IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

JESSICA BARRON, KENNETH WYLIE, and WILLIAM CAMPBELL, *Plaintiffs,* v. THE CITY OF GRANITE CITY, ILLINOIS, *Defendant.*	Case No. 3:19-cv-00834-SMY-MAB

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS (ECF 21, 22)

INTRODUCTION

Plaintiffs Jessica Barron and Kenny Wylie live with their three children at 1632 Maple Street, in Granite City, Illinois. They are buying the home on an installment basis from co-plaintiff Bill Campbell. In recent months, however, the City has taken escalating steps to try to make them homeless. The basis for the City's campaign is not that Jessica and Kenny have done anything wrong; it is that a friend of their sixteen-year-old son broke into a restaurant elsewhere in town. Because the friend often spent time at Jessica and Kenny's home, the City has invoked its compulsory-eviction law and demanded that Bill evict Jessica, Kenny, and their children. Under the law, the City coerces private landlords to evict entire families if any household member or guest commits a crime anywhere within city limits. On that basis, the City wants Jessica and Kenny out. In the words of one officer, "[t]hese people need to go."

This lawsuit seeks to keep them in their home, and the complaint states plausible—indeed, meritorious—claims. Broadly speaking, the City's actions are unconstitutional for two main reasons. To start, the City seeks to punish Jessica and Kenny for a crime they did not

commit (and had neither duty nor authority to prevent). That exercise in collective punishment cannot be squared with the Due Process Clause. Worse, the City singles out only certain people for this unprecedented burden—those who rent or who, like Jessica and Kenny, are buying their homes on a short-term installment basis. No one else in the City has any similar burden to police their householders and guests. And Plaintiffs allege that this classification not only infringes a fundamental right, but is so arbitrary that it fails every level of scrutiny.

These claims (along with the related takings and associational claims) are at least plausible. Governments cannot punish the blameless. And they absolutely cannot do so based on the vagaries of home-financing arrangements. The City's motion to dismiss should be denied, and the case should proceed to the merits.

BACKGROUND

A. Legal background

1. In many ways, public rental housing resembles private rental housing, except your landlord is the government. Like private landlords, government landlords (i.e., public-housing authorities) execute leases with their tenants. Like their private counterparts, public-housing authorities also may enforce the terms of those leases.

One of those terms relates to crime. In 1988, Congress enacted a "one-strike" policy for public housing: Every public-housing lease must provide that the tenants may be evicted if they, or members of their household, or guests, commit certain crimes. 42 U.S.C. § 1437d(*l*)(6). As with other lease terms, the decision whether to enforce a one-strike clause rests with the public-housing authority—the landlord. The federal government even urges those agencies to "consider all circumstances" before evicting. 24 C.F.R. § 966.4(*l*)(5)(vii)(B); Kathryn V. Ramsey, *One-Strike 2.0: How Local Governments Are Distorting a Flawed Federal Eviction Law*, 65 UCLA L. Rev. 1146, 1169-72 (2018).

The Supreme Court upheld the federal one-strike policy in 2002, in *HUD v. Rucker*, 535 U.S. 125. As a statutory matter, the Court ruled that Congress gave public-housing authorities discretion to evict tenants for their guests' crimes, "regardless of whether the tenant knew, or had reason to know, of that activity." *Id.* at 128. As for the Constitution, evicting those "so-called 'innocent' tenants" raised no due-process concerns. *Id.* at 129. A public-housing authority is merely "acting as a landlord of property that it owns." *Id.* at 135. And like any landlord, it can choose to invoke—or not invoke—its lease terms. *See id.* at 133-34, 135.

At the same time, the Court added, the due-process analysis is "entirely different" when the government acts "as sovereign." *Id.* at 135. If a state actor were "attempting to criminally punish or civilly regulate [people] as members of the general populace," *id.*, the Due Process Clause would apply with full force.

2. Granite City took *Rucker*'s warning as a blessing, enacting a compulsory-eviction law a few years later. Unlike the policy at issue in *Rucker*, Granite City's law governs rental housing that is private, not public. Compl. ¶¶ 17-19. The law applies across the board to everyone who rents a home within city limits. *Id.* ¶ 16. It also applies to many people buying homes by installment contract. *Id.* (The law is reproduced at pages 4-12 of Exhibit 3 to the complaint.)

In 2013, Granite City's city attorney identified the compulsory-eviction law as the "[m]ost controversial issue [he had] worked on." *Id.* ¶ 14. Whereas the policy in *Rucker* "entrust[ed]" public landlords with "discretion" to evict tenants, 535 U.S. at 129, 134, Granite City's law takes a different tack: It strips landlords of discretion. When the City demands it, a private landlord must evict his tenants if any member of the tenants' household—or even a guest—commits a crime anywhere within city limits (and sometimes, anywhere on earth).

