August 4, 2020

The Honorable David Chiu
California State Assembly
State Capitol, Room 4112
Sacramento, CA 95814

RE: AB 1436 (Chiu) – Rental Payment Default: State of Emergency – Oppose

Dear Assembly Member Chiu:

On behalf of the organizations listed below, we are writing to inform you that the organizations have taken an oppose position on AB 1436, your bill that will prohibit a rental property owner from collecting unpaid rent for designated period of time.

Recognizing that we are in unprecedented times, we understand that tenants who have been truly affected by the COVID-19 virus – and the government response to it – need protections. In fact, they have already been granted extensive protections under federal law, state executive orders, judicial rules, and local laws, not to mention the countless number of owners who have deferred and reduced

rent to help their tenants without a legal requirement to do so. **The bill does not provide for – nor is it tied to – any funding to help tenants and landlords with the unpaid rent.** There is no way many rental property owners will be able to keep their buildings from foreclosure if AB 1436 were to become law. Here's why:

Under AB 1436, Rental Property Owners Will Go for an Extended Period of Time with No Rent Payments – Because AB 1436 is linked to the state proclamation, a rental property owner will likely receive no rent for more than 1 year. With no rent payments to cover the mortgage and other expenses at the property, including employee salaries, there is no question that rental property owners will lose their single-family rentals and multifamily buildings to foreclosure – notwithstanding the forbearance language. In many cases, the rent payments are an owner's only source of income. Without a source of funding to help tenants and landlords, it is highly unlikely that tenants will be able to pay the back rent that is owed.

The Assembly Banking Committee and Legislative Counsel have opined that Bank Forbearance Language Does not Carry the Force of Law – While we appreciate the attempt to provide forbearance for rental property owners, the Assembly Banking Committee opined in a letter on March 20, 2020, that, "State authority over large national banks is significantly constrained by federal law. Under the National Bank Act and related case law, courts have widely upheld federal preemption over state laws that interfere with the business of banking. Courts would likely stop any attempts by the state to force banks to limit rates or fees, demand forbearance or loan modifications, or require banks to make certain loans. Due to federal preemption, state laws cannot address many of the challenges faced by our constituents who cannot repay their loans. National banks have significant market share in residential mortgages, credit cards, and commercial loans. State officials may urge these banks to give their borrowers relief, as the Governor of New York did yesterday, but these requests do not carry the force of law. State officials may also urge federal policymakers to enact broad debt relief measures that could cover all bank loans. we fear it will not withstand regulatory or legal challenges.[i]"

California's Office of the Legislative Counsel agrees that there is a high risk of preemption regarding any provision that forces banks to engage in forbearance or that prohibits specified fees or specific repayment plans.

According to the Federal Office of the Comptroller of Currency, federal regulations "preempt state laws that conflict with the real estate lending powers of banks and specifically preempt state laws that interfere with banks' ability to make mortgage loans secured by real estate. State action that limits banks' ability to foreclose on a defaulted loan and take possession of collateral, beyond what is provided for in the CARES Act, would interfere with banks' powers to make secured mortgage loans.[ii]" At the same time, we must point out for those owners who do not have a mortgage but depend on rent for their retirement income, the forbearance language is of no assistance to them.

AB 1436 Substantially Impairs Existing Contracts and Takes Property without Compensation in Violation of the State and Federal Constitutions – The bill negates existing contractual rental payment obligations on the part of the tenant and only allows the owner to collect back rent if the owner can persuade the tenant to sign an agreement to pay the back rent. Any allegation from tenants that they felt "harassed or intimidated" to sign an agreement will invalidate that agreement. The bill provides no mandate that a tenant sign this agreement to pay the back rent and instead provides every incentive for a tenant to refuse to sign one. No signature from the tenant means the owner (1) can't collect the back rent, (2) can't terminate the tenancy for failure to pay, and (3) can't report the unpaid rent to a credit reporting agency. The bottom line is that tenants are not only protected from eviction, they are protected from any demand by the owner to pay rent that is owed. **This equates to free rent.**

The United States and California Constitutions prohibit governments from passing laws that impair the obligation of contracts.[iii] A regulation is an impairment of contract if there is a substantial impairment and if the means chosen to implement the regulation is of a character inappropriate to its public purpose.[iv] In this instance, a policy that provides free rent and endangers the ability of rental housing providers to keep their properties in good repair and pay their employees is not sufficiently tailored to serve the purpose of keeping residents housed.[v]

Additionally, the United States and California Constitutions prohibit the taking of property without just compensation.[vi] That just compensation requirement is designed to bar the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[vii]

AB 1436 transfers the COVID-19 burdens of tenants to rental housing providers and represents just the sort of action the taking clause was intended to prevent. The severability clause included in the bill, no doubt, anticipates these constitutional challenges. However, by that time, many landlords – up and down the state – will have lost their rental properties to foreclosure.

