IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
DELTA DIVISION

EDRIN ALLEN **PLAINTIFF**

VS. **NO. 2:20-cv-132 BSM**

GIBBS FERGUSON in his official capacity as City Attorney for McGehee; LARRY ALLEN in his official capacity as Sheriff for Desha County; SARAH FARRAR-PHILLIPS in her official capacity as Chief Clerk of the 27th State District Court (McGehee Department); and HENRY PENNY **DEFENDANTS**

BRIEF IN SUPPORT OF PLAINTIFF'S
MOTION FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiff Edrin Allen's lawsuit arises from Defendant Henry Penny's use of an unconstitutional state statute, Arkansas Code Annotated § 18-16-101, to force Plaintiff from his home in concert with Defendants Gibbs Ferguson, Larry Allen and Sarah Farrar-Phillips. To allow these Defendants to move forward with this unconstitutional process would (1) violate and impermissibly chill Plaintiff's right to a fair trial and due process, and (2) constitute cruel and unusual punishment under the United States and Arkansas Constitutions.

To quell the violation of his constitutional rights, Plaintiff asks this Court to enter a temporary restraining order, and after further proceedings, a preliminary injunction that prevents Defendants from initiating and pursuing criminal proceedings against Plaintiff, and for other relief as the Court deems equitable and just.

BACKGROUND

Arkansas is the only state in the country that criminalizes the eviction process.[1] Under Arkansas Code Annotated § 18-16-101 (the "Criminal Eviction Statute"), the landlord of a tenant who is one day late on rent may order the tenant to vacate the premises within 10 days. If the tenant fails to do so, he is guilty of a separate misdemeanor offense for each day he failed to vacate the premises following the expiration of the 10-day notice and must pay a fine of up to $25 per day or offense. ARK. CODE ANN. § 18-16-101(b)(1)-(2). Under the Criminal Eviction Statute, charges may be filed against the tenant based solely on the grounds of a landlord's statement that (1) the tenant did not pay rent on time and (2) the tenant failed to vacate the premises within the 10-day notice period. A "guilty" verdict is mandated by the statute. The class of misdemeanor(s) of which a defendant may be found guilty is unstated and, therefore, varies according to the number of days the tenant stays in the residence after the expiration of the notice to vacate. The fine concurrently imposed on the tenant likewise varies based on the number of days the tenant remains after the expiration of the notice to vacate. The tenant acquires a criminal record and, as a result thereof, may be subjected to the various forms of second-class citizenship associated with that. And because the fines are owed to the state, instead of the landlord, the Criminal Eviction Statute serves only to bolster the county's income without actually resolving any grounds for eviction that may or may not exist.

[1] Human Rights Watch, Pay the Rent or Face Arrest: Abusive Impacts of Arkansas's Draconian Evictions Law 1 (Feb. 2013), http://www.hrw.org/sites/default/files/reports/us0113arkansas_reportcover_web.pdf [hereinafter "HRW Rep."]; Non-Legislative Commission for the Study of Landlord-Tenant Laws, Report, 35 U. Ark. Little Rock L. Rev. (2013) [hereinafter "Comm'n Rep."]

ARGUMENT

Plaintiff is entitled to a temporary restraining order and preliminary injunction "to preserve the status quo until, upon final hearing, a court may grant full, effective relief." *Kansas City S. Transp. Co. v. Teamsters Local Union No. 41*, 126 F.3d 1059, 1066 (8th Cir. 1997) (internal quotation marks omitted.)

The standards for issuance of a temporary restraining order or a preliminary injunction are the same. The relevant four factors are: "(1) the probability of success on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) whether the issuance of an injunction is in the public interest." *Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 485-86 (8th Cir. 1993) (citing *Dataphase Sys. v. CL Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (*en banc*)); *see also Kroupa v. Nielsen*, 731 F.3d 813, 818 (8th Cir. 2013); *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1178-79 (8th Cir. 1998). When applying the *Dataphase* factors, "a court should flexibly weigh the case's particular circumstances to determine whether the balance of equities so favors the movant that justice requires the court to intervene." *Clorox*, 140 F.3d at 1179. Under this test, no single factor is determinative. *Dataphase*, 640 F.2d at 113; *Kansas City*, 126 F.3d at 1066. Rather, all factors must be balanced to determine whether to grant the injunction. *International Ass'n of Machinists & Aerospace Workers v. Schimmel*, 128 F.3d 689, 692 (8th Cir. 1997).

