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An Eye for an Eye and a Tooth for a Tooth: An Analysis of Georgia's Landlord Retaliation Law

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AN EYE FOR AN EYE AND A TOOTH FOR A TOOTH: AN ANALYSIS OF GEORGIA'S LANDLORD RETALIATION LAW

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Landlord retaliation laws protect tenants from landlords' harmful retaliatory actions in response to tenants' exercise of their legal rights. In May 2019, Georgia joined the majority of other states by enacting H.B. 346, an act establishing the requirements for a prima-facie case of landlord retaliation. Georgia's eviction and poverty rates are higher than the national average, and this law stands to address underlying issues that drive those problems.

Other states' landlord retaliation laws offer best practices in addressing landlord retaliation. These include implementing rent abatement protections and expanding the scope of protected actions. Improving low-income individuals' access to counsel and to information are other key reforms. This Note argues that the Georgia legislature should amend H.B. 346 to incorporate these provisions and, in the process, strengthen tenants' protections from retaliatory landlords and evictions. Although H.B. 346 marks a significant step forward, these additional protections will ensure that Georgia tenants enjoy a robust legal framework for their rights.

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I. INTRODUCTION

After a grueling late-night shift, a father of four returned to his home in Georgia to find an eviction notice posted on the door of his apartment. He feared that this would happen. The mold and mildew in his apartment became apparent around three months earlier. This problem has affected his family's health and has caused his family members to miss either school or work each week. His family cannot afford any more days of lost wages. Soon after discovering the mold, he contacted his landlord to fix the issue, but his efforts were to no avail. He notified the landlord several more times in the months that followed, but the problem persisted due to the landlord's indifference. Last week, the father decided to report the condition of his home to a local government agency. Now, only one week later, this eviction notice from his landlord greets him at the door. With very little money, no knowledge of how to defend himself, and nowhere else to take his family, he is left vulnerable and afraid. Until July 2019, he—along with other tenants in Georgia—would have had no statutory protection against a landlord for retaliatory acts such as these.[1]

Governor Brian Kemp signed Georgia House Bill 346 (H.B. 346) on May 8, 2019,[2] bringing Georgia into line with over forty other states that have either statutes or case law in place to protect tenants from retaliatory acts by landlords.[3] H.B. 346 protects tenants from a landlord's punishment by creating both a cause of action for and a defense against landlord retaliation.[4] Under the

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[1] *See 2019–2020 Regular Session - HB 346*, GA. GEN. ASSEMBLY, https://www.legis.ga.gov/legislation/55074 (last visited Feb. 21, 2021) (showing that the effective date of H.B. 346 was July 1, 2019). For further discussion of the effects of poor housing conditions on tenants, see Mark Niesse, *Senators Vote to Prevent Evictions by Slum Landlords in Georgia*, ATLANTA J.-CONST. (Mar. 28, 2019), https://www.ajc.com/news/state--regional-govt--politics/lawmakers-decide-evictions-slum-landlords-georgia/N37V3PbUBtm8c9E3eFP5FJ/ ("Substandard housing conditions cause asthma attacks and sickness . . . . Children miss school and their parents miss work, perpetuating a cycle of poverty.").

[2] *See 2019–2020 Regular Session - HB 346*, *supra* note 1 (outlining H.B. 346's legislative history).

[3] *See, e.g.*, Janet Portman, *State Laws Prohibiting Landlord Retaliation*, NOLO, https://www.nolo.com/legal-encyclopedia/state-laws-prohibiting-landlord-retaliation.html (last updated Dec. 10, 2020) (providing a list of states with landlord retaliation statutes or case law as of December 10, 2020).

[4] *See* Act effective July 1, 2019, 2019 Ga. Laws 1026 (codified as O.C.G.A. § 44-7-24).

law, "[a] tenant establishes a prima-facie case of retaliation" whenever the tenant takes one of the actions specified in the statute—such as exercising a legal right against the tenant's landlord or complaining to a government entity[5]—and the landlord thereafter retaliates in a manner specified by the statute.[6] H.B. 346 responded to significant needs in Georgia, where eviction rates have been at record high levels in certain urban areas, even before the economic struggles caused by the COVID-19 pandemic.[7] The law will have a particular impact in areas of the state with high poverty rates.[8] In these areas, lower-income tenants have less resources to challenge landlords' actions and have few, if any, options if evicted from their homes.[9]

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[5] *See id.* § 1(a)–(b) (stating actions a tenant must take to prove the "[e]lements of a prima-facie case" of retaliation).

[6] *See id.* § 1(c) (listing actions taken by the landlord that qualify as retaliation).

[7] *See, e.g.*, Stephannie Stokes, *Metro Atlanta Has Third Highest Eviction Rate in U.S., Report Finds*, WABE (Oct. 26, 2017), https://www.wabe.org/eviction-rate-metro-atlanta/ ("According to the results [of a study of renters], Atlanta had the third highest rate of renters experiencing evictions—5.7 percent compared to the national average of 3.3 percent."); *cf.* J.D. Capelouto, *Georgia Renters Brace as Ban on Evictions is Set to Expire Dec. 31*, ATLANTA J.-CONST. (Dec. 18, 2020), https://www.ajc.com/news/atlanta-news/georgia-renters-brace-as-ban-on-evictions-is-set-to-expire-dec-31/YVRDORAQC5CA3DBXV7RMTNWKPQ/ (noting that, because of the pandemic, "tens of thousands of eviction cases are pending in just five metro-area counties" and that "as many as 160,000 households [in Georgia] could be at risk of eviction").

[8] *See, e.g.*, *Percent of Total Population in Poverty, 2019: Georgia*, USDA ECON. RSCH. SERV., [hereinafter *USDA Poverty Data*], https://data.ers.usda.gov/reports.aspx?ID=17826#Pb4c65799edb54ee9ae9b24cf1a6a94d5_5_378iT4 (last updated Jan. 5, 2021) (select "Georgia" in the "State" dropdown box and hit "Submit") (showing percentages of the Georgia population in poverty by county).

[9] *See, e.g.*, Terry Gross, *First-Ever Evictions Database Shows: 'We're in the Middle of a Housing Crisis,'* NPR (Apr. 12, 2018, 1:07 PM), https://www.npr.org/2018/04/12/601783346/first-ever-evictions-database-shows-were-in-the-middle-of-a-housing-crisis (noting that "[o]nly about 1 in 4 families who qualify for housing assistance" receive government housing assistance). While these issues existed prior to the hardships that accompanied the COVID-19 pandemic, a September 2020 order issued by the Centers for Disease Control and Prevention (CDC) has provided temporary protection from evictions based on the nonpayment of rent. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,296 (Sept. 4, 2020). At the time of this Note's publication, the CDC's moratorium was still in place with modifications, with an expiration date of June 30, 2021. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731, 16,731 (Mar. 31, 2021).

Although Georgia has taken the first step in protecting low-income tenants by enacting H.B. 346, questions concerning the law's effectiveness remain. Has Georgia adopted only the bare-minimum level of statutory protection, or has the state gone above and beyond in protecting its tenants from bad-faith landlords? This Note compares retaliatory landlord-tenant laws throughout the country with H.B. 346 to determine whether more should be done to protect Georgia's tenants.[10] While this new law likely will benefit low-income tenants in Georgia, this Note argues that the Georgia legislature can better protect tenants by providing additional protections against retaliation that resemble those of other states. Georgia's higher poverty and eviction rates render these stronger protections particularly necessary.[11]

Part II discusses the costs of eviction for tenants and governments. Part III discusses the background, policy, and importance of landlord-tenant retaliation laws. Part IV analyzes the text of H.B. 346 and compares it to the retaliation laws of other states to determine how Georgia's law can be strengthened. Part IV then discusses the type of retaliation law that properly responds to abnormally high eviction and poverty rates and addresses counterarguments concerning the negative effects of retaliation laws on landlords and property owners. Part V concludes.