Compl. ¶¶ 21-23, 28. No matter where the crime takes place, it is no defense that the tenants had nothing to do with it. *Id.* ¶¶ 42-47. Nor do landlords have discretion to forgo eviction. *Id.* ¶¶ 29-34. If a landlord declines to evict, the City will "compel compliance" by revoking the landlord's license and levying fines. Opp. to Mot. Prelim. Inj. 2 (ECF 14); Compl. ¶¶ 20-21, 35. At the same time, nothing in the law prevents the evicted tenants from moving to any other rental property in the City. Compl. ¶ 35.

From 2014 to the present, Granite City has issued more than 300 compulsory-eviction demands against people living within city limits. *Id.* ¶ 48.

B. Factual background

1. Jessica Barron and Kenny Wylie were born and raised in Granite City. *Id.* ¶ 49. They have been in a committed relationship for the last 18 years and have three teenage children. *Id.* For the past two years, the family has lived in a small house at 1632 Maple Street; they are buying the house under an installment contract with Bill Campbell. *Id.* ¶¶ 51-53. Each month, they pay Bill an installment toward the final purchase price. *Id.* ¶ 53.

Jessica and Kenny have an open-door policy when it comes to their children's friends. *Id.* ¶ 57. Many teenagers in Granite City come from troubled backgrounds, and Jessica and Kenny view their home as a safe zone for kids who are having difficulties with their families or who are otherwise struggling. *Id.* It is not uncommon for their children's friends to come by for a meal, or to have Jessica do their laundry, or to spend the night. *Id.* ¶ 59.

Last fall, their eldest son (now sixteen) befriended an eighteen-year-old boy named Jason Lynch. *Id.* ¶ 60. Jason Lynch did not have a permanent home in the area—he had recently come from Rolla, Missouri—and he at first told Jessica and Kenny that he was homeless and (falsely) that his mother had died. *Id.* ¶¶ 61-62. Like others, he would sporadically spend time at their home. *Id.* ¶ 63. Sometimes he would sleep over, *id.*, and when it got cold out this past winter, he

started spending more nights at the house, *id.* ¶ 64. His movements were irregular, but he would often sleep there a few nights a week. *Id.*

On the night of May 21, 2019, Jason Lynch broke into a restaurant in Granite City. *Id.* ¶ 65. Neither Jessica nor Kenny had anything to do with the crime. *Id.* ¶¶ 66, 135-36. The next morning, Jessica encountered Jason Lynch in her home and told him to get out; she knew nothing about the burglary, but she noticed that he was holding beers. *Id.* ¶ 67. Later that day, as Jessica was returning from her sister's house, a police officer approached her outside her home. *Id.* ¶ 68. The officer informed her that Jason Lynch was suspected of having burglarized the restaurant the night before, and he asked her whether Jason Lynch was inside her home. Jessica (accurately, she thought) said he was not. *Id.* ¶¶ 69-71. But upon entering her home, she found that Jason Lynch had in fact returned. *Id.* ¶ 72. She quietly told her younger son to run down the street and find the police officer. *Id.* With Jessica's consent, several officers then entered her home, and she directed them to a crawlspace where Jason Lynch was hiding. *Id.*

The State of Illinois charged Jason Lynch with one count of burglary, and the circuit court sentenced him to probation. *Id.* ¶¶ 73, 75. After, he visited Jessica and Kenny's home a couple of times. *Id.* ¶ 76. But Jessica told him to stop coming by, and he stopped. *Id.* ¶¶ 76, 134.

2. Then Granite City's "Crime Free Housing Unit" got involved. Around June 18, Lieutenant Mike Parkinson called Bill Campbell (who owns Jessica and Kenny's home), cited the City's compulsory-eviction law, and insisted that Jessica and Kenny "just have to go." *Id.* ¶¶ 77-78. Understandably, though, Bill does not want to evict them for Jason Lynch's crime. *Id.* ¶ 80. He thinks the compulsory-eviction law is unjust. *Id.* ¶ 81. He thinks Jessica and Kenny had nothing to do with Jason Lynch's misconduct. *Id.* ¶ 82. He knows they're good tenants. *Id.* ¶ 83. So rather than evict, he told them to make sure Jason Lynch stopped coming by. *Id.* ¶ 85.

