IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

MITCHELL PURDOM **PLAINTIFF**

VS. **NO.** 16-3072

ROGER MORGAN in his official capacity as City Attorney for Mountain Home; and DON LEWIS and JUDY LEWIS, Individually and in their capacity as trustees of the Lewis Family Trust **DEFENDANTS**

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

INTRODUCTION

Plaintiff claims in this lawsuit that Defendants Don and Judy Lewis have invoked a state statute, Ark. Code Ann. § 18-16-101, empowering Defendant Roger Morgan as City Attorney for Mountain Home to utilize an unconstitutional process that would 1) violate state and federal Constitutional bans on debtors' prisons, 2) impermissibly chill Plaintiff's right to a fair trial, and 3) constitute cruel and unusual punishment under the United States and Arkansas Constitutions.

Plaintiff asks this Court to enter a temporary restraining order, and after further proceedings, a preliminary injunction that prevents Defendant Morgan from initiating criminal proceedings and prevents Defendants Don and Judy Lewis from otherwise evicting 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 § 18-16-101 of the Arkansas Code, a tenant who is alleged to be one day late on rent can be charged with and found guilty of a misdemeanor if the tenant has not vacated the residence after 10 days' notice. Ark. Code Ann. § 18-16-101 (b). The class of misdemeanor of which a defendant may be found guilty, and thus the penalty the defendant faces, varies according to whether the defendant pays a registry fee to the court. Tenants who plead not guilty and remain in the leasehold premises are required to deposit the disputed rent amount into the registry of the court, and they must continue making rental payments into the registry throughout the proceedings. Ark. Code Ann. § 18-16-101(c)(1). If a defendant is subsequently convicted and has paid the required fee, the defendant is guilty of an unclassified misdemeanor and must also pay a statutory fine of $25 per each day the tenant failed to vacate the leasehold premises. Ark. Code Ann §18-16-101(b)(2); Ark. Code Ann. § 5-4-401. However, if a convicted defendant has not paid the required fee, then the tenant is guilty of a Class B misdemeanor, which carries a sentence of up to 90 days, along with a fine of up to $1000. Ark. Code Ann. §18-16-101(c)(3); Ark. Code Ann. § 5-4-401.

The statute's authorization of jail time is of relatively recent vintage. When originally enacted in 1901, the statute authorized only a variable fine of between $1 and $25 for each day the tenant failed to vacate. *See Duhon v. State*, 299 Ark. 503, 505 (Ark. 1989). In 2001, the Arkansas General Assembly changed the fee to a flat $25 per day, added the pre-adjudication fee, and defined a Class B misdemeanor for defendants who do not pay that fee. Since this amendment,

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

several state trial courts have declared the statute unconstitutional, which has slowed enforcement of the statute across the state.

The federal court has not examined the constitutionality of the failure to vacate statute for forty years. While the Eighth Circuit Court of Appeals refused to enjoin prosecution under the statute in *Munson v. Gilliam*, 543 F.2d 48 (8th Cir. 1976), the *Munson* decision does not control in this case because (1) the statute is fundamentally different from the law considered by the *Munson* court; (2) the *Munson* court considered the appropriateness of an action enjoining ongoing criminal prosecutions, rather than the relief requested by Plaintiff of enjoining the initiation of a threatened criminal prosecution; and (3) landlord-tenant law and the nature of a tenant's property rights in his tenancy has evolved significantly over the past four decades. *See, e.g. 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); *See also Gorman v. Ratliff*, 289 Ark. 332, 336 (1986) and *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); *See also 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).

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*)); *also see 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.

Constitutional Claims

I. Plaintiff is Likely to Succeed on the Merits of His Constitutional Claims Because the Eviction and Prosecution Threatened by Defendants Violates Plaintiff's Rights to (A) Be Protected from Debtor's Prison; (B) A Fair Trial (C) Equal Protection; (D) Be Free from Cruel and Unusual Punishment; and (E) Due Process.