II. THE COST OF EVICTION

While H.B. 346 protects tenants from various types of landlord retaliation, protection from retaliatory eviction is especially significant. Being evicted from a home can cause substantial social harm, as well as create governmental costs.[12] This Part provides a brief overview of the potential costs of eviction, which reinforce the importance of strong tenant protection in Georgia.

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[10] *See infra* Part IV.

[11] *See infra* Section IV.C.

[12] *See* Lauren A. Lindsey, Comment, *Protecting the Good-Faith Tenant: Enforcing Retaliatory Eviction Laws by Broadening the Residential Tenant's Options in Summary Eviction Courts*, 63 OKLA. L. REV. 101, 111–12 (2010) (describing eviction's effects on "social stability" and the "monetary burdens [evictions place] on governments").

Eviction can cause significant harms to an individual or family.[13] This displacement disrupts the tenant's social connections, and the "emotional and psychological harm involved with the loss of a home" is comparable to the grief of losing a loved one.[14] The uprooting of a family may cause "school instability" for children involved, and the disruption of eviction may cause a tenant to lose their job if "traveling to and from work becomes difficult or impossible" after the displacement.[15] Before being actually displaced from their home, tenants "who are threatened with eviction . . . are more likely to report poor health, high blood pressure, depression, anxiety, and psychological distress."[16]

Evictions create governmental costs as well.[17] An eviction may cause homelessness, which may persist due to the eviction now appearing on the tenant's rental record.[18] Homelessness places an "economic burden" on the government, in addition to the costs of "judicial enforcement of wrongful evictions" and the clean-up of the ex-tenant's property "left in the wake of wrongful evictions."[19] Additionally, the job disruption caused by eviction decreases the

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[13] *See id.* at 111 (explaining the "substantial social costs" and "significant disruption" of evictions).

[14] *Id.* at 111; *see also* James Bell, *Beyond Displacement: How the Ripple Effects of an Eviction Can Last for Years*, PUBLICSOURCE (Nov. 11, 2020), https://www.publicsource.org/eviction-collateral-impact-displacement-employment-transit-school-mental-health ("The stress of the process, and the upheaval of an abrupt move, can also hurt a tenant's mental health.").

[15] Lindsey, *supra* note 12, at 111–12.

[16] Allison Bovell-Amman & Megan Sandel, *The Hidden Health Crisis of Eviction*, B.U. SCH. PUB. HEALTH (Oct. 5, 2018), https://www.bu.edu/sph/news/articles/2018/the-hidden-health-crisis-of-eviction/.

[17] *See* Lindsey, *supra* note 12, at 112 (discussing how the consequences of eviction "may also place direct and indirect monetary burdens on governments [and force] taxpayers to foot the bill").

[18] *See id.* ("Eviction proceedings, whether resulting in eviction or not, create a unique susceptibility to homelessness . . . ."); *see also* Stephannie Stokes, *When Landlords File Evictions in Georgia, Tenants Feel the Effects for Years*, WABE (Nov. 23, 2020), https://www.wabe.org/when-landlords-file-evictions-in-georgia-tenants-feel-the-effects-for-years/ (explaining that for Georgia tenants, "eviction notice[s can] follow [a tenant] for up to seven years–the amount of time allowed under the Fair Credit Reporting Act").

[19] Lindsey, *supra* note 12, at 112 (explaining that "judicial enforcement of wrongful evictions makes inefficient use of governmental time and resources, crowding the dockets of summary eviction judges and consuming the availability of the sheriffs or marshals who must execute a landlord's writ of possession").

government's tax revenue and increases "the number of individuals requiring aid."[20] These social and governmental costs demonstrate the importance of protecting tenants from wrongful retaliatory evictions.

III. BACKGROUND AND POLICY OF LANDLORD RETALIATION LAW

In general, a tenant can bring a landlord retaliation claim or raise an affirmative defense of retaliation when a landlord moves to evict "with the motive of retaliating against a tenant who was not in default," but who was instead exercising a right possessed by the tenant.[21] Examples of such tenant rights include reporting housing code violations, making requests to the landlord for repairs, or reporting the landlord to the health department.[22] The landlord violates these rights when they take retaliatory action, such as sharply increasing rent, decreasing services, or evicting the tenant.[23]

Under common law, courts did not inquire into a landlord's motive for taking seemingly legitimate actions against their tenant, because "the possession of land was a privilege of the lord who had seisin."[24] Retaliatory action claims and defenses for tenants arose as a response to "a marked increase in tenant activity both in and out of court," sparked by a corresponding "increase in tenants' rights."[25] This growth in tenants' rights led landlords to evict their

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[20] *Id.* at 112–13 (explaining how a job disruption "reduces or eliminates an individual tenant's income and thus constricts the government's income- or sales-tax revenue").

[21] 49 AM. JUR. 2D *Landlord and Tenant* § 508, Westlaw (database updated Feb. 2021). While most courts recognize landlord retaliation as a defense or counterclaim in an eviction proceeding, other courts allow the doctrine to "be used affirmatively as the basis of an action" in response to a landlord's retaliatory act. 45 AM. JUR. 3D *Proof of Facts* § 6, Westlaw (database updated Feb. 2021).

[22] *See* 4 BAXTER DUNAWAY, LAW OF DISTRESSED REAL ESTATE § 48:76 (database updated Nov. 2020), Westlaw LAWDRE (stating that the retaliatory eviction defense may be available "in response to reporting of housing code violations" or when "the tenant has requested repairs from the landlord or has filed a complaint with the health department").

[23] *Id.*

[24] Annotation, *Retaliatory Eviction of Tenant for Reporting Landlord's Violation of Law*, 23 A.L.R. 5th 140 § 2[a] (1994) [hereinafter Annotation, *Retaliatory Eviction*] (citing McCall v. Fickes, 556 P.2d 535, 537 (Alaska 1976)).

[25] DEFENSE AGAINST A PRIMA FACIE CASE § 7:29 (database updated Aug. 2020), Westlaw DAPFC.

tenants, and many states responded by creating more legal protections for tenants.[26] *Edwards v. Habib* was the first case to recognize a defense against retaliatory action by a landlord, specifically creating the retaliatory eviction defense.[27] In *Edwards*, the tenant was renting property from the landlord "on a month-to-month basis."[28] The tenant reported her landlord to the Department of Licenses and Inspection, which subsequently discovered over forty sanitary code violations.[29] After the Department ordered the landlord to correct these violations, the landlord gave the tenant a thirty-day eviction notice and then "obtained a default judgment for possession of the premises."[30] The D.C. Court of Appeals reversed this default judgment, explaining that:

> In light of the appalling condition and shortage of housing in Washington, the expense of moving, the inequality of bargaining power between tenant and landlord, and the social and economic importance of assuring at least minimum standards in housing conditions, we do not hesitate to declare that retaliatory eviction cannot be tolerated.[31]

The court in *Edwards* further described the policy behind the tenant retaliation defense:

> There can be no doubt that the slum dweller, even though his home be marred by housing code violations, will pause long before he complains of them if he fears eviction as a consequence. Hence an eviction under the circumstances of this case would not only punish [the

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[26] *See, e.g.*, *id.* ("In response to the landlords' efforts, and to protect tenants who are doing no more than exercising their rights, the courts in some states have developed a defense of 'retaliatory eviction.'").