That was not good enough for the City. In the weeks that followed, a police officer told Jessica that he was "personally" evicting her and that he intended to arrest Bill for not filing an eviction action. *Id.* ¶ 92. Then, in mid-July, Lieutenant Parkinson called Bill again. *Id.* ¶ 100. He again demanded that Bill evict Jessica and Kenny, he threatened to revoke Bill's license, and he insisted that "[t]hese people need to go." *Id.* Soon after, officers served Bill with a formal eviction demand. The demand stated that "Jason S. Lynch . . . resides at . . . 1632 Maple Ave." and that "Jason S. Lynch was formally charged with Burglary." *Id.* Ex. 3, at 1 (capitalizations altered). "Since this felony incident occurred in the City of Granite City," the demand stated, "it is a direct violation of the Granite City Crime Free Multi Housing Ordinance and a violation of the Crime Free Multi Housing Lease Addendum." *Id.* On that basis, the City "require[d] that an eviction notice be served and the eviction process initiated." *Id.* at 1-2.

ARGUMENT

A motion to dismiss under Rule 12(b)(6) serves "to test the sufficiency of the complaint, not to decide the merits." *Gibson v. Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). For that reason, a complaint need overcome only "'two easy-to-clear hurdles.'" *Tamayo v. Blagojevich*, 526 F.3d 1074, 1084 (7th Cir. 2008). It must plead its claims "in sufficient detail to give the defendant fair notice." *Id.* (Nowhere does the City's motion dispute that this requirement is met.) And with all factual allegations taken as true, the complaint "must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a 'speculative level.'" *Id.* Because each of Plaintiffs' four claims meets that standard, the City's motion to dismiss should be denied.

I. Plaintiffs plausibly allege that Granite City's compulsory-eviction law violates the Due Process Clause (First Claim).

A. "No property is more sacred than one's home," *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 704-05 (1897), and Jessica Barron and Kenny Wylie have core property and

liberty interests in theirs. Granite City seeks to extinguish those interests and make Jessica, Kenny, and their children homeless. The City does not base this action on anything Jessica did, or Kenny did, or their children did. It is enough that a friend of Jessica and Kenny's son, who sometimes stayed at their home, committed a crime within city limits. Compl. ¶¶ 96-97, 135-37.

The complaint plausibly alleges that these actions violate the Due Process Clause. The Supreme Court has "regularly observed" that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted). And in trying to strip an innocent family of their home, Granite City is working a double harm. The City is infringing "the sanctity of the home"—an "overriding respect" for which "has been embedded in our traditions since the origins of the Republic." *Payton v. New York*, 445 U.S. 573, 601 (1980). Worse, the City is imposing this sanction because of someone else's crime. That, too, breaks with "[o]ur Nation's history, legal traditions, and practices." *Glucksberg*, 521 U.S. at 721. "In our jurisprudence guilt is personal." *Scales v. United States*, 367 U.S. 203, 224 (1961). Yet the premise of the City's actions is guilt by association. Someone loosely associated with Jessica and Kenny broke the law; for that, the City seeks to make them and their children homeless.

Imputing guilt in this way is "contrary to fundamental principles of our justice system." *See United States v. Garcia*, 151 F.3d 1243, 1246 (9th Cir. 1998). In fact, this sort of "guilt by association" has been described as "one of the most odious institutions of history." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 178 (1951) (Douglas, J., concurring). It is "a philosophy alien to the traditions of a free society . . . ." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932 (1982) (citation omitted). One California judge even branded a similar

compulsory-eviction law "carcinogenic," citing "the Damoclean substantive due process issue which hangs over this statutory scheme." *Cook v. City of Buena Park*, 126 Cal. App. 4th 1, 10 (2005) (Bedsworth, Acting P.J., concurring); *see also id.* ("I am concerned . . . about its sweeping requirement that *all* occupants of the premises must be evicted for the sins of one . . . ."). If anything, moreover, Granite City's law is worse than the one invalidated in California. For all its "fundamental constitutional infirmities," *id.*, the California law required eviction only for crimes "in or near the rental property." *Id.* at 3 (majority opinion). No such half-measures here: Granite City forces innocent people out of their homes if a householder or guest breaks the law anywhere within city limits. With all the complaint's allegations presumed true, this exercise in collective punishment plausibly violates the Due Process Clause.

B. The City does not dispute that punishing one person for the crimes of another violates due process. Nor does the City dispute that extinguishing Jessica and Kenny's interest in their home is punishment. Instead, the City maintains that it is punishing them, not for Jason Lynch's crime, but for "allow[ing]" Jason Lynch's crime. City Mem. 5 (ECF 22).