A. Plaintiff Has a Likelihood of Success on His Claim that the Statute Violates His Right to Be Protected from Debtors' Prison

Outcomes in the criminal justice system cannot turn on an individual's ability to pay an amount of money. *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"). Specifically, a defendant cannot be jailed for being too poor to pay a fee. *See 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); *Bearden v. Georgia*, 461 U.S. 660, 667 (1983) (individual cannot have his probation revoked for being too poor to pay restitution).

This precedent establishes the federal constitutional ban on "debtors' prisons." For the indigent tenant who decides to contest the charges but remain in his home, Arkansas's failure to vacate statute runs afoul of this ban. The statute allows an individual to be jailed for failing to pay the registry fee without any determination of whether the individual can afford the fee. The statute thus unconstitutionally authorizes individuals to be incarcerated solely because of their poverty, and the Court must declare it invalid.

Section 18-16-101 of the Arkansas Code violates Arkansas's constitutional ban on debtors' prisons as well. The Arkansas Constitution states that "No person shall be imprisoned for debt in

any civil action . . . unless in case of fraud." Ark. Const. Art 2, § 16. The Arkansas Supreme Court has twice struck down statutes that criminalized a non-fraudulent breach of contract. *State v. Riggs*, 305 Ark. 217 (1991) (striking down statute criminalizing contractor's failure to pay for materials where statute only 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 or materialman's lien without element of fraud).

Like the statutes in *Peairs* and *Riggs*, Ark. Code Ann. § 18-16-101 unconstitutionally criminalizes the non-payment of a civil debt. The statute conditions jail time on a defendant paying to the court registry "a sum equal to the amount of rent due on the premises." Ark. Code Ann. § 18-16-101(c)(1). The registry is nothing more than a means of collecting a civil debt, which is made plain by the fact that if the defendant pays into the registry and is convicted, the clerk must remit the registry fee to the landlord. Ark. Code Ann. § 18-16-101(c)(2)(B).

Because the statute allows for imprisonment on the failure to pay this debt in the absence of willfulness or fraud, Plaintiff easily clears the hurdle of demonstrating a likelihood of success on his claim that the statute authorizes a debtors' prison in contravention of the United States Constitution and Article 2, § 16 of the Arkansas Constitution.

B. Plaintiff is Likely to Succeed on the Merits of His Claim that Ark. Code Ann. § 18-16-101 Impermissibly Chills 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); *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."). In *Jackson*, the United States Supreme Court found 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. Jackson's rationale 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*); *United States v. Porter*, 513 F. Supp. 245, 249 (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*); *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). 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 failure to vacate statute impermissibly chills a tenant's due process right to trial. On the threat of incarceration, the statute coerces tenants to choose among: (1) vacating the premises and his possessory property interests in the leasehold; (2) pleading guilty at the outset and facing a lower possible penalty; (3) asserting his innocence and remaining in his residence while paying a hefty registry fee with continuing down payments on his right to trial; or (4) asserting his innocence and remaining in his residence without paying into the registry and risking 90 days of incarceration plus a $1,000 fine.

These exactions on Plaintiff, in order to secure his constitutional rights to a fair trial, are unnecessary and excessive. First, although the purpose of the criminal prosecution is to determine if the tenant improperly failed to vacate, the statute pressures Plaintiff and other tenants into the "anomalous situation" of leaving their homes before the state has been put to its burden of

establishing guilt beyond a reasonable doubt. See *Stump*, 398 F.2d at 120 (invalidating "anomalous situation" of requiring criminal defendants to prove alibi by preponderance of evidence). This conundrum is made more untenable by the statute's failure to require the landlord to hold the tenant's lease until trial is completed, potentially leaving innocent tenants homeless despite securing an acquittal.

