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## Sheltering in Place: How California Confronted COVID-19's Looming Eviction Crisis Under the Contract Clause

Matt Urban

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# Sheltering in Place: How California Confronted COVID-19's Looming Eviction Crisis Under the Contract Clause

Matt Urban\*

## *Code Sections Affected*

Civil Code §§ 789.4, 798.56, 1942.5, 2924.15, Title 19 (commencing with § 3273.01) to Part 4 of Division 3 (new), §§ 1946.2, 1947.12, 1947.13 (amended); Civil Procedure Code § 116.223, 1161.2.5, Chapter 5 (commencing with Section 1179.01) to Title 3 of Part 3, §§ 1161, 1161.2 (amended).

AB 3088 (Chiu); 2020 STAT. CH. 37.

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*“While emergency does not create power, emergency may furnish the occasion for the exercise of power.”*

– Chief Justice Charles Evans Hughes<sup>1</sup>

## I. INTRODUCTION

California renters faced severe challenges long before COVID-19 caused an economic collapse.<sup>2</sup> For decades, housing production failed to meet demand, contributing to average monthly rents in the state rising to 50% higher than the rest of the nation.<sup>3</sup> In the metropolitan regions of Los Angeles and the San Francisco Bay Area, the burden of housing costs affects not just low-wage earners but moderate-income households as well.<sup>4</sup> Even Raul Peralez, an elected official in San José, could not escape the effects of the affordable housing shortage in his city.<sup>5</sup>

The Peralez family lived in their rented home for nine years before their landlord evicted them, sold the property, and retired.<sup>6</sup> Councilmember Peralez reluctantly searched for a new home for his wife, six-month-old son, and two dogs, but he struggled to find affordable options.<sup>7</sup> Most advertisements he saw targeted the more affluent demographic of tech workers in the area.<sup>8</sup> After a “stressful and really depressing” search, the Peralez family found a smaller home to rent for \$600 more per month than they previously paid.<sup>9</sup> Councilmember Peralez said that the

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1. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 437 (1934).

2. See Jill Cowan & Robert Gebeloff, *As Rents Outrun Pay, California Families Live on a Knife's Edge*, N.Y. TIMES: CAL. TODAY (Nov. 19, 2019), <https://nyti.ms/330ujv2> (on file with the *University of the Pacific Law Review*) (providing a snapshot of the day-to-day realities of the housing crisis). See generally CAL. DEP'T OF HOUS. & CMTY. DEV., CALIFORNIA'S HOUSING FUTURE: CHALLENGES AND OPPORTUNITIES FINAL STATEWIDE HOUSING ASSESSMENT 2025, at 1–2 (2018), available at [https://www.hcd.ca.gov/policy-research/plans-reports/docs/SHA\\_Final\\_Combined.pdf](https://www.hcd.ca.gov/policy-research/plans-reports/docs/SHA_Final_Combined.pdf) (on file with the *University of the Pacific Law Review*) [hereinafter STATEWIDE HOUSING ASSESSMENT] (summarizing data, challenges, and recommendations regarding the housing crisis in California).

3. See MAC TAYLOR, LEGISLATIVE ANALYST'S OFFICE, CALIFORNIA'S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES 3 (2015), available at <https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf> (on file with the *University of the Pacific Law Review*) (noting that in coastal areas, “community resistance to housing, environmental policies, lack of fiscal incentives for local governments to approve housing, and limited land constrains new housing construction”).

4. See STATEWIDE HOUSING ASSESSMENT, *supra* note 2, at 28 (defining low-wage earners as receiving \$30,000–\$44,999 annually and moderate-income as \$45,000–\$74,999 annually).

5. See Nadia Lopez, *San Jose Housing Crisis: Councilmember Raul Peralez Evicted from His Home*, SAN JOSÉ SPOTLIGHT (Apr. 28, 2019), <https://sanjosespotlight.com/san-jose-housing-crisis-councilmember-raul-peralez-evicted-from-his-home/> (on file with the *University of the Pacific Law Review*) (observing that “[a]s a renter in the Silicon Valley, no one is completely safe from eviction”).

6. See *id.* (quoting Peralez as saying his family was “very sad to leave the home that we were in”).

7. See *id.* (noting that the family dogs further reduced rental options).

8. See *id.* (quoting Peralez as supporting affordable housing and tech industry growth in San José: “In my mind, you can’t have one without the other”).