[27] *See* Annotation, *Retaliatory Eviction*, *supra* note 24, § 2[a] ("In the landmark case of *Edwards v Habib*, it was first judicially recognized that retaliatory eviction can be a defense against a landlord's possessory action . . . ." (emphasis added) (citing Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968))).

[28] *Edwards*, 397 F.2d at 688.

[29] *Id.*

[30] *Id.* at 688–89.

[31] *Id.* at 701 (footnotes omitted).

> tenant] for making a complaint which she had a constitutional right to make, a result which we would not impute to the will of Congress simply on the basis of an essentially procedural enactment, but also would stand as a warning to others that they dare not be so bold, a result which, from the authorization of the housing code, we think Congress affirmatively sought to avoid.[32]

Stated differently, landlord retaliation laws are based "on the principle that tenants should be encouraged to come forward and report code violations without fear of reprisal" and that "the enforcement mechanism of housing laws alone is ineffective in preventing unsafe and inhabitable living conditions."[33] Also motivating landlord retaliation law is the idea that "permitting the threat of eviction would . . . stifle justifiable complaints, and thereby frustrate the purpose of housing laws, which is to provide safe housing."[34]

Since *Edwards*, other states have established this type of protection from retaliatory eviction for tenants, either through their courts[35] or their legislatures.[36] The doctrine now extends to protecting tenants not only from retaliatory evictions, but from other retaliatory acts by their landlord as well.[37] Retaliatory eviction laws also protect tenants who report their landlord for

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[32] *Id.*

[33] Annotation, *Retaliatory Eviction*, *supra* note 24, § 2[a].

[34] *Id.*

[35] *See, e.g.*, Bldg. Monitoring Sys., Inc. v. Paxton, 905 P.2d 1215, 1218 (Utah 1995) (holding that a landlord "is not . . . free to evict in retaliation for his tenant's report of housing code violations to the authorities" (alteration in original) (quoting *Edwards*, 397 F.2d at 699)); Imperial Colliery Co. v. Fout, 373 S.E.2d 489, 494 (W. Va. 1988) ("[R]etaliation may be asserted as a defense to a summary eviction proceeding . . . if the landlord's conduct is in retaliation for the tenant's exercise of a right incidental to the tenancy.").

[36] *See, e.g.*, Portman, *supra* note 3 (providing a list of all state landlord retaliation statutes as of December 10, 2020).

[37] *See* 4 DUNAWAY, *supra* note 22, § 48:76 ("The landlord is forbidden not only to evict in retaliation, but also to engage in other forms of retaliatory conduct such as increasing rent or decreasing services.").

criminal acts, not just for code violations.[38] The strong public policy behind landlord retaliation laws explains why a majority of states adopted the doctrine.[39] The significance of the doctrine's underlying policy is undeniable,[40] but whether states are taking this protection far enough to meet these policy goals, especially for low-income tenants, remains a lingering question.

IV. ANALYSIS OF GEORGIA HOUSE BILL 346

Examining the text of Georgia House Bill 346 and comparing it to other states' laws helps reveal whether Georgia's tenants need more statutory protection, particularly for those with lower income.[41] This Part conducts that analysis and comparison.

A. TEXT OF H.B. 346

Section (a) of H.B. 346 outlines what tenants must show to establish "a prima-facie case of retaliation."[42] A prima-facie case exists when the tenant takes one of the actions listed under section (b) that relate "to a life, health, safety, or habitability concern."[43] The tenant must then show that the landlord took one of the actions listed under section (c).[44]

Section (b) lists the possible actions a tenant must take to establish the first element of a prima-facie case of retaliation.[45] The tenant must have taken one of the following actions: exercised a right or remedy under contract or law against the landlord; given the landlord notice to make a repair or remedy; issued a complaint

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[38] *See, e.g.*, Barela v. Superior Ct., 636 P.2d 582, 586 (Cal. 1981) (holding that a retaliatory defense was available to a tenant "when she reported her landlord's crime to the police" and was subsequently evicted).

[39] *See supra* notes 31–34 and accompanying text.

[40] *See* Lindsey, *supra* note 12, at 110 (listing "(1) improving public health, housing, and living conditions; (2) promoting social stability; and (3) reducing the cost of eviction to governments" as underlying policy of retaliatory eviction laws).

[41] *See* O.C.G.A. § 44-7-24 (West, Westlaw through Laws 2021, Act 6) (codifying the text of H.B. 346).

[42] *Id.* § 44-7-24(a).

[43] *Id.* § 44-7-24(a)–(b).

[44] *Id.* § 44-7-24(a), (c).

[45] *Id.* § 44-7-24(b).

to a government entity about a regulatory violation by the landlord; or taken part in a tenant organization to address related issues.[46] Section (c) then lists landlord actions that, if proven, may satisfy this element of a prima-facie retaliation case.[47] "[W]ithin three months after the date that a tenant takes" an action listed in section (b), the landlord must have either:

> (1) Filed a dispossessory action . . . ;
> (2) Deprived the tenant of the use of the premises, except for reasons authorized by law;
> (3) Decreased services to the tenant;
> (4) Increased the tenant's rent or terminated the tenant's lease or rental agreement; or
> (5) Materially interfered with the tenant's rights under the tenant's lease or rental agreement.[48]

Section (d) lists certain actions by the landlord that are *not* considered retaliatory.[49] Under section (d)(1), the landlord is allowed to either increase a tenant's rent or reduce their services pursuant to a lease's escalation clause, "as part of a pattern of service reductions, for an entire multiunit residential building or complex," or under the terms of a state or federal government program.[50] Similarly, it is not considered retaliatory for a landlord to evict a tenant or terminate their lease in the following scenarios:

> (A) The tenant is delinquent in rent when the landlord gives notice to vacate or files a dispossessory action;
> (B) The tenant, a member of the tenant's family, or a guest or invitee of the tenant intentionally damages property on the premises or by word or conduct threatens the personal safety of the landlord, the landlord's employees, or another tenant;

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[46] *Id.* § 44-7-24(b)(1)–(4).
[47] *Id.* § 44-7-24(c).
[48] *Id.*
[49] *Id.* § 44-7-24(d).
[50] *Id.* § 44-7-24(d)(1)(A)–(C).

> (C) The tenant has breached the lease, other than by holding over, by an action such as violating written lease provisions prohibiting serious misconduct or criminal acts;
> (D) The tenant holds over after the tenant gives notice of termination or intent to vacate; or
> (E) The tenant holds over after the landlord gives notice of termination at the end of the rental term as agreed upon in the written lease.[51]

Section (e) provides that a landlord retaliation action under this law is "a defense to a dispossessory action" and that "the tenant may recover from the landlord a civil penalty of one month's rent plus $500.00, court costs, reasonable attorney's fees where the conduct is willful, wanton, or malicious, and declaratory relief," minus any balance owed to the landlord.[52] Finally, section (f) states that a landlord can defend against a retaliation claim from a tenant by demonstrating "that the property complies with applicable building and housing codes."[53]

B. LANDLORD RETALIATION LAWS OF OTHER STATES COMPARED TO GEORGIA

Comparing H.B. 346 with other states' landlord retaliation laws illuminates both the potential effects of Georgia's new law and whether it is more or less protective than other states' laws. This Section conducts that analysis by considering the presumption of retaliation, the scope of protected tenant conduct, the availability of common law remedies, and the existence of tenant protections that exceed the Uniform Residential Landlord and Tenant Act.

1. Presumptions of Retaliation. Arizona's landlord retaliation statute is structured similarly to Georgia's new law, but certain provisions of Arizona's law are more protective than Georgia's.[54] For

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[51] *Id.* § 44-7-24(d)(2).

[52] *Id.* § 44-7-24(e).