Further, requiring a registry fee of tenants unwilling or perhaps unable to vacate is impermissibly burdensome. There is no relationship between Plaintiff's or other tenants' payment of the registry fee and whether they should be incarcerated for failing to vacate. *See Smith v. Bennett*, 365 U.S. 708, 710 (1961); *Bearden* at 673. To illustrate, an innocent tenant wrongfully accused of missing a rental payment may not be able to afford a second payment; thus, the tenant's innocence would paradoxically expose her to more jail time. Or, a tenant may be able to make an initial registry payment but miss subsequent registry payments due to unforeseen economic hardships. The tenant would nonetheless face 90 days in jail, due solely to her poverty. Yet, a tenant accused of precisely the same conduct who can afford the registry fees would face no jail time. The result is that tenants are threatened with jail, not for failing to vacate, but for failing to compensate. Quite naturally, the tenant who cannot "pay up" will most likely give up. *See* Comm'n Rep. at 16 (noting risk that the statute "victimizes the poor").

Tenants who pay the registry fee or vacate, and thus only face the unclassified misdemeanor established by the statute, may nonetheless be coerced into pleading guilty by the possibility of an exorbitant fine. The failure to vacate statute contains no upper limit on the amount a defendant may be assessed at $25 per day. The final sum would be subject only to the vagaries of the criminal process: how long it took 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, and other factors outside of the tenant's control. Tenants subsequently found guilty would be charged arbitrarily for the amount of time they protested their innocence. Meanwhile, the applicable statutory scheme may have effectively raised the class of misdemeanor fine for which the tenant is liable. If the process takes twenty days, the tenant charged with the unclassified misdemeanor would nonetheless face a fine of $500, the maximum for a Class C misdemeanor. *See* Ark. Code Ann. § 5-4-201. Twenty more days would result in a Class B misdemeanor. *Id.* 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.

Taken together, these coercive pressures against Plaintiff and other tenants exercising the constitutional right to fair trial on criminal charges are 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."). Outcomes under this regime are inevitably coerced and inherently unreliable. *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 statute's unconstitutional chilling effect requires its invalidation.

C. Plaintiff is Likely to Succeed on His Claim that Ark. Code Ann. § 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 this proscription 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 requiring proportionality review, which bars punishments that are grossly disproportionate to the act labeled a 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.").

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 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* Part I (b)(ii). 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 statute recommended its full repeal. Comm'n Rep. at 17.

Arkansas state courts are increasingly rejecting the statute. 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. 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 statute unconstitutional. *State v. Jones*, Poinsett County Circuit Court Case No. 2014-389; *State v. Bledsoe*, Woodruff County Circuit Court Case No. 2014-77-2. The State Attorney General was served notice of each case and declined to intervene at the trial court level or file an appeal. These decisions have dramatically reduced the number of prosecutions under §18-16-101 across most of the state of Arkansas. Prosecutions are now brought only in a few outlier jurisdictions.

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.

Prior to the statute being declared unconstitutional in Pulaski County, the Pulaski County Prosecutor's Office wrote: "[t]he State has reservations as to the constitutionality of the Failure to Vacate statute as applied because the statute may expose a defendant to different levels of punishment based on the defendant's ability to pay into the district court registry. There are also constitutional ramifications when requiring a defendant to pay into a district court registry prior to adjudication of any criminal matter." State's Response to Def's Mot. to Dismiss at 1, Pulaski Co. Case No. 2014-2707 (Dec. 12, 2014).

Though the statute's penalties are not per se cruel and unusual, this official discomfort with applying those penalties in the landlord-tenant context provides powerful evidence 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).

Beyond this irrefutable consensus, criminalizing evictions is constitutionally excessive because it does not sufficiently advance the state's penological interests. Failing to vacate involves a private dispute not properly addressed 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 equal terms." 289 Ark. 332, 337 (1986). *Gorman* suggests the impropriety of treating a holdover tenant like a trespasser.

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 liberty and property that leverage a tenant's eviction. This 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.

D. Ark. Code Ann § 18-16-101 Violates Plaintiff's Right to Due Process Under the State and Federal Constitutions Because the Statute Provides No Hearing Prior to Requiring a Registry Fee.