9. See *id.* (reporting that the Peralez family downsized from a three-bedroom house with a yard to a two-bedroom townhouse without a yard).

experience helped him better understand the struggles a tenant faces finding affordable housing in his city.<sup>10</sup>

The onset of COVID-19 threatened to exploit California's housing affordability shortage and create an eviction crisis.<sup>11</sup> On March 27, 2020, Governor Gavin Newsom placed a temporary moratorium on evictions against renters impacted by COVID-19.<sup>12</sup> The Judicial Council of California suspended all eviction proceedings soon after.<sup>13</sup> City lawmakers feared a wave of evictions when statewide eviction moratoriums expired, and Councilmember Peralez co-sponsored a proposal to suspend rent for struggling families in San José.<sup>14</sup> The City Council rejected the plan over concerns it would violate federal and state constitutions.<sup>15</sup> However, the City Council did adopt Councilmember Peralez's following proposal to extend a local eviction moratorium and implement a temporary rent freeze.<sup>16</sup>

The Judicial Council extended the statewide eviction moratorium until the California State Legislature reconvened several months later—delayed after multiple members and staffers tested positive for COVID-19.<sup>17</sup> Just before the legislative session ended, Governor Newsom signed Chapter 37 to prevent

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10. See Lopez, *supra* note 5 (quoting the Councilmember as saying he thought he resembled “a lot of individuals that have the same fears of gentrification and being priced out of their own city”).

11. See Isabel Solange Muñoz, *The Coronavirus Pandemic Is Making the Housing Crisis Even Worse*, THE CONVERSATION (Apr. 21, 2020), <https://theconversation.com/the-coronavirus-pandemic-is-making-the-us-housing-crisis-even-worse-136025> (on file with the *University of the Pacific Law Review*) (warning that the housing crisis creates displacement and gentrification which “lead to greater inequality, greater social and economic insecurity and can undermine social cohesion”).

12. Cal. Exec. Order No. N-37-20 (Mar. 27, 2020), available at <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.27.20-EO-N-37-20.pdf> (on file with the *University of the Pacific Law Review*).

13. See CAL. COURTS, CALIFORNIA RULES OF COURT app. I, at 1 (2020), available at <https://www.courts.ca.gov/documents/appendix-i.pdf> (on file with the *University of the Pacific Law Review*) (“A court may not issue a summons on a complaint for unlawful detainer unless the court finds, in its discretion and on the record, that the action is necessary to protect public health and safety.”).

14. See Nadia Lopez, *Coronavirus: San José Lawmakers Propose Suspending Rent*, SAN JOSÉ SPOTLIGHT (Apr. 6, 2020), <https://sanjosespotlight.com/coronavirus-san-jose-lawmakers-propose-suspending-rent/> (on file with the *University of the Pacific Law Review*) (reporting on Councilmember Peralez's proposal with Councilmember Magdalena Carrasco to waive three months' rent for tenant households struggling due to COVID-19).

15. See Nadia Lopez, *San José Strikes Down Proposal to Suspend Rent, Citing Constitutional Concerns*, SAN JOSÉ SPOTLIGHT (Apr. 8, 2020), <https://sanjosespotlight.com/coronavirus-san-jose-lawmakers-propose-suspending-rent/> (on file with the *University of the Pacific Law Review*) (highlighting City Attorney Rick Doyle's concern that the plan would also amount to a taking of private property).

16. See Nadia Lopez, *Updated: San José Approves Rent Freeze, Extends Moratorium on Evictions*, SAN JOSÉ SPOTLIGHT (Apr. 14, 2020), <https://sanjosespotlight.com/san-jose-mulls-rent-freeze-more-tenant-protections-through-may/> (on file with the *University of the Pacific Law Review*) (including concerns from opposing councilmembers who felt extending the moratorium until the end of 2020 placed a significant burden on “mom-and-pop landlords”).

17. See Melody Gutierrez, *California Legislative Leaders Ask Courts to Keep Coronavirus Eviction Ban in Place*, L.A. TIMES (Aug. 5, 2020), <https://www.latimes.com/california/story/2020-08-05/california-legislative-leaders-judicial-council-delay-lifting-eviction-moratorium-coronavirus> (on file with the *University of the Pacific Law Review*) (noting that the Judicial Council originally planned to vote on whether to end the moratorium in June).

