. *See Abdurrahman*, 903 F.3d at 817.

The Court also does not view this action as one that fits into the "transitory" action exception to mootness. In this instance, Plaintiffs' relocation to Michigan is what the Court finds mooted this action. Therefore, the Court does not view speed and nature of the challenged enforcement as what prevented this action from proceeding and thus would justify keeping the claims of the potential class alive until ruling on the pending motion to certify the proposed class. *See G.R.X*, 2018 WL4701869 at *2-3. The Court is also not persuaded by Plaintiffs' argument regarding the Eighth Circuit's general approach to not mooting a class action when a named plaintiff receives an offer of judgment prior to denial of class certification. *See Liable v. Rockport Financial, LLC*, 2015 WL5227120, at *2-3 (E.D. Mo. Sept. 8, 2015) (citing *Alpern v. Utilicorp*

United, Inc., 84 F.3d 1525, 1539 (8th Cir.1996)). In the various cases from the Eighth Circuit and other Circuits cited by the court in *Liable*, the consistent theme is that the claims of a potential class should not become moot because of the speed at which a defendant can make an offer of judgment to a named plaintiff and avoid dealing with broader claims of the class. *See id*. (collecting cases). In the instant matter, the Court views Plaintiffs' actions as those that contributed the most to the mootness of the claims and does not find the comparison to offers of judgment persuasive.

Accordingly, the Court finds that there is no longer a live case or controversy and Plaintiffs' claims are moot. Consequently, the Court does not have subject matter jurisdiction over Plaintiffs' claims, and this action must be dismissed. Fed. R. Civ P. 12(h)(3).

IV. CONCLUSION

For the reasons stated above, the Court finds that Plaintiffs' claims are **MOOT**. Accordingly, Defendants' motions to dismiss (ECF Nos. 13 and 15) should be and hereby are **GRANTED**. Plaintiffs' claims are hereby **DISMISSED WITHOUT PREJUDICE**.

IT IS SO ORDERED, this 22nd day of August, 2022.

/s/ Susan O. Hickey
Susan O. Hickey
Chief United States District Judge