That sleight of hand amounts to guilt by association repackaged. The City faults Jessica and Kenny for "allow[ing]" Jason Lynch to break the law and for "fail[ing] to responsibly control" him. *Id.* But absent a legal duty and authority to prevent Jason Lynch's crime, Jessica and Kenny cannot be liable for "allow[ing]" it. In fact, the Supreme Court made this point explicitly in one of the leading cases rejecting guilt by association. In the Court's words, "[a] legal duty to 'repudiate'—to disassociate oneself from the acts of another—cannot arise unless, absent the repudiation, an individual could be found liable for those acts." *Claiborne Hardware Co.*, 458 U.S. at 925 n.69; *cf. Swearingen v. Momentive Specialty Chemicals, Inc.*, No. 10-cv-4470, 2011 WL 1692147, at *3 (N.D. Ill.) (St. Eve, J.) ("If no duty exists, there can be no

liability."), *aff'd*, 662 F.3d 969 (7th Cir. 2011). That rule makes perfect sense. Were it otherwise, state actors could always do what the City seeks to do here: arbitrarily punish Person *A* for "allowing" Person *B*'s misdeeds.

The City has no response to this hard truth, and that silence speaks volumes. The "core" of the Due Process Clause is "protection against arbitrary action." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). And punishing someone for a crime they did not commit—and that they had neither duty nor power to stop—is arbitrariness made manifest. The City gives no basis for ascribing to Jessica and Kenny a citywide obligation to police Jason Lynch. The City cites no ground on which Jessica and Kenny can be held liable for failing to "responsibly control" Jason Lynch—an adult who happened sometimes to spend time in their home. *Cf. Graham v. McGrath*, 363 F. Supp. 2d 1030, 1035 (S.D. Ill. 2005) ("[I]n Illinois, one does not owe a duty to protect another from criminal acts of third parties unless the plaintiff and defendant are in one of a very limited number of special relationships . . . ."). Most troubling, the City offers no limiting principle. On the City's theory, could the duty to "responsibly control" another human being be triggered by giving them a loan? A ride? A warm meal? A smile?

The City's motion raises all these questions, and more, without offering any answers. In fact, the City fails even to say what it thinks Jessica and Kenny should have done differently. The couple had no hand in Jason Lynch's crime. Compl. ¶¶ 66, 135-36. They had no foreknowledge. *Id.* ¶ 70. When Jessica learned of it, she cooperated fully with police. *Id.* ¶ 72 ("As the officers removed Jason Lynch from the house, one of the officers thanked Jessica and reassured her that she had done the right thing by contacting them."). Yet the City wants to punish them anyway. With all inferences drawn in Plaintiffs' favor, it is at least plausible that the City's actions violate the Due Process Clause.

C. The City's appeal to precedent does not change matters. In the City's view, the Supreme Court's decision in *HUD v. Rucker*, 535 U.S. 125 (2002), ratifies its compulsory-eviction law. City Mem. 5-6. But as explained in our preliminary-injunction motion (at 13-14), *Rucker* only spotlights how far afield the City has strayed. When the government "is . . . acting as a landlord of property that it owns," the Court in *Rucker* reasoned, it may exercise a contractual right to evict even innocent tenants for the crimes of their guests. *Id.* at 128-29, 135. Like any other landlord, public-housing authorities can invoke "a clause in a lease to which [their tenants] have agreed." *Id.* at 135. But it goes without saying—or it should—that the due-process analysis is "entirely different" when the state acts "as sovereign." *Id.* When the state "attempt[s] to criminally punish or civilly regulate [people] as members of the general populace," *id.*, it does not have a blank check to punish the blameless.

Granite City claims just such a blank check here. Unlike the public-housing authority in *Rucker*, the City is not Jessica and Kenny's landlord. Bill Campbell is, and he doesn't want to evict them for Jason Lynch's crime. Compl. ¶¶ 80-84, 106-07. Unlike a public-housing authority, the City is not invoking a lease to which it is party; it is intruding on the leases of others, armed with a battery of sanctions. And unlike the law in *Rucker*, the City's program does not "entrust[]" landlords with "discretion." 535 U.S. at 129, 134. (The Illinois legislature has already done that. 735 ILCS 5/9-120(a).) Instead, the City strips landlords of discretion and gives that discretion to the police. Compl. ¶¶ 25-35. These actions are paradigmatically "sovereign." *Rucker*, 535 U.S. at 135. In *Rucker*'s words, the City is "civilly regulat[ing]" Jessica, Kenny, and Bill "as members of the general populace." *Id.* The City even admits as much. City Mem. 15.