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evictions through January 31, 2021 where a tenant can demonstrate lost income due to COVID-19.<sup>18</sup> Despite federal and state prohibitions on impairing contractual obligations, Chapter 37 and other eviction moratoriums are constitutionally permissible delays in the enforcement of contractual remedies.<sup>19</sup> Chapter 37 is bold and necessary legislation; however, under the Contract Clause, California lawmakers could use elements of previous proposals to provide more comprehensive protection for tenants against COVID-19.<sup>20</sup>

## II. LEGAL BACKGROUND

The United States Constitution and the California Constitution expressly forbid impairing the obligations of contracts.<sup>21</sup> These prohibitions, however, are not absolute.<sup>22</sup> Section A describes the evolution of judicial evictions as a remedy for landlords.<sup>23</sup> Section B discusses “unlawful detainer”—the primary judicial eviction process in California.<sup>24</sup> Section C explores the constitutional issues raised by legislation impairing the obligations of contracts.<sup>25</sup> Section D recounts the provisions of two prominent bills that California lawmakers considered before enacting Chapter 37.<sup>26</sup>

### *A. The Evolution of Judicial Evictions*

Landlord–tenant law derives from the feudal system and initially regarded leases merely as private contracts.<sup>27</sup> Increased urbanization changed society’s

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18. See Matt Levin, *Analysis: How Renters, Landlords, and Banks Fared in the Eviction Compromise*, CALMATTERS (Aug. 31, 2020), <https://calmatters.org/housing/2020/08/renters-landlords-eviction-deal-california-pandemic-moratorium/> (on file with the *University of the Pacific Law Review*) (noting lawmakers framed the statute as “a stopgap to buy time until the federal government steps in with more direct financial assistance”).

19. See *infra* Sections IV.A–B (arguing temporary eviction moratoriums are substantial impairments on the contractual relationship between landlord and tenant but they reasonably advance the legitimate purpose of fighting the COVID-19 emergency).

20. See *infra* Section IV.C (examining how provisions from previous proposals could provide additional support to combat COVID-19).

21. See U.S. CONST. art. I, § 10, cl. 1 (“No State . . . shall pass any . . . Law impairing the Obligation of Contracts . . . .”); see also CAL. CONST. art. I, § 9 (“[A] law impairing the obligation of contracts may not be passed.”).

22. See *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 428 (1934) (observing that judicial decisions “put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula”); see also B.E. WITKIN ET AL., *Obligation of Contracts*, in SUMMARY OF CALIFORNIA LAW § 1426 (11th ed. 2020) (identifying permissible changes to remedies and procedures in California contract law).

23. *Infra* Section II.A.

24. *Infra* Section II.B.

25. *Infra* Section II.C.

26. *Infra* Section II.D.

27. See JESSE DUKEMINIER ET AL., PROPERTY 282–83 (9th ed. 2017) (distinguishing between the

needs, and the law came to recognize a tenant's property interest in their home.<sup>28</sup> A modern lease became both a contract and the conveyance of a right to possess the property.<sup>29</sup>

When a tenant breaches an obligation of the lease, the landlord may choose to terminate the lease.<sup>30</sup> A "holdover tenancy" occurs when a tenant remains in possession of rented property after the lease ends.<sup>31</sup> At common law, "ejectment" was the only judicial remedy to remove a tenant and recover damages for unpaid rent.<sup>32</sup> Ejectment frequently failed to serve the needs of landlords because the process was cumbersome and expensive.<sup>33</sup> As a result, property owners often resorted to "self-help"—taking action outside the judicial system—to retrieve possession of property from a tenant.<sup>34</sup>

In the nineteenth century, legislatures developed statutes that created summary proceedings—non-jury trials that quickly resolve cases—as an alternative to ejectment and self-help evictions.<sup>35</sup> While self-help is often an available remedy to recover personal property, the modern approach strongly disfavors the practice in the residential real estate context.<sup>36</sup> Today, all states offer a form of summary proceedings to execute evictions, and almost all states prohibit repossession of residential real estate property through self-help.<sup>37</sup> By offering a safe, efficient, and legal substitute to self-help evictions, states aim to deter violent, emotionally charged confrontations between landlords protecting their investments and tenants

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landlord's "seisin" and the tenant's "possession").

28. See Randy G. Gerchick, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 761–62 (1994) (describing "a phenomenon comparable to the prof[-]consumer shift in consumer-producer relations").