[53] *Id.* § 44-7-24(f). However, tenants may rebut this defense. *See id.* (stating that section (f) is a "rebuttable defense").

[54] *See* ARIZ. REV. STAT. ANN. § 33-1381 (West, Westlaw through 1st Reg. Sess. of 55th Legis. (2021)) (prohibiting certain forms of landlord retaliation against tenants).

example, the Arizona statute places the burden on the landlord by creating a presumption of retaliation if the landlord takes a certain action within six months after the tenant takes a certain action,[55] whereas Georgia law only "establishes a prima-facie case of retaliation" for certain actions taken "within three months."[56] Many other states provide this six-month protection as well,[57] with some state statutes extending it up to one year.[58] Georgia's statute could provide greater protection for its tenants by following Arizona's example and creating a longer presumption period, or an unlimited presumption period.[59]

2. Protected Tenant Conduct. Georgia's landlord retaliation law is more protective than many other states' laws because it protects a wider scope of tenant conduct. Such tenant conduct includes (1) complaints to landlords or government agencies, (2) participation in tenants' organizations, and (3) exercise of legal protections.[60] While nearly all states appear to protect a retaliatory

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[55] *See id.* § 33-1381(B) ("In an action by or against the tenant, evidence of a complaint within six months prior to the alleged act of retaliation creates a presumption that the landlord's conduct was in retaliation.").

[56] O.C.G.A. § 44-7-24(a), -24(c) (West, Westlaw through Laws 2021, Act 6).

[57] *See, e.g.*, D.C. CODE ANN. § 42-3505.02(b) (West, Westlaw through Jan. 12, 2021) (stating that "the trier of fact shall presume retaliatory action has been taken . . . if within the [six] months preceding the housing provider's action" the tenant had taken a certain action); ME. REV. STAT. ANN. tit. 14, § 6001(3) (West, Westlaw through ch. 2–20 of 2021 1st Reg. Sess. of 130th Legis. (2019)) (creating a six-month "rebuttable presumption" of retaliation); MASS. GEN. LAWS ANN. ch. 239, § 2A (West, Westlaw through ch. 3 of 2021 1st Ann. Sess.) (establishing a six-month "presumption" that "may be rebutted only by clear and convincing evidence that such action was not a reprisal against the tenant").

[58] *See, e.g.*, IOWA CODE ANN. § 562A.36(2) (West, Westlaw through 2020 Reg. Sess.) ("[E]vidence of a good-faith complaint within one year prior to the alleged act of retaliation creates a presumption that the landlord's conduct was in retaliation."); KY. REV. STAT. ANN. § 383.705(2) (West, Westlaw through ch. 7 of 2021 Reg. Sess.) ("In an action by or against the tenant, evidence of a complaint within one . . . year before the alleged act of retaliation creates a presumption that the landlord's conduct was in retaliation.").

[59] Georgia's three-month period is better, though, than the complete absence of a period in which retaliation is presumed. Alabama and Florida, for example, lack such a presumption. *See, e.g.*, ALA. CODE § 35-9A-501 (West, Westlaw through Act 2020-206) (providing no presumption of retaliation); FLA. STAT. ANN. § 83.64 (West, Westlaw through ch. 184 of 2020 2d Reg. Sess. of 26th Legis.) (making no mention of a presumption of retaliation).

[60] *See* Portman, *supra* note 3 (evaluating state retaliation laws based on these three categories of protected tenant activity and showing that Georgia, unlike some other states, protects all three types of activity); *see also* O.C.G.A. § 44-7-24(b) (West, Westlaw through Laws 2021, Act 6) (providing the "[e]lements of a prima-facie case under this Code section").

act by the landlord after a tenant complains either to the landlord or to a government agency,[61] a number of states still do not explicitly protect against retaliatory actions after a tenant becomes involved in a tenant organization or after a tenant exercises a legal right.[62] Therefore, conduct that may be held as retaliatory in Georgia may leave a tenant with no cause of action or defense in another state.

3. Protection Under the Common Law. A landlord retaliation statute may not encompass all possible retaliatory actions by a landlord, leaving some tenants without a statutory remedy. In some jurisdictions, those tenants could pursue their claim at common law.[63] But in Georgia, prior to the passage of H.B. 346, tenants had few common law options for relief.[64] *Green v. Housing Authority of Atlanta* described the common-law remedy available for landlord retaliation.[65] In that case, the Georgia Court of Appeals explained that evidence of a landlord's motive for an eviction action is "immaterial"[66] and should not be admitted as evidence except when "the landlord's motive to evict [is] so fundamental to the cause of

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[61] *See* Portman, *supra* note 3 (showing that, as of December 10, 2020, Mississippi and Pennsylvania were the only states with landlord retaliation laws in place that do not protect a tenant following a complaint made to a landlord or government agency).

[62] *See id.* (showing that sixteen states do not offer protections for a tenant's involvement in a tenants' organization, while twenty-two states do not offer protections when a tenant exercises a legal right). Some states do not protect tenants from retaliation for involvement in a tenant's organization. *See, e.g.*, ARK. CODE ANN. § 20-27-608(a) (West, Westlaw through Acts 18, 20, 56, 60, 87 and 94 passed by 2021 Reg. Sess. of 93d Ark. Gen. Assemb.) (making no mention of tenant organizations and only protecting tenants if "lead hazards" are present); HAW. REV. STAT. ANN. § 521-74(a) (West, Westlaw through 2020 Reg. Sess.) (protecting tenants after complaints made by the tenant, the department of health, or other governmental agency and after tenant repair requests). Other states do not protect tenants from retaliation following their exercise of a legal right. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-1381(A) (West, Westlaw through 1st Reg. Sess. of 55th Legis. (2021)) (protecting a tenant following complaints and involvement in a "tenants' union or similar organization," but not a tenant's exercise of a legal right).

[63] *See* 45 AM. JUR. 3D, *supra* note 21, § 3 (discussing the "common-law theory of retaliatory eviction" and noting that "where a state statute essentially codifies a common law retaliatory eviction defense, the statutory defense may be regarded as cumulative").

[64] *See, e.g.*, Green v. Hous. Auth. of Atlanta, 296 S.E.2d 758, 759–60 (Ga. Ct. App. 1982) (describing the limited circumstances in which evidence of a landlord's retaliatory motive for eviction can be introduced).

[65] *Id.*

[66] *Id.* at 759 (quoting Powell v. Blackstock, 13 S.E.2d 503, 505 (Ga. Ct. App. 1941)).

action as to be its foundation."[67] Without cases recognizing other retaliatory actions by the landlord, tenants lack protection at common law for other retaliatory acts, such as significant rent increases or a decrease in the tenant's rights or services.[68] It is, therefore, important that Georgia has a broad and protective landlord retaliation statute, since Georgia's common law offers few protections—unlike the common law of other states.[69]

4. Other Protections Beyond the Uniform Residential Landlord and Tenant Act. The Uniform Residential Landlord and Tenant Act is the model law for many state landlord retaliation statutes,[70] and Georgia appears to borrow from it as well.[71] The model law provides that "a landlord may not retaliate by increasing rent or decreasing services or by bringing or threatening to bring an action for possession after" the tenant takes one of the following actions:

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[67] *Id.* at 760.

[68] The Georgia Court of Appeals in *Green* only provided narrow protection by suggesting that evidence of a retaliatory motive may, in some circumstances, be admitted in an eviction proceeding but made no mention of when it may be relevant in other contexts. *Id.* at 760.

[69] *See* 45 AM. JUR. 3D, *supra* note 21, § 3 ("Where a landlord's conduct falls outside the scope of an existing retaliatory eviction statute, in some jurisdictions the tenant may still have a cause of action under a common-law theory of retaliatory eviction.").