That makes the City's analogy to *Rucker* particularly misplaced. Far from being "similar" to the policy upheld in *Rucker*, *id.* 5, the City's compulsory-eviction law could not be more

different. And, twice now, the City has squandered the chance to reconcile its law with *Rucker*'s reasoning. In its preliminary-injunction papers, the City pretended *Rucker* didn't exist. *Compare* Mot. Prelim. Inj. 3-4, 13-14 (ECF 6), *with* Opp. to Mot. Prelim. Inj. 1-15 (ECF 14). And in its 12(b)(6) motion, it skips past the Supreme Court's distinction between the state "as . . . landlord" and the state "as sovereign." Those evasions confirm what basic due-process principles make clear: Plaintiffs' claim is—at minimum—plausible.[1]

II. Plaintiffs plausibly allege that Granite City's compulsory-eviction law violates the Equal Protection Clause (Second Claim).

Plaintiffs' equal-protection claim is no less plausible. Granite City's compulsory-eviction law targets innocent people—but only certain ones. For people who can afford to buy their homes outright, the City imposes no citywide duty to "responsibly control" householders and guests. *See* City Mem. 5; *see also* Compl. ¶ 151. Likewise for people who qualify for a traditional mortgage. Compl. ¶ 151. Likewise for (some) people buying their home under installment contract. It's a different story, though, for people who rent. *Id.* ¶¶ 16, 151. And for people—like Jessica and Kenny—who are buying homes on a shorter-term installment basis. Granite City Mun. Code § 5.142.010(B); Compl. ¶¶ 16, 53-54, 151. That subset of people is held responsible for any offense that any household member or any guest commits anywhere within city limits (and sometimes, anywhere at all). Compl. ¶¶ 21-23, 28.

As alleged in the complaint, the City's classifying residents along these lines plausibly violates the Equal Protection Clause. The Equal Protection Clause "is essentially a direction that

[1] The City's assurance that its law "afford[s] the top-end of the spectrum of procedural due process" is questionable but beside the point. City Mem. 7; *see generally* Compl. ¶¶ 40-41. Whatever process it might afford, the City expels people from their homes for the crimes of others. That is why Plaintiffs' complaint plausibly alleges that the law is unconstitutional. *Cf. Zinermon v. Burch*, 494 U.S. 113, 125 (1990) ("[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'").

all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). It tests the validity of governmental "classifications." *Monarch Beverage Co. v. Cook*, 861 F.3d 678, 682 (7th Cir. 2017). And against this backdrop, Plaintiffs' equal-protection claim rises well "above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). On its face, the compulsory-eviction law treats people differently based on whether they are homeowners, mortgagors, renters, or installment buyers (Section A, below). That classification burdens a fundamental right—the right not to be punished for another's crime—meaning it merits strict scrutiny (Section B.1). Even if a fundamental right were not at stake, moreover, Plaintiffs plausibly allege that the classification lacks even a rational basis (Section B.2). Whatever level of scrutiny, Plaintiffs have a right to move past the pleadings.

A. By its terms, the compulsory-eviction law singles out renters and installment buyers for special burdens.

First things first. The City devotes much of its brief to arguing that Plaintiffs lack similarly situated "comparators" and thus "fail to state a claim for a violation[] of Equal Protection rights under a 'class of one' theory." City Mem. 10. That misapprehends Plaintiffs' claim; the current complaint does not include a class-of-one claim. A class-of-one plaintiff "doesn't challenge a statute or ordinance but argues instead that a public official . . . has treated him differently than other persons similarly situated for an illegitimate or irrational reason." *Monarch Beverage Co.*, 861 F.3d at 682. In that kind of case—alleging ad hoc discrimination—the plaintiff usually must identify "a similarly situated comparator." *Id.* Otherwise, "it may not be clear that the challenged governmental action entails any classification at all." *Id.* But things are different for plaintiffs who "challenge[] a statute or ordinance that by its terms imposes regulatory burdens on a specific class of persons." *Id.* Those plaintiffs have "no need to identify a comparator" since "the classification appears in the text of the statute itself." *Id.*

These principles apply here. By its terms, the City's compulsory-eviction law imposes burdens on specific classes of persons: (1) people who rent their homes, Granite City Mun. Code § 5.142.010(A); (2) anyone buying a home under an installment contract with a purchase period of less than five years, *id.* § 5.142.010(B); and (3) anyone buying their home under an installment contract if "the amount unpaid . . . is less than eighty percent of the original purchase price." *Id.* No one else has any citywide duty to police their householders or guests. The challenged classification thus "appears in the text of the statute itself." 861 F.3d at 682. The City's "reliance on the class-of-one line of cases is misplaced." *Id.* And the equal-protection question is straightforward: Does singling out renters and installment buyers have the necessary means-end fit? As discussed below, the complaint plausibly alleges that it does not.