29. See DUKEMINIER ET AL., *supra* note 27, at 469 (explaining that the lease creates contractual rights because "leases usually contain a number of promises . . . such as the promise by the tenant to pay rent or a promise by the landlord to provide utilities").

30. See *id.* at 519–20 (instructing that if a tenant breaches the obligation of a lease and retains possession, "the landlord may also terminate the lease and recover possession").

31. See *id.* at 467–68 ("[C]ommon law rules give the landlord confronted with a holdover essentially two options—eviction (plus damages), or consent (express or implied) to the creation of a new tenancy.").

32. See *Ejectment*, BLACK'S LAW DICTIONARY, (11th ed. 2019) (defining the writ's essential allegations as "(1) the plaintiff has title to the land, (2) the plaintiff has been wrongfully dispossessed or ousted, and (3) the plaintiff has suffered damages"); see also DUKEMINIER ET AL., *supra* note 27, at 508 (noting that ejectment "still exists today, with statutory modifications").

33. See DUKEMINIER ET AL., *supra* note 27, at 508 (concluding that that ejectment "ill served the landlord's needs").

34. See *id.* (explaining that self-help became "a very important remedy" because ejectment was the landlord's only alternative).

35. See *Summary Proceeding*, BLACK'S LAW DICTIONARY, (11th ed. 2019) (referencing English statutes that limited acquittal and condemnation in the proceedings to appointed judges, not juries); see also DUKEMINIER ET AL., *supra* note 27, at 508 (noting the common nomenclature of "forcible entry and detainer" statutes).

36. See Adam B. Badawi, *Self-Help and the Rules of Engagement*, YALE J. ON REG. 1, 24 (2012) ("Nearly every American jurisdiction has eliminated the ability to exercise this privilege by statute or by court ruling in the residential domain and most states have done likewise in the commercial context.").

37. See DUKEMINIER ET AL., *supra* note 27, at 506, 508 (noting a dozen states allow for the use of "peaceable self-help in commercial settings").

protecting their homes.<sup>38</sup>

### B. Evictions in California: Unlawful Detainer

When a tenant fails to pay rent on time, the tenant does not automatically forfeit all interests in the property.<sup>39</sup> The tenant's default only enables the landlord to use legal mechanisms to terminate the lease.<sup>40</sup> The primary legal process to evict a tenant in California is the "unlawful detainer" claim, which is much more prevalent than ejectment.<sup>41</sup> Unlawful detainer's summary proceeding, enacted by statute, is a substitute for the landlord's self-help remedy.<sup>42</sup> California expressly prohibits a landlord from using the self-help eviction techniques of interrupting utility service, preventing access, and removing doors or windows from rented property to terminate an occupancy.<sup>43</sup>

To evict a tenant under the existing statute, a landlord must provide the tenant who fails to pay rent with at least three days' written notice.<sup>44</sup> If the tenant defaults and continues to possess the property without permission after the notice period elapses, then the tenant violates the unlawful detainer statute.<sup>45</sup> The landlord may then start the unlawful detainer case by filling out several forms and paying the local court's administrative fee.<sup>46</sup> The landlord must serve notice of the complaint to the tenant, who has at least five days to respond.<sup>47</sup> If the case goes to summary proceeding and the landlord is successful, the landlord can ask the local sheriff to

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38. See Gerchick, *supra* note 28, 782 (citing "over-whelming concern for preventing violent confrontations between angry and frustrated landlords and tenants").

39. See Davidson v. Quinn, 138 Cal. App. 3d Supp. 9, 11 (1982) (holding that default "does not *ipso facto* work a forfeiture of the leasehold") (quoting Lamey v. Masciotra, 273 Cal. App. 2d 709, 714 (1969)).

40. *Id.* (emphasizing notice as the "essential element" of the unlawful detainer claim).

41. See CAL. CIV. PROC. CODE § 1161 (West 2020) (defining the unlawful detainer claim); see also B.E. WITKIN ET AL., *Real Property*, in SUMMARY OF CALIFORNIA LAW § 734 (11th ed. 2020) (noting that ejectment claims are "seldom brought" to evict tenants).

42. See Childs v. Eltinge, 29 Cal. App. 3d 843, 853 (1973) (finding support for the summary proceeding in the "strong public policy of preserving the peace as well as the recognition of the unique factual and legal characteristics of the landlord-tenant relationship"); see also *supra* Section II.A (reviewing the origins of summary proceedings as a remedy for nonconsensual holdover tenancies).