[70] UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 5.101 (UNIF. LAW. COMM'N 1972); *see also* 45 AM. JUR. 3D, *supra* note 21, § 3 n.37 (noting that Alaska, Arizona, Florida, Hawaii, Iowa, Kansas, Kentucky, Montana, Nebraska, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, and Virginia have adopted Uniform Residential Landlord and Tenant Act § 5.101).

[71] *Compare* UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 5.101(a) (UNIF. LAW. COMM'N 1972) ("Except as provided in this section, a landlord may not retaliate by increasing rent or decreasing services or by bringing or threatening to bring an action for possession after: (1) the tenant has complained to a governmental agency . . . ; or (2) the tenant has complained to the landlord of a violation . . . ; or (3) the tenant has organized or become a member of a tenant's union or similar organization."), *with* O.C.G.A. § 44-7-24(b)–(c) (West, Westlaw through Laws 2021, Act 6) (stating that the elements of a prima-facie case of landlord retaliation include "[d]ecreased services to the tenant" or an "[increase of] the tenant's rent" within three months after the tenant "[c]omplained to a governmental entity," "[g]ave a landlord a notice to repair or exercise a remedy," or "[e]stablished, attempted to establish, or participated in a tenant organization"). The Act has since been revised, with the most recent version drafted in 2015. *See* REVISED UNIF. RESIDENTIAL LANDLORD AND TENANT ACT (UNIF. LAW. COMM'N 2015). However, since the 1972 version of the Act has been widely adopted, this Note will analyze that version of the Act. *See supra* note 70.

> (1) the tenant has complained to a governmental agency . . . ;
> (2) the tenant has complained to the landlord of [certain violations] . . . ; or
> (3) the tenant has organized or become a member of a tenant's union or similar organization.[72]

Some states, however, have provided more tenant protections than the model law does. Comparing other state statutes to the model law, specifically those states that exceed the model law's baseline, helps identify areas where Georgia's law can be improved.

For example, Florida's statute provides an illustrative, non-exhaustive list of possible tenant actions against which a landlord's actions will be deemed retaliatory.[73] This approach contrasts with the model law, which provides an exhaustive—and thus more limited—list of tenant actions that might form the basis of landlord retaliation.[74] A number of states also specifically include a landlord's *threat* of a retaliatory act as a sufficient "action" under the statute.[75] The model law also includes the threat of an action as sufficient to show retaliation but limits this to only the landlord's threat of an eviction.[76] Other states even list the landlord's increasing the tenant's obligations as a possible retaliatory action,[77]

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[72] UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 5.101(a) (UNIF. LAW. COMM'N 1972).

[73] *Compare* FLA. STAT. ANN. § 83.64(1) (West, Westlaw through ch. 184 of 2020 2d Reg. Sess. of 26th Legis.) (stating that "[e]xamples of conduct for which the landlord may not retaliate include, but are not limited to," certain enumerated situations), *with* UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 5.101(a) (UNIF. LAW. COMM'N 1972) (listing only three tenant actions after which "a landlord may not retaliate").

[74] *See supra* note 72 and accompanying text.

[75] *See, e.g.*, WIS. STAT. ANN. § 704.45(1) (West, Westlaw through 2019 Act 186) (stating that the landlord may not "threaten any of the foregoing" listed actions); 68 PA. STAT. AND CONS. STAT. ANN. § 399.11 (West, Westlaw through 2021 Reg. Sess. Act 1) (stating that it is "unlawful for any landlord ratepayer or agent or employee thereof to threaten or take reprisals against a tenant because the tenant exercised his rights").

[76] *See* UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 5.101(a) (UNIF. LAW. COMM'N 1972) (specifying that "a landlord may not retaliate . . . by bringing or threatening to bring an action for possession").

[77] *See, e.g.*, WASH. REV. CODE ANN. § 59.18.240(2) (West, Westlaw through 2020 Reg. Sess. of Wash. Legis.) (including "[i]ncreasing the obligations of the tenant" as part of the definition of "[r]eprisal or retaliatory action"); MICH. COMP. LAWS ANN. § 600.5720(1)(e) (West, Westlaw through P.A. 2020, No. 402, of 2020 Reg. Sess., 100th Legis.) (naming an increase of the

while the model law only includes "increasing rent" as a retaliatory action, but not increasing any other obligations.[78] Idaho's statute also includes more than the model law by providing protection for the tenant's act of retaining counsel or an agent to represent their interests.[79]

South Carolina and South Dakota provide broader protection for the tenant than the model law does by specifying that an increase of rent to anything above fair market value can be a retaliatory act.[80] This provision offers better protection for tenants than a statute that does not specify at what point a raise in rent becomes retaliatory. In the latter case, courts do not have statutory guidance in assessing whether a rent increase is retaliatory, leaving the outcome of a tenant's claim to judicial discretion. But a statute with the "fair market value" standard provides courts with a guidepost and protects tenants in the process.

Including definitions in a statute may also provide additional tenant protections than those offered by the model law.[81] For example, Oregon's statute defines the meaning of a landlord's "decreasing services" to include

> (a) Unreasonably restricting the availability of or placing unreasonable burdens on the use of common areas or facilities by tenant associations or tenants meeting to establish a tenant organization; and

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tenant's obligations under the lease as part of a possible retaliatory termination of tenancy defense).

[78] UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 5.101(a) (UNIF. LAW. COMM'N 1972) (limiting a landlord's possible retaliatory actions to "increasing rent," "decreasing services," or "bringing or threatening to bring an action for possession").

[79] IDAHO CODE ANN. § 55-2015(4) (West, Westlaw through 2020 2d Reg. & 1st Extraordinary Sess. of 65th Idaho Legis.) (protecting a tenant from retaliatory acts who "[r]etain[s] counsel or an agent to represent his interests").

[80] S.C. CODE ANN. § 27-40-910(a) (West, Westlaw through 2020 Legis. Sess.) ("[A] landlord shall not retaliate by increasing rent to an amount in excess of fair-market value . . . ."); S.D. CODIFIED LAWS § 43-32-27 (West, Westlaw through 2020 Sess. Laws) (providing that "[a] cause of action may arise . . . for retaliation by the lessor against the lessee if the lessor increases rents above fair market value").

[81] UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 5.101 (UNIF. LAW. COMM'N 1972) (defining some terms, but not explaining what is meant by "decreasing services").

> (b) Intentionally and unreasonably interfering with and substantially impairing the enjoyment or use of the premises by the tenant.[82]

Defining terms such as "decreasing services" to include specific actions, while also not creating an exhaustive list, is helpful to tenants. Clear definitions provide courts with statutory guidance on what is considered retaliatory, eliminating judicial discretion over the defined actions. Including a non-exhaustive definition, however, still provides an opportunity for tenants to argue that a landlord's actions were retaliatory.

The Oregon statute also provides additional protections for tenants by protecting both a tenant's complaint or expressed *intention* to complain to a government agency, as well as by protecting any complaint to the landlord "that is in good faith and related to the tenancy."[83] The model law, in contrast, does not protect intentions to complain, and only protects complaints to a landlord for failure to maintain the premises.[84] Oregon's statute also goes further than the model law by protecting a tenant who "has testified against the landlord in any judicial, administrative or legislative proceeding" and who has successfully defended an eviction action in the prior six months for specified reasons.[85]

Unlike the model law, the District of Columbia statute protects tenants who have been harassed or have had their privacy violated in retaliation by the landlord, as well as from "any other form of

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[82] OR. REV. STAT. ANN. § 90.385(2) (West, Westlaw through 2020 Reg. Sess. of 80th Legis. Assemb.).