B. Plaintiffs plausibly allege that the compulsory-eviction law's classification fails constitutional scrutiny.

"The equal-protection guarantee is 'concerned with governmental classifications that "affect some groups of citizens differently than others."'" *Id.* If "the state-crafted classification . . . 'impermissibly interferes' with a fundamental right," it merits strict scrutiny. *St. Joan Antida High Sch. Inc. v. Milwaukee Pub. Sch. Dist.*, 919 F.3d 1003, 1008 (7th Cir. 2019). And even if no fundamental right is implicated, a classification cannot stand if "arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446. Under either standard, Plaintiffs plausibly allege that Granite City's classifications are invalid, so their case should proceed.

1. Plaintiffs plausibly allege that the City's classification merits strict scrutiny.

The "basic concept" of our justice system is that "legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972). Yet Granite City's compulsory-eviction law carves out a different rule for certain people: those who rent their homes or buy them under short-term installment contracts.

Those people stand to lose their homes if the City decides that any member of their household or any guest has committed any crime anywhere within city limits or, sometimes, anywhere at all. Compl. ¶¶ 21-24, 28. In this way, the City singles them out for a direct burden on a fundamental right: the right not to be punished for someone else's misdeeds. *See* pages 6-9, above; *cf. St. Ann v. Palisi*, 495 F.2d 423, 426 (5th Cir. 1974) (noting that Supreme Court precedent "provide[s] ample indication that personal guilt is a fundamental element in the American scheme of liberty"). In 12(b)(6) terms, Plaintiffs plausibly allege that the classification "impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

That is enough for Plaintiffs' equal-protection claim to move past the pleadings. The City's motion does not try to defend its law under strict scrutiny. Such an argument would be premature in any event; under heightened scrutiny, the government bears an evidentiary burden that cannot be met at the motion-to-dismiss stage. For this reason alone, Plaintiffs have a right to proceed to the merits on their equal-protection claim.

2. Plaintiffs plausibly allege that the City's classification fails even rational-basis scrutiny.

a. Plaintiffs also would be entitled to proceed if the City's regime were subject only to rational-basis review. The Equal Protection Clause demands that governmental classifications "rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Johnson v. Robison*, 415 U.S. 361, 374 (1974) (citation omitted). To be sure, when a classification does not involve suspect classes or fundamental rights, a court must uphold it if it "bears a rational relationship" to a legitimate legislative goal. *St. Joan Antida High Sch. Inc.*, 919 F.3d at 1011. But that review is not "toothless," *Sutkier v. Ill. State Dental Soc'y*, 808 F.2d 632, 634 (7th Cir. 1986), and "[t]he State may not rely on a classification whose relationship to an

asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446. Nor does the rational-basis standard "defeat the plaintiff's benefit of the broad Rule 12(b)(6) standard." *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992). If a complaint "allege[s] facts sufficient to overcome the presumption of rationality that applies to government classifications," *id.* at 460, the case may proceed.

Plaintiffs' complaint alleges sufficient facts here. The City states that its compulsory-eviction law "aims to prevent, reduce, and deter criminal activity within the City." City Mem. 15. Yet nowhere does the City try to explain why classifying people based on their home-financing arrangements "bears a rational relationship to th[at] end." *St. Joan Antida High Sch. Inc.*, 919 F.3d at 1011. If you have the credit for a traditional mortgage, your son (or his friend) could break into the same restaurant Jason Lynch did—under identical circumstances—and your home would be safe. Compl. ¶¶ 153-54. For people with fee-simple title, or mortgages, or longer-term installment contracts, the City imposes no duty to "control" householders or guests at all. City Mem. 5. But things are different for renters and for people buying their homes under shorter-term installment contracts. On pain of losing their home, people like Jessica and Kenny are saddled with an unprecedented legal burden: Unlike their neighbors, they are liable for the misdeeds of any householder or guest anywhere "within the city limits." Compl. ¶¶ 22-23, 152.

That classification is the main basis for Plaintiffs' equal-protection claim, and the complaint plausibly alleges that it "bears no relation to the statutory purpose." *Williams v. Vermont*, 472 U.S. 14, 24 (1985). Classifying residents based on their home-financing arrangements no more relates to "prevent[ing], reduc[ing], and deter[ring] criminal activity" than would classifying them based on student-loan debt or child support or car color. *See* Compl. ¶¶ 155-56. And nowhere in the one paragraph it devotes to the issue (City Mem. 15) does the

City argue otherwise. Beyond "bald assertions" of rationality, *Keenon v. Conlisk*, 507 F.2d 1259, 1261 (7th Cir. 1974), the City nowhere explains why it makes sense to require renters and short-term installment buyers—and nobody else—to police their householders and guests citywide.