In considering the likelihood of the movant prevailing on the merits, "a court does not decide whether the movant will ultimately win." *PCTV Gold, Inc. v. SpeedNet, LLC*, 508 F.3d 1137, 1143 (8th Cir. 2007). While "an injunction cannot issue if there is no chance on the merits, the Eighth Circuit has rejected a requirement [that the] party seeking preliminary relief prove a

greater than fifty per cent likelihood that he will prevail on the merits." *Id.* (internal quotation marks and citations omitted.) As explained below, the balance weighs heavily in the Plaintiff's favor on each of the four factors.

I. A Temporary Restraining Order is Warranted Because Plaintiff is Likely to Succeed on the Merits of His Constitutional Claims

A. Plaintiff is Likely to Succeed on the Merits of His Claim that Arkansas Code Annotated § 18-16-101 Violates the Constitutional Right to a Fair Trial with Due Process.

Statutes that unduly chill a defendant's exercise of a constitutional right violate the federal constitutional right to due process. *United States v. Jackson*, 390 U.S. 570, 582 (1968); *see also Stump v. Bennett*, 398 F.2d 111, 120-21 (8th Cir. 1968) ("Any deterrent to the right to be heard in full and to offer evidence in defense of life or liberty violates the oldest and deepest-rooted foundation of due process"). The United States Supreme Court has held that the "inevitable effect" of a state statute reserving the death penalty only for defendants who went to trial, but not for those who pled guilty, was to "discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." *Jackson*, 390 U.S. at 581. This decision has been followed by a number of courts in a variety of contexts. *See, e.g., United States v. Mitchell*, 30 F.3d 1493, 1994 WL 399152 (5th Cir. 1994) (waiver of right to jury trial in exchange for release on bond violates *Jackson*); *Scharf v. United States*, 606 F.Supp. 379 (E.D. Va. 1985) (finding $25 assessment unconstitutional because it was imposed only on those who exercised their right to trial); *United States v. Porter*, 513 F. Supp. 245 (M.D. Tenn. 1981) (statute imposing potential fine of $500 and up to six months incarceration for bringing an unleashed dog onto a federal park, but permitting defendants who pleaded guilty to forfeit a 'bond' worth $15 violates *Jackson*). The relevant test is whether the statute's deterrent effect on exercising the constitutional right is "unnecessary and therefore excessive." *Jackson*, 390 U.S. at 582.

Arkansas's Criminal Eviction Statute is unconstitutional on its face because it impermissibly chills a tenant's due process right to trial. The statute provides that a tenant who does not vacate the premises "shall be guilty of a misdemeanor" without due process or a trial. ARK. CODE ANN. §18-16-101(b)(1). Moreover, each day that a tenant remains in the property "after the expiration of notice to vacate shall constitute a separate [misdemeanor] offense." ARK. CODE ANN. §18-16-101(b)((2)(B). And, because conviction is mandated by the statute, the tenant will always be found "guilty" (without the benefit of due process), and "fined in any sum between one and twenty-five dollars" for each day the tenant remains on the premises – regardless of the reasons or defenses he may have for staying on the property.

Furthermore, the exactions imposed on Plaintiff by the Criminal Eviction Statute are unnecessary, excessive, and violate his constitutional rights to due process and a fair trial. For instance, although the purpose of the criminal prosecution generally and typically is to determine if someone is guilty, the statute imposes a guilt determination based on an unadjudicated yet disputed civil matter - without requiring the state to satisfy its burden of providing due process through a civil case or even the criminalization of a debt allegation under this statute. The statute puts Plaintiff and other tenants into the "anomalous situation" of depriving them of the opportunity to mount a defense to eviction. *See Stump*, 398 F.2d at 120 (invalidating "anomalous situation" of requiring criminal defendants to prove alibi by preponderance of evidence). The criminal eviction is made more untenable by the statute's mandatory finding that the tenant is guilty of one or more misdemeanors while failing to require the landlord to hold the tenant's lease until trial is completed, potentially leaving innocent tenants homeless. The statute clearly deprives Plaintiff and other tenants of their constitutional right to fair trial on criminal charges; an outcome that is unacceptable in a system that presumes the defendant's innocence. *Taylor v. Kentucky*, 436 U.S.