[83] *Id.* § 90.385(1)(a)–(b).

[84] UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 5.101(a)(2) (UNIF. LAW. COMM'N 1972) (protecting a tenant who "has complained to the landlord of a violation under Section 2.104"); *see id.* § 2.104 (requiring a landlord "to [m]aintain [p]remises").

[85] OR. REV. STAT. ANN. § 90.385(1)(d)–(e) (West, Westlaw through 2020 Reg. Sess. of 80th Legis. Assemb. & 1st, 2d, & 3d Spec. Sess. of 80th Legis. Assemb.). Other states similarly protect a tenant who has testified or defended in a past proceeding or arbitration. *See, e.g.*, N.M. STAT. ANN. § 47-8-39(A)(5)–(6) (West, Westlaw through 2d Reg. Sess. & 1st & 2d Spec. Sess. of 54th Legis. (2020)) (protecting a tenant from retaliation who has "prevailed in a lawsuit," "has a lawsuit pending against the owner relating to the residency," or has "testified on behalf of another resident"); NEV. REV. STAT. ANN. § 118A.510(1)(e) (West, Westlaw through 31st & 32d Spec. Sess. (2020)) (protecting a tenant from retaliation who "has instituted or defended against a judicial or administrative proceeding or arbitration" in certain circumstances).

threat or coercion" by their landlord.[86] The Massachusetts statute also goes further than the model law by protecting tenants who have reported to law enforcement "an incident of domestic violence, rape, sexual assault or stalking . . . against a tenant, co-tenant or member of the household."[87] California's statute even prohibits "report[ing], or [threatening] to report, the [tenant] or individuals known to the landlord to be associated with the [tenant] to immigration authorities" as "a form of retaliatory conduct."[88]

Finally, Ohio departs from the model law by protecting tenants who decide to join with other tenants to negotiate with the landlord on the terms of the lease agreement.[89] Nevada protects tenants from retaliation if they refuse to consent to certain regulations adopted after the tenant began their lease, a protection that is absent in the model law.[90] New Mexico also surpasses the model law's provisions by protecting tenants who have abated rent in accordance with state law.[91]

Analyzing how other states have departed from the model law helps to identify ways in which the Georgia law can be improved, particularly since H.B. 346 appears to borrow from the model law as well.[92] The Georgia legislature could strengthen the law by adding the above-described provisions from other states' laws or by amending H.B. 346's existing provisions to offer greater protections for tenants. This Note will now discuss which of these potential

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[86] D.C. CODE ANN. § 42-3505.02(a) (West, Westlaw through Jan. 12, 2021).

[87] MASS. GEN. LAWS ANN. ch. 239, § 2A (West, Westlaw through ch. 226 of 2020 2d Ann. Sess.).

[88] CAL. CIV. CODE § 1942.5(c) (West, Westlaw through ch. 2 of 2021 Reg. Sess.).

[89] OHIO REV. CODE ANN. § 5321.02(A)(3) (West, Westlaw through File 115 of 133d Gen. Assemb. (2019–2020)) (protecting a tenant from retaliation who has "joined with other tenants for the purpose of negotiating or dealing collectively with the landlord on any of the terms and conditions of a rental agreement").

[90] NEV. REV. STAT. ANN. § 118A.510(1)(f) (West, Westlaw through 31st & 32d Spec. Sess. (2020)) (protecting a tenant from retaliation who "has failed or refused to give written consent to a regulation adopted by the landlord, after the tenant enters into the rental agreement, which requires the landlord to wait until the appropriate time has elapsed before it is enforceable against the tenant").

[91] N.M. STAT. ANN. § 47-8-39(A)(7) (West, Westlaw through 2d Reg. Sess. & 1st & 2d Spec. Sess. of 54th Legis. (2020)) (protecting a tenant from retaliation who has "abated rent in accordance with the provisions of" certain sections of the state code). See *infra* Section IV.C for a discussion of tenants who have abated rent.

[92] *See supra* note 71.

changes to H.B. 346 would be most beneficial to Georgia's low-income tenants.

C. RETALIATION LAW CONSIDERING HIGH EVICTION AND POVERTY RATES

Even before the economic challenges that accompanied the COVID-19 pandemic,[93] certain areas in Georgia had higher eviction rates compared to the national average.[94] For example, in 2016, Fulton County had an eviction rate of 5.23%, which was 2.89% above the national average, for an average of 29.38 evictions per day.[95] Likewise, in 2016, Dekalb County had an eviction rate of 6.22%, an amount 3.88% above the national average.[96] The state of Georgia as a whole had an average of 155.64 evictions per day in 2016, reaching an eviction rate of 4.71%, which was 2.37% higher than the national average.[97] Even before the COVID-19 pandemic, Georgia had high poverty rates in certain areas, with 13.5% of the state's population living in poverty in 2019.[98] In 2019, 13.8% of the Fulton county population lived in poverty, and 25.7% of the Clarke

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[93] *See generally* LAUREN BAUER, KRISTEN BROADY, WENDY EDELBERG & JIMMY O'DONNELL, HAMILTON PROJECT, TEN FACTS ABOUT COVID-19 AND THE U.S. ECONOMY (Sept. 2020), https://www.hamiltonproject.org/assets/files/FutureShutdowns_Facts_LO_Final.pdf (observing ten distinct impacts of the COVID-19 pandemic on the U.S. economy and describing an "economic crisis" that "is unprecedented in its scale").

[94] *See* EVICTION LAB, https://evictionlab.org/map/#/2016?geography=counties&bounds=-91.951,30.44,-77.848,35.675&locations=13,-83.445,32.649%2B13121,-84.469,33.79%2B13089,-84.223,33.771 (last visited Feb. 21, 2021) (providing eviction data for Georgia at state and county levels and showing Georgia's statewide eviction rate as exceeding the national average by 2.37%); *see also supra* note 7.

[95] EVICTION LAB, *supra* note 94. The eviction rate measures the number of evictions per one hundred renter homes. *Id.*

[96] *Id.*

[97] *Id.*

[98] *USDA Poverty Data*, *supra* note 8. These poverty rates are expected to increase due to the impact of the COVID-19 pandemic. *See generally* Stefan Sykes, *8 Million Americans Slipped into Poverty Amid Coronavirus Pandemic, New Study Says*, NBC NEWS (Oct. 16, 2020, 6:00 PM), https://www.nbcnews.com/news/us-news/8-million-americans-slipped-poverty-amid-coronavirus-pandemic-new-study-n1243762 (discussing a University of Chicago and University of Notre Dame study that "found that poverty rates temporarily stabilized amid federal economic intervention, but are now getting worse, particularly for certain groups").

county population lived in poverty.[99] Low-income individuals have less resources to protect themselves against retaliatory action by a landlord, especially a retaliatory eviction.[100] In the case of a successful eviction, they often have few to no options of where to go next.[101]

Because evictions disproportionately affect lower-income tenants, eviction and poverty rates are important factors to consider when determining possible reform to landlord retaliation law.[102] The higher rates in Georgia demonstrate why even stronger protection should be provided to low-income tenants than what is offered by the current provisions of H.B. 346. While H.B. 346 will hopefully diminish Georgia's high eviction rates, the state legislature can provide greater protection for low-income tenants against retaliatory landlord actions.

One exception to landlord liability for retaliation that will likely have a significant effect on low-income tenants is Section (d)(2)(A) of Georgia's law, which prohibits a retaliatory defense for an eviction if "[t]he tenant is delinquent in rent when the landlord

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[99] *USDA Poverty Data*, *supra* note 8.