43. See CAL. CIV. PROC. CODE § 789.3 (West 2020) (identifying the landlord's liability for violations and the tenant's right to injunctive relief).

44. See CIV. PROC. § 1161 (requiring a tenant to be in possession of the property, without permission, in default of rent, served at least three days' written notice in provisions 1–3).

45. See *id.* (requiring that the notice period expire in provision 4).

46. See *Eviction: Landlords*, CALIFORNIA COURTS THE JUDICIAL BRANCH OF CALIFORNIA, <https://www.courts.ca.gov/27701.htm> (last visited Aug. 31, 2020) (leading landlords through the steps of the eviction process); see also Kimberlee Leonard, *How Long Does It Take to Evict a Tenant in California?*, SFGATE (Dec. 29, 2018), <https://homeguides.sfgate.com/long-evict-tenant-california-8035.html> (on file with the *University of the Pacific Law Review*) (reporting fees being "about \$435").

47. See *Landlords: Tenants Can Choose to Respond to the Complaint (Step 5 of 7)*, CALIFORNIA COURTS THE JUDICIAL BRANCH OF CALIFORNIA, <https://www.courts.ca.gov/27757.htm> (last visited Sept. 4, 2020) (explaining that landlords must track the different methods and timelines for each tenant).

give the tenant five days' notice to vacate.<sup>48</sup>

*C. The Constitutionality of Canceling the Rent Under the Contract Clause*

The Contract Clause of the United States Constitution prohibits states from passing laws that impair the obligations of a contract.<sup>49</sup> A law impairs contractual obligations when it renders the obligation invalid, releases a party from a promise, or destroys a duty.<sup>50</sup> Constitutional Framers James Madison viewed the Contract Clause as a “bulwark in favor of personal security and private rights” against the interference of fluctuating policies from revolving legislatures.<sup>51</sup>

The police power is “the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people.”<sup>52</sup> The Tenth Amendment reserves the police power to the states, which limits the authority of the prohibition in the Contract Clause.<sup>53</sup> While the Supreme Court construes the police power as harmonious with the Constitution’s protective clauses, the police power “is paramount to any rights under contracts between individuals.”<sup>54</sup>

During the Great Depression, Minnesota enacted the Mortgage Moratorium Law, which extended the period of time property loan debtors had to repay lenders.<sup>55</sup> In *Home Building & Loan Ass’n v. Blaisdell*, the Supreme Court upheld the law because an emergency justified exercising the police power to protect economic interests.<sup>56</sup> The mortgage forbearance was constitutionally permissible because the temporary legislation addressed a legitimate end, and the provisions were reasonably “of a character appropriate” to the emergency.<sup>57</sup> In his opinion, Chief Justice Hughes observed the issue was not “merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the

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48. See Leonard, *supra* note 46, (“While the tenants can ask the court for a stay, meaning more time to move, the reason must be extreme, such as a medical condition requiring more time to vacate.”).

49. U.S. CONST. art. I, § 10, cl. 1; see also *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 429 (1934) (defining the obligation of a contract between parties as “the law which binds the parties to perform their agreement”).

50. *Blaisdell*, 290 U.S. at 431 (citing *Sturges v. Crowninshield*, 17 U.S. 122 (1819)).

51. THE FEDERALIST NO. 44 (James Madison).

52. See *Manigault v. Springs*, 199 U.S. 473, 480 (1905) (using examples of contracts relating to liquor, breweries, and lotteries which may have been legal agreements when parties entered into them, but a legislature’s exercise of the police power could permissibly impair the contracts’ obligations).

53. See U.S. CONST. amend. X. (reserving undelegated powers for the States); see also *Manigault*, 199 U.S. at 480 (explaining that the prohibition of impairing the obligation of contracts does not prevent states from exercising the police power).

54. *Manigault*, 199 U.S. at 480 (noting that parties may not enter contracts as way to “estop the legislature from enacting laws intended for the public good”).

55. See *Blaisdell*, 290 U.S. at 416 (“The act provides that, during the emergency declared to exist, relief may be had through authorized judicial proceedings with respect to foreclosures of mortgages, and execution sales, of real estate; that sales may be postponed and periods of redemption may be extended.”).

56. *Id.* at 437 (citing *Manigault*, 199 U.S. at 480).