478, 483 (1978) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law"); *Porter*, 513 F. Supp. at 249 (M.D. Tenn. 1981) ("The hearty (or foolish) souls who venture to trial face substantial penalties on the exercise of that right, since they face penalties so disparate that most reasonable people would have pleaded guilty, without regard to actual guilt."). The unconstitutionality of the Criminal Eviction Statute requires its invalidation.

Section 18-16-101 violates the right to trial by convicting a tenant of a crime without the opportunity to defend himself and contest eviction. The statute imposes escalating criminal sanctions on a tenant who remains in his home, but provides no mechanism for actual eviction of the tenant or restitution to a landlord. And because all fines are paid to the State, the Criminal Eviction Statute is essentially a government-sanctioned income generator. Factors such as how long it takes the landlord to seek a summons, the amount of time for the sheriff's office to serve the summons, 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. This regime forces tenants who want their day in court to grapple with the fact that, if they are subsequently found guilty, they will be charged arbitrarily for time they protested their innocence. Meanwhile, though section 18-16-101 proscribes an unclassified misdemeanor, its lack of a total maximum fine for the same course of conduct may effectively raise the class of misdemeanor fine for which the tenant is liable. For example, if the process takes twenty days, at $25 a day the tenant charged with the unclassified misdemeanor would face a fine of $500, the maximum for a Class C misdemeanor. *See* ARK. CODE ANN. § 5-4-201(b)(3). Twenty more days would result in a Class B misdemeanor. *See* ARK. CODE ANN. § 5-4-201(b)(2). Given these pressures, the tenant's

willingness to contest the charges would vary inversely with the length of the pretrial process, rather than his or her actual guilt.

Finally, the Criminal Eviction Statute pressures innocent tenants into either abandoning the very home in which they claim a possessory interest or pleading guilty to avoid the possibility of mounting convictions and an exorbitant total fine. Because the statute removes the possibility of jail time, it also eliminates defendants' state and federal rights to counsel. *Scott v. Illinois,* 440 U.S. 367 (1979); ARK. R. CRIM. P. 8.2(b). The fact that indigent tenants, deprived of an advocate to help them evaluate viable defenses, must make such dire decisions as whether to protest their innocence or move out of their home—all as their charges and potential fines mount every day—only exacerbates the statue's chilling effect.

B. Plaintiff is Likely to Succeed on His Claim that Arkansas Code Annotated § 18-16-101 Violates the Due Process Guarantees found in the Federal and State Constitutions.

Arkansas Code Annotated §18-16-101 violates core precepts of due process because its lack of standards for determining a defendant's ultimate culpability will inevitably cause arbitrary enforcement. In this context, a criminal statute is unconstitutionally vague if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357-58 (1983). The Court's vagueness doctrine consists of two separate but related concepts: 1) fair notice and 2) adequate standards. The fair notice component protects against imprecisely drawn statutes that "trap the innocent" by providing inadequate notice of prohibited conduct. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A statute need not account for every factual contingency, but it must set forth its terms with sufficient definiteness so that individuals facing potential criminal sanctions are not forced to

speculate as to its meaning. *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999) (plurality opinion) (citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453, (1939)). The doctrine's second component mandates that legislative bodies "establish minimal guidelines to govern law enforcement" to prevent "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 357-58 (quoting *Smith v. Goguen*, 415 U.S. 566, 574-75 (1974)) (internal quotation marks omitted). Statutes must effectively cabin law enforcement's discretion to prevent the oppression of unpopular groups or people. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).