The failure to vacate statute requires a tenant who wishes to enter a plea of "not guilty" to first pay the amount that he is alleged to owe into the registry of the court. Ark. Code Ann. § 18-16-101(c)(1). If the tenant does not pay the alleged amount and is later convicted, he is guilty of

a more serious crime. Ark. Code Ann. § 18-16-101(c)(3). The coercive threat of incarceration is effectively a seizure of the registry fee from the tenant. Upon conviction, any money deposited into the registry is turned over to a third party creditor, the landlord. Ark. Code Ann. § 18-16-101(c)(2)(B).

Especially given the presumption of innocence that protects the accused throughout a criminal proceeding, a statute that compels a tenant charged with a crime to pay money before a finding of guilt beyond a reasonable doubt raises serious due process concerns. "[W]hen a creditor claims to be owed a sum of money, neither federal nor state governments should employ or offer procedures to compel payment of such amounts, until after certain procedural protections have been followed. This is the essence of procedural due process." Carol R. Goforth, Arkansas Code § 18-16-101: A Challenge to the Constitutionality and Desirability of Arkansas' Criminal Eviction Statute, 2003 Ark. L. Notes 21. The United States Supreme Court has issued a string of decisions regarding the process due when the government assists a creditor prior to a civil trial. In *Sniadach v. Family Finance Corp.*, the Court held that, absent exigent circumstances, it was impermissible to garnish the wages of a debtor prior to a hearing. 395 U.S. 337 (1969). Similarly, in *Connecticut v. Doehr*, the Court held unconstitutional a state statute authorizing pre-judgment attachment of real estate prior to notice and a hearing even though the statute required a post-attachment hearing. 501 U.S. 1 (1991). See also *Fuentes v. Shevin*, 407 U.S. 67 (1972) (requiring a prior hearing in cases involving replevin).

Sniadach, Doehr, and *Fuentes* collectively stand for the proposition that a hearing is required before a debtor can be forced to cede a property interest to a creditor. Other procedural safeguards, such as a neutral magistrate that judges the validity of the affidavit, may also adequately protect the debtor in some cases. See generally *North Georgia Finishing, Inc. v. Di-*

Chem, Inc., 419 U.S. 601 (1975); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (prosecutor is not a neutral official qualified to determine probable cause). However, Ark. Code Ann. § 18-16-101 contains no procedural protections whatsoever for the tenant. There is no hearing prior to the tenant having to deposit the amount of rent with the court, and no neutral magistrate passes judgment on the validity of the affidavit prior to the court seizing the registry fee. The absence of these protections makes it "possible for landlords to make false representations, simply to evict the tenant." Comm'n Rep. at 15; HRW Rep. at 24 (with lack of due process protections "unscrupulous landlords and others can turn prosecutors, courts, and law enforcement agencies into agents of retribution against people who they know have not actually violated the law").

Furthermore, Ark. Code Ann. § 18-16-101 implicates fundamental property and liberty interests. Prior to any hearing in a criminal prosecution, an innocent tenant must choose between abandoning her home and paying a registry fee to avoid the threat of incarceration. These deprivations require a heightened level of procedural due process. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 (1972). By failing to require any pre-deprivation process before a court seizes the registry fee from the defendant, the statute violates the due process guarantees of the state and federal constitutions.

FAIR HOUSING ACT CLAIMS

The constitutional infirmities of Ark. Code Ann. § 18-16-101 are stark when viewed through Plaintiff's situation. Plaintiff has been wrongfully accused of non-payment of rent when in actuality, his rent was tendered to Defendants Lewis and subsequently returned, likely solely because he complained to the Arkansas Fair Housing Commission. Plaintiff has strong claims and defenses to bring to a criminal charge, yet the statute places pressure on him to vacate the premises, both by imposing a monetary requirement before he can assert a defense and also by escalating

penalties the longer it takes to get his case to trial. If he is unable to pay the statutory registry fee to the Court, he faces increased jail time and a $1,000 fine solely because of his inability to pay. His ability to pay has no relation to the validity of the charges or his defense, yet he runs the risk of deprivation of property and liberty just by virtue of asserting a defense.