AB 1436 Requires No Proof of Tenant Hardship – Unfortunately, during this pandemic, some tenant organizations have unethically urged all tenants to forego rent payments, even if those tenants have been unaffected financially by COVID-19 and can afford to pay. AB 1436 lends to this unethical action by allowing tenants to withhold rent with no proof of a hardship or inability to pay. They simply need to provide a statement that they cannot pay. We are already seeing this in our communities; as local governments pass ordinances allowing for delayed rent payments, tenants have begun to withhold the rent, some announcing "solidarity with other tenants," despite the fact that they have also announced their ability to pay.

AB 1436 Invalidates Local Ordinance Payment Agreements – The bill provides that any agreement that conflicts with or purports to waive the provisions of this section is prohibited and is void as contrary to public policy. This would invalidate the payment plan agreements that landlords and tenants have entered into, which are consistent with the repayment requirements developed by local governments.

AB 1436 Limits the Use of Security Deposits – The bill limits the use of a security deposit by a property owner even if the tenant moves out. The language needs to be made clear that the owner is not required to return the security deposit to the tenant if the tenant moves out and there is damage to the unit and/or the tenant leaves owing back rent.

For these reasons listed above, we must oppose AB 1436.

Sincerely,
California Apartment Association, Debra Carlton
California Building Industry Association, Robert Raymer
California Business Properties Association, Rex Hime
California Council for Affordable Housing, Pat Sabelhaus
California Downtown Association, Jason Bryant
California Institute of Real Estate Management, Commercial Real Estate Development of California, Building Owners and Managers Association of California, Matthew Hargrove
Downtown San Diego Partnership, Jason Bryant
Highridge Costa, Michael Costa
Western Manufactured Housing Communities Association, Sheila Dey

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[i] https://buckleyfirm.com/sites/default/files/Buckley%20InfoBytes%20-%20California%20State%20Assembly%20Banking%20and%20Finance%20Memo%20on%20Covid-19%202020.03.20.pdf

[ii] https://www.occ.treas.gov/news-issuances/bulletins/2020/bulletin-2020-62.html

[iii] U.S. Const. art. I, § 10, cl. 1; Cal. Const. art. I, § 9.

[iv] *Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 244; see, e.g., *Ross v. Berkeley* (1987) 655 F.Supp. 820 (finding that a rent control ordinance severely impaired contractual obligations in an unreasonably overbroad manner ill-tailored to its objectives).

[v] Unfortunately, this is not the first time governments have been called on to address an emergency that impacts the average person's ability to pay their bills. In the 1920s, the Supreme Court addressed a series of rent control laws in the wake of World War I. In all of these cases, the government was allowed to foreclose eviction by a holdover tenant, but the tenant was not exempt from the obligation to pay a reasonable rent. (See *Levy Leasing Co, Inc. v. Siegel* (1922) 258 U.S. 242; *Marcus Brown Holding Co. v. Feldman* (1921) 256 U.S. 170; *Block v. Hirsch* (1921) 256 U.S. 135.) In addition, during the Great Depression, the Court considered a state's mortgage moratorium law that allowed troubled homeowners to extend their mortgage payments through a court review process – even in that case, the homeowners still had to pay a reasonable rental value while the mortgage payments were extended. (*Home Building Assn. v. Blaisdell* (1934) 290 U.S. 398; see also *Wright v. Vinton Branch of Mountain Turs Bank* (1937) 300 U.S. 440.)

[vi] U.S. Const., 5th Amendment (applicable to states through 14th Amendment); Cal. Const., rt. I, §19.

[vii] *Pennell v. San Jose* (1988) 485 U.S. 1, 9.