The Criminal Eviction Statute violates these principals of vagueness by failing to place any constraints on the number of convictions or total fines a defendant faces under the statute. This omission is exacerbated by the fact that the statute does not contain any time for filing a complaint or adjudicating the charges. The statute also lacks any mechanism for a tenant independently to "stop the clock" on additional charges while the case is pending. Thus, this statutory scheme is readily vulnerable to arbitrary outcomes and abuse. For instance, any delay in the criminal process—whether by the sheriff serving a summons, the court scheduling preliminary proceedings and the trial, or the parties seeking continuances—however benign, could result in a defendant facing additional charges for the same course of conduct. Because the time for adjudications does and inevitably will continue to vary across the state, the number of charges a defendant will face may vary, not as a function of a defendant's culpability, but as a function of geography, court congestion, or law enforcement priorities.

Unfortunately, it is likely that not all of the variation will be benign. The absence of standards limiting the impact of case delay effectively grants judges, prosecutors and city attorneys unchecked discretion over charging and sentencing decisions. Prosecutors and city attorneys are

free to charge or threaten as many or as few charges as warranted by delay, whether in service of mitigating the harms of prosecution or stacking charges to push a defendant into vacating the premises. Similarly, judges can use or threaten the variable fine per conviction to adjust the total fine without sufficient standards to guide the court or a tenant. The "vast amount of discretion" that section 18-16-101 grants to Arkansas law enforcement in failure to vacate prosecutions is fatal to the law's design. *See Morales*, 527 U.S. at 63 (quotations omitted).

While the vagueness doctrine typically focuses on arbitrary enforcement by state officials, ARK. CODE ANN. §18-16-101 additionally opens itself to abuse by private landlords attempting to evict tenants. To illustrate, the statute of limitations for a misdemeanor imposed by section 18-16-101 is one year. ARK. CODE ANN. § 5-1-109(3). Thus, an unscrupulous landlord has ample leeway to delay filing a complaint to maximize the number of convictions the tenant faces once the prosecution commences. Withholding a complaint would thereafter become one of the landlord's most effective tools to force a tenant off the property. The landlord could use this tactic even if he accepted a late payment from the tenant but still wanted to remove the tenant for other, perhaps improper reasons, such as retaliation for a complaint of discrimination.

Imagine, then, the confusion facing a tenant who wishes to contest failure to vacate charges. A central aim of the vagueness doctrine is to require that criminal statutes provide enough clarity "so that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue." *Connally v. General Const. Co.*, 269 U.S. 385, 393 (1926). Section 18-16-101 provides no such clarity, as it leaves defendants uncertain as to whether the very act of pleading not guilty and staying in their residence may itself be criminal, and, if so, the statute deprives defendants of any advance notice of the potential extent of their culpability for asserting their innocence.

An additional feature of the statute must be noted in this regard. As under the previous statute, the first section of the statute declares that "[a]ny person . . . 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." ARK. CODE ANN. § 18-16-101(a). Unlike the next section, which authorizes a misdemeanor conviction for those who thereafter "willfully refuse to vacate," ARK. CODE ANN. § 18-16-101(b)(1), the first section contains no scienter requirement. The statute thereby appears to terminate a tenant's right to remain on the property if she is one day late on rent, regardless of the reason. However, the statute is unclear on whether its termination of a tenant's right to remain for failing to pay survives an acquittal for failure to vacate. Because the two sections address different conduct—failing to pay versus failing to vacate—this anomalous situation might occur if, for example, the tenant admits to refusing to pay rent under the contract, but successfully asserts as a defense that she had a "claim of right" to remain on the property. *See Poole v. State*, 428 S.W.2d 628, 1226 (Ark. 1968) (recognizing claim of right defense).

Because of this statutory framework, the tenant who wishes to contest the charges has no means to evaluate whether he should remain in the residence. The tenant may feel compelled to leave the property by the threat of criminal prosecution, even if he believes he has a viable defense to a wrongful eviction. But if the tenant does leave, the statute provides no mechanism to force the landlord to allow him to return if the tenant is the case is dismissed at a later time.[2] If the tenant decides to stay, he faces criminal charges that will remain a part of his record *and* the threat of a separate civil eviction process brought by the landlord. This uncertainty is fundamentally unfair to the presumptively innocent tenants who face prosecution under the statute based solely on the word of a landlord and without the benefit of due process under the law.