II. Plaintiff is Likely to Succeed on the Merits of His Fair Housing Act Claims Because the Defendants Lewis's Acts Violated (1) His Right to A Reasonable Accommodation and (2) His Right to Exercise the Rights Provided to him Under the FHA.

In addition to the imminent threats to Plaintiff's constitutionally protected rights, the Defendants Lewis have already deprived Mr. Purdom of his civil rights under the Fair Housing Act. The Fair Housing Act, 42 U.S.C. § 3601 *et seq*., Title VIII of the Civil Rights Act of 1968, was originally enacted to prohibit discrimination in housing practices on the basis of race, color, religion, or national origin. *United States v. California Mobile Home Park Management Co.*, 29 F.3d 1413, 1416 (9th Cir.1994).

In 1988, Congress extended coverage to disabled persons under the Fair Housing Amendments Act of 1988 (FHAA), P.L. No. 100-430, 102 Stat. 1619 (1988), thereby intending "to protect the right of handicapped persons to live in the residence of their choice in the community, and to end the unnecessary exclusion of persons with handicaps from the American mainstream." *Giebeler v. M & B Associates*, 343 F.3d 1143, 1149 (9th Cir. 2003) (internal quotations omitted).

The FHA authorizes the Court, where "a discriminatory housing practice has occurred or is about to occur," to grant "any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate)." 42 U.S.C. § 3613(c)(1). A temporary restraining order under Federal Rule 65(b) and preliminary injunction under § 3613(c)(1) maintain

the status quo while the court takes the time needed to consider the merits of Plaintiffs' Title VIII claim. *See University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

A. Plaintiff is Likely to Succeed on the Merits of His Claim that the Defendants Lewis Refused his Request for a Reasonable Accommodation in Violation of the FHA

The FHA makes it illegal to refuse to "make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3). *See King's Ranch of Jonesboro, Inc. v. City of Jonesboro, Ark.*, No. 3:10CV00096 JLH, 2011 WL 1544697 at 4-5 (E.D. Ark. Apr. 25, 2011).

To prevail on a failure to accommodate claim pursuant to Section 3604(f)(3)(B) of the FHA, a plaintiff "must establish that (1) he is disabled or handicapped within the meaning of the FHA, (2) he requested a reasonable accommodation, (3) such accommodation was necessary to afford him an opportunity to use and enjoy his dwelling, and (4) the defendants refused to make the requested accommodation." *Hawn v. Shoreline Towers Phase 1 Condo. Ass'n, Inc.*, 347 Fed. Appx. 464, 467 (11th Cir.2009) (quoting *Schwarz v. City of Treasure Island,* 544 F.3d 1201, 1218–19 (11th Cir.2008)).

The FHA defines handicap, or disability, as "a physical or mental impairment which substantially limits one or more of such person's major life activities." 42 U.S.C. § 3602(h)(1). Similarly, an individual has a disability within the meaning of the FHA if she has: (1) a physical or mental impairment which substantially limits one or more of such person's major life activities; (2) a record of having such an impairment, or; (3) one regarded as having such an impairment. 42 U.S.C. §3602(h).

Under the FHA, the Secretary of the Department of Housing and Urban Development shall have "the authority and responsibility for administering this Act." 42 U.S.C. 3608. In exercising

that authority, the Secretary promulgated 24 C.F.R. § 100.201, which defines key terms in the FHA. This regulation defines "mental impairment" to include "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 24 C.F.R. § 100.201.

Mr. Purdom has been diagnosed with, and receives treatment for, a mental impairment: severe depression. Purdom Aff. ¶ 6. Depression falls squarely into the plain language of the FHA and related HUD regulations, which specifically include mental impairment and mental illness. *Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt.*, 778 F. Supp. 2d 1028, 1036 (D.N.D. 2011); *See also Radecki v. Joura*, 114 F.3d 115, 116 (8th Cir. Neb. 1997) (holding that a plaintiff suffering from clinical depression has a "handicap" within the meaning of the FHA).