The City's separate "Chronic Public Nuisance Properties" law gives still more reason to question this disparate treatment. Granite City Mun. Code §§ 8.97.010 *et seq.*, tinyurl.com/y6o6htep. The public-nuisance law addresses properties that are hotspots for crime—but unlike the compulsory-eviction law, it is written in evenhanded terms. It gives people two chances to "abate the nuisance activities." *Id.* § 8.97.050. It creates a defense for those who could not "control" the nuisance. *Id.* § 8.97.060(B). Most importantly, it achieves the City's public-safety goals with no distinctions at all between owners, mortgagors, renters, and installment buyers. *See id.* § 8.97.020 (defining "owner"). That, too, "casts considerable doubt" on the jigsaw classifications in the City's compulsory-eviction law. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 537 (1973).

b. In its class-of-one analysis, the City also cites three ways in which Plaintiffs are not "similarly situated" to other people in Granite City. As discussed (at 12-13), the complaint does not currently assert a class-of-one claim. On top of that, the City's perceived distinctions confirm that Plaintiffs' equal-protection claim is far more than plausible.

First, the City contends that singling out renters and short-term installment buyers is rational because no other people—homeowners, for example—are "subject to eviction under Illinois law." City Mem. 13. As the City explains, it simply lacks the "legal option" to evict anyone else. *Id.*

That argument lacks merit. "[E]ven in the ordinary equal protection case calling for the most deferential of standards," what matters is "the relation between the classification adopted

and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996). Yet in the City's own telling, there is no such relation here. The City singles out renters and short-term installment buyers not because that classification relates to the City's claimed *object*, public safety. The City singles them out because they are vulnerable to the City's preferred *punishment*—eviction.[2]

Punishment is not in itself a lawful governmental objective. But instead of designing its law in service of "an independent and legitimate legislative end," *id.* at 633, the City first picked the punishment it wanted to impose, then worked backwards. That is why the City's classification has everything to do with private real-estate disputes and nothing to do with public safety. *See* Compl. ¶¶ 152-86. That is also why any link between classification and crime-control "is not only 'imprecise,'" but "wholly without any rational basis." *Moreno*, 413 U.S. at 538.

Second, the City contends that Bill Campbell is not "being treated differently than any other landlord in the City" because "all landlords in the City are subject to the City's Ordinance." City Mem. 12. But the City "cannot deflect an equal protection challenge by observing that in light of the statutory classification all those within the burdened class are similarly situated." *Williams*, 472 U.S. at 27. "Bill's right to lease property to Jessica and Kenny is restricted," while "every other landlord in Granite City can rent any of his or her properties to Jessica and Kenny." Compl. ¶¶ 182-83. And just as the City cannot constitutionally evict Jessica and Kenny itself, it has no legitimate interest in forcing Bill to do the job for it.

Third, the City lets the cat out of the bag: Renters differ from homeowners, the City suggests, because their homes matter less. City Mem. 11. In the City's view, homeowners and mortgagors enjoy "increased protections." *Id.* But people like Jessica and Kenny—with "only"

[2] Perhaps due to poor drafting, the compulsory-eviction law in fact applies to some people who "are not subject to eviction under Illinois law." City Mem. 13; *compare* Granite City Mun. Code § 5.142.010(B), *with* 735 ILCS 5/15-1106(a)(2).

equitable title—have no cause to complain if the City kicks them out of their homes. *Id.* That is a remarkable argument for the City to make. As a matter of property law, there are of course differences between fee-simple estates and leasehold estates. But as against the government, Jessica and Kenny's home is no less their castle because they have "only" a leasehold. The Constitution protects them just as it protects "the Lord of the Manor who holds his estate in fee simple." *Minnesota v. Carter*, 525 U.S. 83, 95 (1998) (Scalia, J., concurring). The Fourth Amendment, for example, protects tenants and owners alike. *Chapman v. United States*, 365 U.S. 610 (1961). So too does the Fifth Amendment, *Mid-Am. Waste Sys., Inc. v. City of Gary*, 49 F.3d 286, 289 (7th Cir. 1995), and the Fourteenth, *Dyson v. Calumet City*, 306 F. Supp. 3d 1028, 1042 (N.D. Ill. 2018). And as relevant here, the City's motion cites no difference between "equitable" and "legal" title that might justify singling out renters alone for collective punishment.