[2] By contrast, under Arkansas' unlawful detainer statute, a tenant wrongfully evicted could obtain a writ of restitution to return to the property. ARK. CODE ANN. § 18-60-309(d)(2).

C. Plaintiff is Likely to Succeed on His Claim that Arkansas Code Annotated § 18-16-101 Constitutes Cruel and Unusual Punishment Under the Federal and State Constitutions.

Both the Eighth Amendment to the United States Constitution and Article 2, Section 9 of the Arkansas Constitution prohibit cruel and unusual punishment. Determining which acts violate the Eighth Amendment "cruel and unusual" clause requires an evaluation of "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86, 101 (1958). The evolving standards analysis places substantive limits on the state's police power by barring punishments that are grossly disproportionate to the crime. *Robinson v. California,* 370 U.S. 660, 666 (1962) ("[I]n the light of contemporary human knowledge, a law which made a criminal offense of [drug addiction] would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."). Criminalizing a failure to vacate the premises is cruel and unusual punishment under the Arkansas and U.S. Constitutions, such that the statute should be declared invalid.

Arkansas's criminalization of tenant evictions undeniably lags well behind the evolving standards of decency of both the nation and the state. "Every other US state treats evictions as a purely civil matter," heavily suggesting that the failure to vacate statute is morally outdated. HRW Rep., *supra* note 1, at 1; *see also Duhon v. State,* 299 Ark. 503, 512 (1989) (Purtle, dissenting) ("Arkansas has won another distinction: it is the only state in the nation which imposes criminal sanctions on a person who does not pay his rent on time. . . The majority has, with all the speed of a crawfish, backed into the 19th century."). By comparison, when the Eighth Circuit ruled that Arkansas's use of a "strap" to inflict corporal punishment on prisoners was cruel and unusual, the court relied heavily on the fact that "only two states still permit[ted] the use of the strap," and that it had been "almost uniformly . . . abolished." *Jackson v. Bishop,* 404 F.2d 571, 580 (8th Cir.

1968). That Arkansas stands alone in its criminalization of tenant evictions is the clearest indicator that the statute authorizes cruel and unusual punishment. *See Solem v. Helm*, 463 U.S. 277, 300 (1983) (striking down sentence in part because defendant "was treated more severely than he would have been in any other State").

Within the state, many of the very city attorneys, prosecutors and state judges charged with enforcing the law refuse to do so, or attempt to mitigate the law's harshest consequences. *See* Comm'n Rep. at 17; HRW Rep., *supra.* City attorneys, prosecutors and local judges are not alone in abandoning the statute. A bipartisan, non-legislative commission charged by the legislature in 2012 with examining the prior version of this statute recommended its full repeal. Comm'n Rep. at 17. In January 2015, the Pulaski County Circuit Court declared that ARK. CODE ANN. § 18-16-101 violated both the state and federal constitutions. *State v. Smith*, Pulaski County Circuit Court Case No. 2014-2707.[3] Pulaski County was previously responsible for the majority of prosecutions under the statute in Arkansas. Since that ruling, two additional state circuit judges have ruled the prior version of the statute unconstitutional. *State v. Jones*, Poinsett County Circuit Court Case No. 2014-389;[4] *State v. Bledsoe*, Woodruff County Circuit Court Case No. 2014-77-2.[5] These decisions dramatically reduced the number of prosecutions under §18-16-101 across most of the State of Arkansas. And, at the federal level, the United States Department of Housing and Urban Development has barred the statute's use by landlords who accept Section 8 vouchers, as well as in federally-subsidized housing. Comm'n Rep. at 16. Today, prosecutions are now brought only

[3] A copy of the *Smith* order is attached to the Motion as Exhibit A, and is incorporated herein by reference under FED. R. CIV. P. 10(c).
[4] A copy of the *Jones* order is attached to the Motion as Exhibit B, and is incorporated herein by reference under FED. R. CIV. P. 10(c).
[5] A copy of the *Bledsoe* order is attached to the Motion as Exhibit C, and is incorporated herein by reference under FED. R. CIV. P. 10(c).

in a few outlier jurisdictions. This official discomfort with applying the statutory penalties in the landlord-tenant context provides powerful ev[6]idence of the societal judgment that criminalizing the failure to pay rent is inherently disproportionate. *See Roper v. Simmons*, 543 U.S. 551, 590 (2005) (relying on rarity with which juries impose a sentence as "a significant and reliable objective index of societal mores") (citing *Coker v. Georgia*, 433 U.S. 584, 594 (1977) (plurality opinion)) (quotations omitted).