Purdom's depression substantially limits one or more of his major life activities. The HUD regulations define "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 24 C.F.R. § 100.201. "This list … is meant to be illustrative and not exclusive." *Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144, 150 (2d Cir. 1998).

The Social Security Administration has determined that Plaintiff is unable to work as the result of his impairment. He receives a monthly Social Security Disability benefit. Purdom Aff. ¶ 2. In awarding these benefits, the SSA found that Mr. Purdom was unable "to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of no less than 12 months." Social Security Act, § 223(d)(1)(A), as amended, 42 U.S.C.A. § 423(d)(1)(A); 20 C.F.R. § 404.1520(b).

In addition, Plaintiff's impairment limits several other major life activities, including interacting with others. Purdom Aff. ¶ 10.

The Defendants Lewis were aware that Plaintiff suffers from depression. Plaintiff told the Lewises that he had mental impairments. Plaintiff also provided the Lewises with a letter from Dr. Phillip Brown, his psychologist, explaining that he was receiving psychological services to address his emotional state. Purdom Aff. ¶ 13. Mrs. Lewis has admitted to Plaintiff's counsel, in a recorded conversation that will be provided to this court, that she was aware of Mr. Purdom's depression, and she had received the psychologist's letter.

Plaintiff requested two separate reasonable accommodations: to have an emotional support animal in his unit and to waive the non-refundable fee that the Lewises requested in order to make the accommodation. 24 C.F.R. § 100.204 provides two examples of situations where an accommodation has been found to be reasonable. § 100.204(b). Example one illustrates that a building with a "no pets" policy must accommodate a blind person and his seeing-eye dog otherwise "the blind person will not have an equal opportunity to use and enjoy a dwelling." *Id.*

Under nearly identical circumstances as in this case, courts have held that an emotional support animal as defined by the FHA is a reasonable accommodation. *See Bhogaita v. Altamonte Heights Condo. Ass'n*, 765 F.3d 1277 (11th Cir. Fla. 2014) (plaintiff's request to keep an emotional support animal to alleviate the symptoms of PTSD was a reasonable accommodation request under the FHA). *See also Warren v. Delvista Towers Condo. Ass'n,* 49 F. Supp. 3d 1082, 1087 (S.D. Fla. 2014) (holding that an emotional support animal as defined by the FHA is a reasonable accommodation). *See also Peklun v. Tierra Del Mar Condo. Ass'n*, 2015 U.S. Dist. LEXIS 163554, 47-8 (S.D. Fla. Dec. 7, 2015) (finding that an emotional support animal ameliorates mental and emotional symptoms, and as such, qualifies as a reasonable accommodation.).

HUD and the United States Department of Justice, in a joint statement providing technical assistance regarding reasonable accommodations under the FHA, stated a "housing provider may not require the applicant to pay a fee or a security deposit as a condition of allowing the applicant to keep the assistance animal." *Joint Statement of the Dept. of Housing and Urban Dev. and the Dept. of Justice,* "Reasonable Accommodations under the Fair Housing Act," at p. 9, ¶ 11, Example 2 (May 17, 2004) (hereinafter "HUD/DOJ Joint Statement").

Similarly, courts have held that charging a fee for an emotional support animal is unreasonable. *See Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt.*, 778 F. Supp. 2d 1028, 1040 (D.N.D. 2011) (claim survived summary judgment that denial of waiver of landlord's pet fee for all non-trained service animals that are necessary to ameliorate emotional disabilities is unreasonable because "[h]ousing providers cannot impose additional fees as a condition to granting an accommodation"); *See also Intermountain Fair Hous. Council v. CVE Falls Park, L.L.C.*, 2011 U.S. Dist. LEXIS 79144, 21 (D. Idaho July 20, 2011) (defendant's waiver of the regular animal deposit for disabled/handicapped individuals was a reasonable accommodation).

The requested accommodations were necessary for Plaintiff's use and enjoyment of his housing. A reasonable accommodation is necessary if, without the accommodation, the plaintiff "will be denied an equal opportunity to obtain the housing of her choice." *King's Ranch v. City of Jonesboro*, at 4-5.