* * *

Dismissal at the 12(b)(6) stage "is warranted only when 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Rodriguez v. Wexford Health Sources, Inc.*, No. 19-cv-203-SMY, 2019 WL 4392994, at *2 (S.D. Ill. Sept. 13, 2019). The City's motion makes no such showing here. Plaintiffs' equal-protection claim plausibly alleges that the City's classification infringes a fundamental right, meriting strict scrutiny. Plaintiffs also allege—in far more than "threadbare[]" and "conclusory" terms (City Mem. 15)—that the classification lacks even a rational basis. With all inferences in their favor, Plaintiffs have a right to make their case on the merits.

III. Jessica Barron and Kenny Wylie properly assert a claim under the Takings Clause (Third Claim).

Jessica and Kenny's Fifth Amendment takings claim is also proper. The City seeks to extinguish their "entire property interest" in their home. Compl. ¶ 199. That makes the City's

actions "functionally equivalent" to a "classic taking," in which the government "ousts the owner from his domain." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005).

The City does not appear to dispute that its actions—once completed—will amount to a taking. *See* City Mem. 17 (asking that claim be dismissed "without prejudice"). Yet the City asserts that Jessica and Kenny's takings claim will not be "ripe" until after the City has ousted them. *Id.* 16. That is incorrect. "[T]here is nothing in the Constitution that prohibits anticipatory litigation over whether a taking that would entitle a property owner to compensation has occurred or is being threatened." Thomas W. Merrill, *Anticipatory Remedies for Takings*, 128 Harv. L. Rev. 1630, 1633 (2015). And while the federal courts typically cannot use equitable decrees to undo takings once completed, *see Knick v. Township of Scott*, 139 S. Ct. 2162, 2179 (2019), the Supreme Court has long entertained claims for relief against ones that are threatened. *See, e.g.*, *Babbitt v. Youpee*, 519 U.S. 234, 242 (1997); *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 71 n.15 (1978). *Knick*, in fact—the only case the City cites for its ripeness theory—included a claim for forward-looking relief much like Plaintiffs' here. 2d Am. Compl. ¶¶ 44-53, 14-cv-2223 (M.D. Pa. Nov. 16, 2015) (ECF 21).[3]

IV. Jessica Barron and Kenny Wylie plausibly allege a freedom-of-association claim (Fourth Claim).

Jessica and Kenny's final claim is proper as well. The City seeks to punish them only because of their association with Jason Lynch, and they have a right not to be punished on that ground. Compl. ¶¶ 208-12. For its part, the City says it can impose guilt by association so long as the association is not "intimate" or expressive. City Mem. 17. And because "the 'freedom of

[3] The City states in passing that the complaint's allegations about harm to Jessica and Kenny's property interests are "threadbare." City Mem. 17. But the complaint alleges that the City will "destroy[]" Jessica and Kenny's "entire property interest" if it coerces their eviction, and the harm of being thrown out of one's home is obvious. Compl. ¶ 199; *see also id.* Ex. 3, at 1-2.

intimate association' is limited to personal affiliations which involve the creation and sustenance of a family," the City posits, Jessica and Kenny's claim should be dismissed. *Id.* 18.

Even on its own terms, the City is wrong; the Supreme Court has "not held that constitutional protection is restricted to relationships among family members." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987); *see also id.* (detailing "unavoidably" fact-intensive inquiry into association's intimacy). More fundamentally, the Constitution prevents the government from punishing "all those who have been associated in any degree whatever with the main offenders." *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.) (L. Hand, J.), *aff'd*, 311 U.S. 205 (1940). Whether viewed through the lens of due process or associational freedom, that precept applies across our nation's legal system. It applies within the corporate limits of Granite City too. By punishing Jessica and Kenny based on their choice of house guest, the City has abandoned "the accepted limits of imputation of guilt." *Scales*, 367 U.S. at 225 n.17.

CONCLUSION

For the foregoing reasons, Granite City's motion to dismiss should be denied.

Dated: September 23, 2019.

Respectfully submitted,

s/Samuel B. Gedge
Samuel B. Gedge (lead counsel)
Robert McNamara
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
Telephone: 703.682.9320
Facsimile: 703.682.9321
E-mail: sgedge@ij.org; rmcnamara@ij.org

Bart C. Sullivan, #6198093
FOXGALVIN, LLC
One South Memorial Drive, 12th Floor
St. Louis, MO 63102
Phone: 314.588.7000
Facsimile: 314.588.1965
E-mail: bsullivan@foxgalvin.com

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2019, I electronically filed this Plaintiffs' Response to Motion to Dismiss with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Erin M. Phillips
Bradley C. Young
UNSELL SCHATTNIK & PHILLIPS PC
3 South 6th Street
Wood River, IL 62095
Phone: 618.258.1800
Fax: 618.258.1957
E-mail: erin.phillips7@gmail.com; bradleyyoung925@gmail.com

s/Samuel B. Gedge
Samuel B. Gedge