Furthermore, and beyond this irrefutable consensus that the statute is unlawful, criminalizing evictions is constitutionally excessive because it does not sufficiently advance the state's penological interests. Failing to vacate involves a private property dispute that does not belong in the criminal system. *See* Comm'n Rep. at 16-17; *see also Solem v. Helm*, 463 U.S. 277, 290-91 (1983) (identifying gravity of offense as significant factor for proportionality review). Disputes over the rightful possessor of property have traditionally been treated as private, civil matters. *Coleman v. State*, 119 Fla. 653, 663 (1935) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *5) ("[I]f I detain a field from another man, to which the law has given him a right, this is a civil injury, and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public which of us is in possession of the land."). In *Gorman v. Ratliff*, the Arkansas Supreme Court, rejecting the right of a landlord to utilize self-help to evict a holdover tenant, recognized that a holdover tenant properly maintained possession of the property "until the right to possession could be adjudicated" in a civil action "where the weak and strong stand on

[6] A federal challenge was brought against the previous version of the Criminal Eviction Statute in the case of *Purdom v. Morgan*, CASE NO. 3:16-CV-3072 (W.D. Ark. 2016). While this case was pending, the Arkansas State Legislature amended the Criminal Eviction Statute to its current form. The *Purdom* case was ultimately dismissed without prejudice after the Court determined that the Plaintiff's claims were moot when a year had passed and the Plaintiff no longer faced the threat of criminal prosecution.

equal terms." 289 Ark. 332, 337 (1986). *Gorman* suggests the impropriety of treating a holdover tenant like a trespasser.[7]

Consistent with *Gorman*'s rationale of not forcing an eviction before a civil court can equitably adjudicate the dispute, Arkansas provides several civil remedies to evict non-paying tenants. These civil proceedings serve precisely the same ends as the failure to vacate statute, except without the stigma and irreversible consequences of a criminal conviction. *See Argersinger v. Hamlin,* 407 U.S. 25, 47-48 (1972) (Powell, J., concurring) ("The consequences of a misdemeanor conviction, whether they be a brief period served under the sometimes deplorable conditions found in local jails or the effect of a criminal record on employability, are frequently of sufficient magnitude not to be casually dismissed by the label 'petty.'") (quotations and citations omitted).

Indeed, the primary goal served by the criminal statute appears to be allowing landlords to bypass these civil proceedings and instead "to use the resources of the criminal justice system to get restitution for an alleged breach of contract." Comm'n Rep. at 16; *see also Id*. at 17 (finding that the statute "criminalizes breach of a contract, using the criminal law to enforce a civil matter"). Such disparate treatment is hardly a valid penological objective. Thus, the marginal deterrent or retributive benefits, if any, of the statute cannot justify branding an individual a "criminal" for a mere property dispute. *Robinson*, 370 U.S. at 667 ("Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold."). The statute itself does not permit courts to evict a tenant; it is only the threat of criminal prosecution and escalating deprivations of

[7] Also see, *Glasgow v. Century Prop. Fund XIX*, 299 Ark. 221, 222, 772 S.W.2d 312, 312 (1989) (holding that tenants have a right equal to that of their landlord to exclusive possession of their property); *Greene v. Lindsey*, 456 U.S. 444. 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982) (recognizing tenants' constitutionally protected property rights in civil eviction proceedings); *Dixon v. Lowry*, 302 F.3d 857, 864 (2002) (citing *Soldal v. Cook County*, 506 U.S. 56, 58-59, 113 S.Ct. 538 (1992), *Fuentes v. Shevin*, 407 U.S. 67, 86, 92 S.Ct. 1983 (1972) (indicating that the Fourteenth Amendment protects disputed as well as undisputed property interests).

liberty and property that leverage a tenant's eviction. Extortion cannot be a valid penological objective. Criminalizing a failure to vacate the premises is therefore cruel and unusual punishment under the state and federal constitution, and the Court must declare the statute invalid.