An emotional support animal helps ameliorate the effects of Mr. Purdom's disability. According to his therapist, an emotional support animal would provide support and counter the negative effects of Mr. Purdom's social isolation. In addition to providing companionship, Mr. Purdom's previous support animal improved his mood and encouraged him to interact with others. Purdom Aff. ¶¶ 9-10.

Given his limited income, Mr. Purdom was unable to afford the $500 nonrefundable pet fee requested by the Lewises. Purdom Aff. ¶ 16. A waiver of this fee was necessary to enable Mr. Purdom to have the emotional support animal in his unit. Without the requested accommodations, Mr. Purdom must choose between giving up the housing of his choice or being unable to enjoy the unit because he must live there without his emotional support animal.

In determining whether a requested accommodation is necessary, "[t]he overall focus should be on whether waiver of the rule would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change." *Dadian v. Village of Wilmette*, 269 F.3d 831, 838-39 (7th Cir.2001) (internal quotation marks omitted). In the Eighth Circuit, after a plaintiff shows that a requested accommodation is reasonable and necessary, the burden then shifts to the defendant to show case-specific circumstances that demonstrate unreasonableness or undue hardship. *King's Ranch v. City of Jonesboro*, at 4-5.

The Plaintiff has no reason to believe that waiving the "no pet" policy or the nonrefundable pet fee would be a fundamental and unreasonable change to the rental agreement between Mr. Purdom and the Lewises. Similarly, Mr. Purdom is unaware of any facts that would indicate that his requests would cause an undue hardship for the Lewises. Even though a fee may not be charged for a reasonable accommodation, the Lewises could charge Mr. Purdom for the cost of any repairs required if his assistance animal were to cause damage. *HUD/DOJ Joint Statement*, at 9, ¶ 11, Example 2.

The Lewises refused to reasonably accommodate Mr. Purdom in two distinct ways. First, the Lewises denied Mr. Purdom's initial request for an emotional support animal, even after he provided them with a letter from his psychologist. Second, after being contacted by the Fair Housing Commission regarding this denial, the Lewises demanded a $500 nonrefundable fee for

the requested accommodation. When Mr. Purdom explained that he was unable to pay this fee, the Lewises initiated the process of attempting to force him to vacate by threating criminal charges under Ark. Code Ann. § 18-16-101.

B. Plaintiff is Likely to Succeed on the Merits of His Claim that the Defendants Lewis Retaliated Against him for Exercising his Rights Under the FHA

The FHA also makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of the Fair Housing Act." 42 U.S.C. § 3617. "[T]he language 'interfere with' has been broadly applied to reach *all practices* which have the effect of interfering with the exercise of rights under the federal fair housing laws." *U.S. v. City of Hayward*, 36 F.3d 832, 835 (9th Cir. 1994) (emphasis added) (internal quotation marks omitted).

Mr. Purdom was engaging in activities protected by the FHA when he requested a reasonable accommodation based on his disabilities. As discussed above, Section 3604 of the FHA allows an individual to request a reasonable accommodation when necessary to allow the individual "equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3). In cases with facts similar to this case, courts have held that tenants were engaged in protected activity when they exercised their right to seek a reasonable accommodation based on their disabilities. *See Chavez v. Aber*, 122 F. Supp. 3d 581, 599-600 (W.D. Tex. 2015) ("Protected activities under the FHA include the request for a reasonable accommodation for handicapped persons.") (internal quotations omitted) (citing *Donovan v. Woodbridge Maint. Ass'n,* No. 2:14-cv-00995 JAM-EFB, 2015 U.S. Dist. LEXIS 32977, 2015 WL 1241020, at 4 (E.D. Cal. Mar. 17, 2015)); *See also Wilson v. Wilder Balter Partners, Inc.*, No. 13-CV-2595, 2015 U.S. Dist. LEXIS 19178, 2015 WL 685194,

at *12 (S.D.N.Y. Feb. 17, 2015) ("[A] request for a reasonable accommodation is [a] protected activity under the FHA.") (internal quotation marks omitted).