57. See *id.* at 444–48 (avoiding the question of whether the legislation was wise policy).

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economic structure upon which the good of all depends.”<sup>58</sup>

In *Sveen v. Melin*, the Supreme Court recently articulated a two-part test to determine if a state action violates the Contract Clause.<sup>59</sup> First, a court should determine if the statute substantially impairs the contractual relationship.<sup>60</sup> In its analysis, the court should evaluate “the extent to which the law undermines the contractual bargain, interferes with a party’s reasonable expectations, and prevents the party from safeguarding or reinstating his rights.”<sup>61</sup> If the statute substantially impairs the contractual relationship, the court will strike down the statute unless it appropriately and reasonably advances “a significant and legitimate public purpose.”<sup>62</sup> As the lone dissenter in *Sveen*, Justice Gorsuch distinguished the statutes in question from those in *Blaisdell*.<sup>63</sup> Justice Gorsuch emphasized that the constitutionally permissible mortgage forbearance in *Blaisdell* altered contractual remedies and did not release parties from their contractual obligations.<sup>64</sup>

D. AB 1436 & SB 1410: Prominent Precursors to Chapter 37

During the summer of 2020, the California State Legislature considered several bills to restrict a landlord from evicting a tenant for failing to pay rent during the COVID-19 emergency.<sup>65</sup> AB 1436 contained an eviction moratorium giving financially struggling tenants fifteen months after the emergency ended to repay unpaid rent before incurring liability for unlawful detainer.<sup>66</sup> AB 1436 also offered up to six months’ mortgage forbearance to homeowners and small landlords experiencing financial hardship.<sup>67</sup> A lending institution could request the borrower sign an attestation of hardship, but AB 1436 would require the lending

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58. *Id.* at 442.

59. 138 S. Ct. 1815, 1817 (2018) (holding that a Minnesota automatic-revocation-on-divorce statute did not violate the Contracts Clause as applied to the primary designation under a life insurance policy).

60. *See id.* at 1817 (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978), which challenged Minnesota’s Private Pensions Benefit Protection Act).

61. *Id.*

62. *Id.* (quoting *Energy Reserves Grp. Inc., v. Kan. Power & Light Co.* 459 U.S. 400, 411–12 (1983)).

63. *See id.* at 1830 (Gorsuch, J., dissenting) (noting *Blaisdell* only affected “remedial processes”).

64. *Sveen*, 138 S. Ct. at 1830 (Gorsuch, J., dissenting) (“Although the Constitution allows legislatures some flexibility to address changing social conditions through retroactive remedial legislation, it does not permit upsetting settled expectations in contractual obligations.”).

65. *See* AB 1436, 2019 Leg., 2019–2020 Sess. (Cal. 2020) (as amended Aug. 14, 2020, but not enacted) (introducing a previous Homeowner, Tenant, and Small Landlord Relief Act of 2020); *see also* SB 1410, 2019 Leg., 2019–2020 Sess. (Cal. 2020) (as amended Aug. 5, 2020, but not enacted) (creating COVID-19 eviction relief agreements between a landlord and tenant); Robert M. McCormick, *Legislative Alert: Status Report on SB939 and Commercial Evictions*, CAL. LAWS. ASS’N, <https://calawyers.org/real-property-law/legislative-alert-status-report-on-sb939-and-commercial-evictions/> (last visited Sept. 19, 2020) (on file with the *University of the Pacific Law Review*) (referencing five other legislative proposals concerning leases during COVID-19).

66. *See* Cal. AB 1436 § 6 (requiring a landlord intending to evict to provide a tenant with notice informing the tenant of rights and obligations under the program).

67. *Id.* § 4 (defining “financial hardship” as a drop of 10% or more in “average gross monthly rental revenue over the two most recent calendar months”).

institution to grant an initial request for thirty days' forbearance.<sup>68</sup> A borrower who signed the attestation could request additional thirty-day periods of forbearance and could also choose to discontinue the forbearance.<sup>69</sup>

AB 1436 expressly permitted a landlord and tenant to enter into a voluntary agreement that created a schedule to repay rental debt accumulated due to COVID-19.<sup>70</sup> The bill would only have authorized agreements that allowed a tenant to remain in possession if the tenant missed a portion or all of one or multiple rental payments.<sup>71</sup> Under AB 1436, the total amount a tenant would pay under the agreement could not exceed the rental debt and could not include interest or other fees.<sup>72</sup> Any mortgage forgiveness, property tax credits, or other financial assistance the landlord received to offset rental revenue loss would have offset the tenant's COVID-19 rental debt under the agreement.<sup>73</sup>