[100] *Cf.* Philip ME Garboden & Eva Rosen, *Serial Filing: How Landlords Use the Threat of Eviction*, 18 CITY & COMMUNITY 638, 655–56 (2019) (researching eviction as a "process" and "find[ing] that landlords use serial filing [for rent collection] to create the threat of eviction" because "the *threat* of eviction can often generate revenue" whereas "[e]viction is expensive" and to force tenants into debt); Steven Gunn, Note, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385, 385 & nn.2–3 (1995) (discussing financial and emotional costs of eviction and the value of legal aid for poor tenants facing eviction); Lindsey, *supra* note 12, at 133 ("Some courts have recognized that low-income tenants living in tight urban housing markets are the renters who most need retaliatory eviction protections."). Low-income Americans often do not have access to counsel in civil matters and thus have less resources to protect themselves. *See* LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017) ("[Eighty-six percent] of the civil legal problems reported by low-income Americans in the past year received inadequate or no legal help.").

[101] *See* Gross, *supra* note 9 (explaining how a successful eviction "comes with a mark" on the tenant's record, preventing the tenant from obtaining public or other suitable housing).

[102] *See* Garboden & Rosen, *supra* note 100, at 641 ("[P]oor women with children are more likely to be evicted than other demographics, and individual factors such as family size, employment status, and neighborhood crime are important predictors of eviction."); *cf.* Deena Greenberg, Carl Gershenson & Matthew Desmond, *Discrimination in Evictions: Empirical Evidence and Legal Challenges*, 51 HARV. C.R.-C.L. L. REV. 115, 118 (2016) ("For low-income tenants, evictions can exacerbate residential instability even after the initial eviction.").

gives notice to vacate or files a dispossessory action."[103] This exception prevents tenants from relying on the retaliatory eviction defense when they have purposefully withheld rent in response to a landlord's refusal to fix issues of which the landlord had notice.[104] Low-income tenants would be better protected, and landlords would be more incentivized to fix dangerous issues, if Georgia's landlord retaliation statute did not disqualify tenants from using the retaliation defense for rent abatement. New Mexico's statutory language, for example, could be a model for this reform.[105]

But it is also true that low-income tenants might not be *purposefully* withholding rent due to a landlord's failure to fix issues but instead are simply unable to pay. In that case, a tenant receives no protection.[106] For situations such as this, landlord retaliation law in Georgia should be strengthened to emphasize the *motive* the landlord has for their action. For example, consider a tenant who often struggles to pay rent on time, but whose landlord has historically excused the tardiness. Then, the tenant complains to the landlord about a dangerous health condition in the home and is soon after evicted. In that situation, a court should inquire into the *true motive* of the eviction—the late rent payment or the reporting of the dangerous condition.

Adding the protections offered by other states' retaliation laws to Georgia's law would provide greater protection for tenants. Certain protections in particular would significantly help the situation of low-income tenants. Amending the lists of landlord and tenant actions that comprise a prima-facie case of landlord retaliation to be

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[103] O.C.G.A. § 44-7-24(d)(2)(A) (West, Westlaw through Laws 2021, Act 6).

[104] A hypothetical helps to illustrate this point. Suppose a family's air conditioner in their rented apartment breaks down in late May. After notifying the landlord several times to fix the issue, the family decides to purposefully withhold the June rent payment until the issue is fixed. When the issue still is not fixed in late June, the family reports their landlord to a local government entity. One week later, the family receives an eviction notice. Because of Section (d)(2)(A), the family cannot claim a retaliation defense since they withheld the rent payment. This is true even though the eviction may actually be in response to the family's report to the government entity.

[105] *See* N.M. STAT. ANN. § 47-8-39(A)(7) (West, Westlaw through 2d Reg. Sess. & 1st & 2d Spec. Sess. of 54th Legis. (2020)) (protecting tenants who have "within the previous six months . . . abated rent in accordance with" certain provisions of the New Mexico law).

[106] *See* O.C.G.A. § 44-7-24(d)(2)(A) (West, Westlaw through Laws 2021, Act 6) (removing landlord liability for retaliation when the tenant is delinquent in rent, regardless of the reason behind such delinquency).

non-exhaustive is one such change.[107] Tenants may upset landlords in numerous ways, while landlords may retaliate using means that the law as written does not capture.[108] Including protections against any *threats* of possible retaliation is another significant way to strengthen the law.[109] Threatened retaliation may scare tenants from taking justified actions against their landlords just as much as actual retaliation.[110] Protecting against threatened retaliation, furthermore, aligns with the policy behind landlord retaliation law.[111] Finally, following South Dakota's and South Carolina's examples, prohibiting retaliatory rent increases that exceed fair market value would benefit low-income tenants, who may struggle to pay rent even slightly above fair market value.[112] What may not seem retaliatory to some tenants may be severe for tenants of low income. A law that takes into account fair market value would alleviate the subjectivity of evaluations when determining whether a rent increase was retaliatory.

Now that this new law is in place, government agencies, non-profit organizations, and other tenant advocates must emphasize

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[107] *See supra* notes 42–48 and accompanying text. Florida's statute provides an example of such non-exhaustive language. *See supra* note 73.

[108] For example, if a tenant expressed an intention to complain to a government entity and the landlord retaliated against the tenant because of that expressed intention, the Georgia law would not protect that tenant. *See* O.C.G.A. § 44-7-24(b) (West, Westlaw through Laws 2021, Act 6) (providing a list of protected tenant actions, none of which mention a tenant's intent). *But see* OR. REV. STAT. ANN. § 90.385(1)(a) (West, Westlaw through 2020 Reg. Sess. of 80th Legis. Assemb. & 1st, 2d, & 3d Spec. Sess. of 80th Legis. Assemb.) (protecting a tenant who "has complained to, or expressed to the landlord in writing an intention to complain to, a governmental agency"). Similarly, a landlord's responding to a tenant's action by increasing the tenant's obligations in a way other than increasing rent, such as by imposing new obligations to pay for utilities or other fees, may not fall under the elements of a prima-facie case of retaliation in Georgia if the landlord's action does not rise to the level of having "[m]aterially interfered with the tenant's rights." O.C.G.A. § 44-7-24(c). *But see* statutes cited *supra* note 77.

[109] *See supra* note 75 and accompanying text.

[110] *See, e.g.*, Garboden & Rosen, *supra* note 100, at 650 (explaining that landlords rely on tactics such as "the monthly threat of eviction" and "serial eviction filings . . . to shape tenant behavior," and that these tactics have "important effects for tenants' ability (or perceived ability) to advocate for their own rights").

[111] Annotation, *Retaliatory Eviction*, *supra* note 24, § 2[a] ("[R]etaliatory eviction statutes tend to be founded on the principle that tenants should be encouraged to come forward and report code violations without fear of reprisal from the landlords.").

[112] *See supra* note 80 and accompanying text.

access to counsel and to information to ensure that tenants can take advantage of the law's protections.[113] Tenants struggle to succeed when challenging an eviction.[114] Tenants lack the right to counsel, while most landlords have representation.[115] Programs and organizations that provide information on landlord retaliation law and access to counsel enable low-income tenants to protect themselves against retaliatory landlords, particularly when these tenants might not otherwise know about the next steps to take following a wrongful action taken against them.[116] More funding and resources should be allocated to these types of programs and organizations, either from private individuals and entities or from state and local government.[117] More funding will strengthen the

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[113] *See, e.g.*, Alexander Popp, *New Georgia Law to Shield Renters from Retaliation*, FORSYTH CNTY. NEWS (July 15, 2019, 12:16 PM), https://perma.cc/N2LS-Y5ZL (quoting the president of The Place of Forsyth, as saying, "While [H.B. 346] is certainly a step in the right direction, the responsibility of enforcement ultimately lies at the local level.").