II. Plaintiff Faces Irreparable Harm for Which There Is No Adequate Remedy at Law

"Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *General Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 318–19 (8th Cir. 2009). In this case, the irreparable nature of the threatened injuries to the Plaintiff is concrete, imminent, and obvious. He is being pressured to vacate his home and his property interests in it or risk facing deprivation of even more property and his liberty. Without an injunction, the plaintiff is subject to imminent prosecution by Defendant Ferguson under ARK. CODE ANN. § 18-16-101. This imminent prosecution would not only violate Plaintiff's constitutional rights but also would place him in jeopardy of homelessness during a pandemic by coercing him to leave his home in order to avoid prosecution. Even a disputed interest in property is to be constitutionally protected. *See Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (finding that the loss of a constitutional right constitutes irreparable harm); *Johnson v. United States Dep't of Agriculture*, 734 F.2d 774, 789 (11th Cir. 1984) (finding irreparable harm in the loss of a home).

No amount of money damages will make Plaintiff whole for the loss of these fundamental rights. The Plaintiff is suffering, and without an injunction, he will suffer further actual, imminent, and irreparable harm.

III. The Balance of Harms Favors the Plaintiff

The third *Dataphase* factor requires the Court to consider the potential impact that the requested injunction might have upon the Defendants and to balance that potential with the harms

that the Plaintiff could suffer should the request be denied. The balance in this case overwhelmingly favors entering a temporary injunction.

Absent an injunction, the Plaintiff will face prosecution for which he will not be afforded a fair trial based on due process but instead one that denies him due process and imposes cruel and unusual punishment. The landlord Defendants retain all rights to pursue civil remedies available to landlords, including an unlawful detainer action under Arkansas Code Annotated § 18-60-304, *et. seq.*

The Defendants will suffer no harm if the injunction is granted. As noted above, Arkansas law provides landlords seeking to collect unpaid rent or evict a tenant with several adequate civil remedies, including contract actions and the unlawful detainer statute discussed above, making it completely unnecessary to resort to the criminal process to protect the landlord's legal interests. *Id.* Further, most judges and prosecutors across the state largely refuse to enforce the statute, and, following the three state court decisions striking down the statute, prosecutions under the statute are now a relative rarity. Under these circumstances, requiring Defendants to cease their efforts to prosecute the Plaintiff until the completion of this action will not affect their interests.

IV. The Public Interest is Served by the Issuance of Injunctive Relief to Preserve the Status Quo

The public interest in this case is clear. "It is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n,* 23 F.3d 1071, 1079 (6th Cir.1994). The public interest favors housing for all citizens and disfavors homelessness. The public interest also disfavors deprivations of property rights without due process. "Our society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights or privileges." *Lopez v. Heckler,* 713 F.2d 1432, 1437 (9th Cir. 1983).

The requested injunction will ensure that Plaintiff will not be subject to unlawful eviction and prosecution until the other issues in the case can be resolved. The requested injunction, if granted, would therefore favor the public interest.

V. The Injunction Should Issue Without Bond

Defendants will suffer no monetary injury if preliminary relief is issued. The Criminal Eviction Statute does not authorize the physical removal of a tenant or the recovery of unpaid rent as a civil eviction action would. Enjoining action by Penny to file and pursue criminal charges under ARK. CODE ANN. 18-16-101 will have no effect whatsoever on his budgets or pocketbooks. Thus, no bond should be required.

CONCLUSION

Each of the four factors weighs heavily in favor of the Plaintiff. The Court should grant the Plaintiff's motion for a temporary restraining order and preliminary injunction preventing Defendants from utilizing Arkansas Code Annotated § 18-16-101 to prosecute Plaintiff, and all other just and proper relief.

Respectfully submitted,

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