Mr. Purdom was also engaging in activities protected by the FHA when he filed a complaint with the AFHC. HUD has interpreted § 3617 as prohibiting "retaliation against any person because that person has made a complaint, testified, assisted, or participated in any manner in a proceeding under the Fair Housing Act." 24 C.F.R. § 100.400. Similarly, courts have held that the filing of a complaint under the FHA is a protected activity. *See*, *e.g.*, *Young v. Jackson*, 417 F. App'x 592, 593-94 (8th Cir. 2011); *also see e.g.*, *Johnson v. YWCA Residence, LLC*, 2014 U.S. Dist. LEXIS 94587 (S.D.N.Y. July 9, 2014).

The notice to vacate that the Lewises served on Mr. Purdom was an adverse action against him. On June 2, 2016, the Lewises returned a check that Mr. Purdom had provided for June's rent and served him with a "Notice to Vacate for Failure to Pay Rent," ordering Mr. Purdom to vacate the premises within 10 days. The notice threatened Mr. Purdom with misdemeanor charges if he failed to leave the premises within that time. A threat of eviction or an eviction notice can be an adverse action under the FHA. *Neudecker v. Boisclair Corp.*, 351 F.3d 361, 364 (8th Cir. 2003); *Young v. Jackson*, 417 F. App'x 592, 593-94 (8th Cir. 2011). While this case is unique because this type of criminal charges can only be brought against tenants in Arkansas, courts have held that threatening unfounded criminal charges constitutes an adverse action in other civil rights contexts. *See, e.g., Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (holding that retaliatory prosecution can be an adverse action under Title VII of the Civil Rights Act of 1964).

The Lewises served Mr. Purdom with a 10-day notice as a direct response to his reasonable accommodation requests and his complaint to the AFHC. After learning about Mr. Purdom's complaint to the AFHC, the Lewises came to Mr. Purdom's home and Mr. Lewis told Purdom that

he was upset because Mr. Purdom had complained to a government agency. Purdom Aff. ¶ 15. Mr. Lewis told Mr. Purdom he would have to pay a $500 nonrefundable fee before allowing the emotional support animal. Purdom Aff. ¶ 16. When Mr. Lewis made another reasonable accommodation request to waive this fee, the Lewises returned his rent check and served him with the 10 day notice to vacate the premises. Purdom Aff. ¶ 17.

Based on these facts, Plaintiff is substantially likely to prevail on his claim that the Lewises retaliated against him for exercising his rights under the FHA.

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 Morgan under Ark. Code Ann. § 18-16-101. If plaintiff is unable to afford the registry fee and elects to remain in his home while contesting this unconstitutional prosecution, he is at risk of being illegally jailed solely because of his poverty. *Wanatee v. Ault*, 120 F.Supp.2d 784, 789 (N.D. Iowa 2000) ("[E]very day of unconstitutional incarceration generally constitutes irreparable harm to the person in such custody."). This imminent prosecution would not only violate Plaintiff's constitutional rights but also would place him in jeopardy of homelessness by coercing him to leave his home in order to avoid being jailed. *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, equal protection, 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 Ark. Code Ann. § 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 evict and 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.

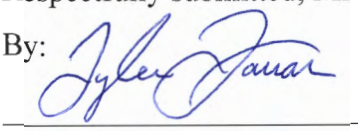
V. The Injunction Should Issue Without Bond

Defendants will suffer no monetary injury if preliminary relief is issued. Defendant landlords have received and can continue to receive rents as due and owing under the rental agreement with Plaintiff. Enjoining action by Morgan to file and pursue criminal charges under Ark. Code Ann. 18-16-101 will have no effect whatsoever on Defendants' 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 Ark. Code Ann. 18-16-101 to prosecute Plaintiff, and all other just and proper relief.

Respectfully submitted, Mitchell Purdom

By: 

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