[114] *See* Ericka Petersen, *Building a House for Gideon: The Right to Counsel in Evictions*, 16 STAN. J. C.R. & C.L. 63, 76 (2020) (describing the "devastatingly simple" process of eviction court as one in which "[t]enants, who are 'typically poor, often women, and disproportionately racial and ethnic minorities,' are quickly pushed through high-volume courtrooms without much, if any, chance to raise a defense" (quoting Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 47 (2010))); Lindsey, *supra* note 12, at 117 ("To start, studies have found that a tenant-defendant's likelihood of winning at trial in summary eviction court is extremely low.").

[115] *See* Petersen, *supra* note 114, at 76 ("Most landlords are represented by counsel, while most tenants are not. Even without counsel, landlords still fare much better than tenants regardless of the merits, probably due to systemic bias." (footnote omitted)); *see also* Laurie Ball Cooper, *Legal Responses to the Crisis of Forced Moves Illustrated in* Evicted, 126 YALE L.J.F. 448, 453 (2017) (book review) (describing the "dramatic disparity in legal representation for parties in eviction court," where "90 percent of landlords are represented by attorneys, and 90 percent of tenants are not" (quoting MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 303 (2016))).

[116] *See* Ball Cooper, *supra* note 115, at 453 (explaining that some jurisdictions have created "programs providing legal representation to tenants" to assist "tenants [who] are often ill-equipped to avail themselves of [local housing] laws when proceeding alone"). Atlanta Legal Aid is an example of one such program in Georgia. *See* ATLANTA LEGAL AID, https://atlantalegalaid.org/ (last visited Apr. 20, 2021) (describing the organization's work as "help[ing] low-income people navigate the complexities of the court system at the most vulnerable times in their lives").

[117] Additionally, some cities in the United States have implemented a right to counsel for eviction proceedings, a reform that may be beneficial in Atlanta or other Georgia cities. *See* Heidi Schultheis & Caitlin Rooney, *A Right to Counsel Is a Right to a Fighting Chance*, CTR.

capacity of these organizations to ensure that low-income tenants know their rights and have a better opportunity to protect themselves.

D. ARGUMENTS AGAINST STRONG RETALIATION LAW

Despite the strong policy supporting landlord retaliation law, arguments against these laws exist. One argument against H.B. 346, and arguably against all landlord retaliation statutes, is the potential for negative effects on landlords.[118] Opponents of H.B. 346 fear the "onus" that may be placed on landlords in order to evict delinquent tenants and cite concerns "that landlords would now be forced to affirmatively prove the intent of their actions regarding tenant disputes and certain actions."[119]

Opponents of landlord retaliation laws outside Georgia have specifically raised concerns about the rebuttable presumption of retaliation that many statutes include.[120] Such opponents argue that these presumptions "[do not] take into account that oftentimes there [is] retaliatory action by the tenant or the former tenant against the landlord."[121] This shifted burden of proof, they contend, "would create an unlevel playing field in favor of the ex-tenant and an incentive for the tenant to sue the landlord."[122]

While HB. 346, as well as many other landlord retaliation laws around the country, places a burden on landlords to prove the nonretaliatory motive of their actions, the social benefit of tenant

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FOR AM. PROGRESS (Oct. 2, 2019, 12:00 PM), https://www.americanprogress.org/issues/poverty/reports/2019/10/02/475263/right-counsel-right-fighting-chance/ (explaining that New York City, San Francisco, and Newark, New Jersey, have all "provid[ed] a right to counsel in eviction cases").

[118] *See, e.g.*, Joseph N. Guardino & Megan A. Kirk, Note, *Landlord and Tenant*, 36 GA. ST. U. L. REV. 193, 204 (2019) (explaining various concerns expressed by "legislators that opposed" H.B. 346).

[119] *Id.*

[120] *See Hearing on L.B. 435 Before the Judiciary Comm.*, 106th Leg. 116–17 (Neb. 2019) (statement of John Chatelain, Member, Metropolitan Omaha Property Owners Association, and Member, Statewide Property Owners Association) [hereinafter *Hearing on L.B. 435*] (discussing his concerns about an amendment to Nebraska's existing landlord retaliation law that would include complaining to a landlord as a protected tenant action); see *supra* Section IV.B.*1* for examples of states with a similar presumption.

[121] *See Hearing on L.B. 435*, *supra* note 120, at 117.

[122] *Id.*

protection is worth the cost. The burden has been appropriately placed on landlords, since a significant power imbalance often characterizes the landlord-tenant relationship in favor of landlords.[123] And tenants often lack representation in eviction proceedings, while landlords tend to be represented—meaning that landlords are already at an advantage in the courtroom.[124] If the burden were instead placed on the *tenant* to prove that an action was retaliatory, tenants would have less resources to meet that burden.[125] The burden should be on the landlord to help right the power imbalance in the courtroom and provide tenants with a fair opportunity for success.[126] While it may be true that this approach will require landlords "to affirmatively prove the intent of their actions,"[127] and that it may not take into account all previous tenant actions,[128] the need to protect tenants and "to hold [landlords] accountable" outweighs these costs.[129]

Lastly, critics argue that H.B. 346 does "not help address the underlying conditions that everyone is concerned about," since "[i]t [does not] require the landlords to fix [the housing problems complained of]."[130] Some argue that "unkempt properties should be policed by county and city code enforcement officers, not through the court system."[131] But the county and city code cannot be properly enforced if tenants are too afraid of repercussion to report any issues.[132] While retaliation laws themselves might not require landlords to fix any issues, allowing tenants to report issues without

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[123] *See* Lindsey, *supra* note 12, at 116 ("In fact, studies show that the balance of power between landlords and tenants within the summary eviction courts is skewed in favor of landlords.").

[124] *See supra* notes 114–115 and accompanying text.

[125] *See* Lindsey, *supra* note 12, at 117 ("Tenants' lack of representation directly affects their ability to bring a case and articulate a valid defense.").

[126] *See id.* at 115 ("The judicial expansion of the methods and circumstances in which the tenant may invoke the protections of retaliatory eviction law, combined with judicial and legislative authority allowing a rebuttable presumption in favor of the tenant, indicates an emerging pattern of rebalancing the scales of justice.").

[127] Guardino & Kirk, *supra* note 118, at 204.

[128] *See supra* note 121 and accompanying text.

[129] Niesse, *supra* note 1.

[130] *Id.* (quoting Decatur real estate attorney David Metzger).

[131] *Id.*

[132] *See id.* (explaining that "[tenants are] very scared to complain to anyone because they're afraid they'll be evicted" (quoting state Rep. Sharon Cooper)).

fear of retaliation still addresses these underlying property conditions by providing an avenue for tenants to challenge the conditions.[133]

V. CONCLUSION

H.B. 346 was a significant step for Georgia in protecting its tenants from landlord retaliation. While Georgia's law is written just as strongly, if not more so, than the laws of a number of other states, landlord retaliation law in Georgia can be strengthened to better protect all tenants, especially those with low-income. The statutes of other states offer examples of provisions that can be added to bolster Georgia's law. Adding protections relating to rent abatement, emphasizing landlords' motives, and establishing better access to counsel and information for low-income tenants are key reforms that Georgia could implement in light of its high poverty and eviction rates. H.B. 346 provided needed improvements in Georgia's landlord-tenant law and strengthening the law further will ensure that Georgia families can remain in their homes without fearing a landlord's retaliation.

[133] *See, e.g.*, Popp, *supra* note 113 (stating that proponents of H.B. 346 "say it is a step in the right direction for ensuring safe housing for all").