The Senate considered SB 1410, which would have authorized a landlord and tenant to enter into a standardized COVID-19 eviction relief agreement to defer the tenant's unpaid rent.<sup>74</sup> In exchange, the landlord would receive tax credits equal to the unpaid rent.<sup>75</sup> Tenants who signed a COVID-19 eviction relief agreement would commit to repay the debt over a span of ten annual installments when they filed taxes.<sup>76</sup> Tenants could apply to California's Franchise Tax Board ("FTB") for a reduction or elimination of an installment based on the tenant's taxable income for that year.<sup>77</sup> Both the repayment installments and the period available to apply tax credits were scheduled to begin January 1, 2024, and end December 31, 2034.<sup>78</sup> SB 1410 would permit a landlord to sell the interest in the tax credit as an investment to a third party before the credit could apply in 2024.<sup>79</sup>

The Assembly Appropriations Committee held SB 1410 after estimating it

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68. *See id.* (requiring the lending institution to provide the first 30 days' forbearance before canceling for failure to provide the attestation).

69. *See id.* (requiring the borrower to make the request during the bill's effective time period and no less than 15 days before the end of a forbearance period).

70. *See id.* § 6 (requiring a landlord to provide a tenant with the terms of the agreement in the language in which the landlord normally negotiated with the struggling tenant).

71. *See* Cal. AB 1436 § 6 (providing heightened protection for the tenant).

72. *See id.* (protecting a tenant from incurring greater liability).

73. *See id.* (preventing a landlord from unduly profiting from protective measures during the pandemic).

74. *See* SB 1410, 2019 Leg., 2019–2020 Sess. § 1 (Cal. 2020) (as amended Aug. 5, 2020, but not enacted) (requiring contracting parties to use the version included in the bill or created by the Franchise Tax Board).

75. *See id.* § 3 (allowing the credit to apply against the "net tax").

76. *See* Cal. SB 1410 § 5 (prohibiting the Franchise Tax Board from charging interest unless collections receives the taxpayer's unpaid rent balance).

77. *See id.* § 7 (providing that the FTB may reduce installments for tenants making up to 150% of median state income and forgive installments for tenants making less than 75% of median state income).

78. *See id.* § 5 (setting deadlines for the landlord to provide the FTB with a signed copy of the notice and agreement); *see also id.* (repealing the statute when it expires); *id.* § 7 (stating that a tenant shall pay the deferred rent "beginning on and after January 1, 2024, and before January 1, 2034," and repealing the section of the bill when the tax credit program expires).

79. *See* Cal. SB 1410 § 9 (restricting the third party from re-selling the interest after acquiring it from the taxpayer).

could cost hundreds of millions to implement by 2021 and billions more over the life of the program.<sup>80</sup> After AB 1436 faced fierce opposition from landlord and banking interests, lawmakers came to the compromise of Chapter 37.<sup>81</sup> Co-author of both Chapter 37 and AB 1437, Assembly Member David Chiu, acknowledged his disappointment:

There is much more I wanted to see in this bill, much more that I fought for during the negotiations, and much more needed to truly protect renters in California. But, through the course of negotiations, it became clear that the choice was not between this proposal and a stronger one. The choice was between this proposal and nothing.<sup>82</sup>

### III. CHAPTER 37

Chapter 37 prohibited courts from issuing a summons on an unlawful detainer complaint for failure to pay rent or other charges until October 5, 2020.<sup>83</sup> Courts could then resume eviction proceedings, but Chapter 37 prohibits a landlord from using COVID-19 rental debt as the basis for an unlawful detainer claim until February 2021.<sup>84</sup> The act defines “COVID-19 rental debt” as “unpaid rent or any other unpaid financial obligation of a tenant” that came due March 1, 2020–January 31, 2021.<sup>85</sup> Chapter 37 directs courts to permanently mask unlawful detainer cases for unpaid rent if the plaintiff filed the complaint between March 4, 2020–January 31, 2021.<sup>86</sup>

A tenant who signs a declaration of COVID-19 financial distress is not guilty of unlawful detainer if the tenant pays 25% of COVID-19 rental debt before

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80. See Senate Committee on Appropriations, Committee Analysis of SB 1410, at 2 (Aug. 18, 2020) (assessing the financial impact of SB 1410's program); see also Senate Judiciary Committee, Committee Analysis of AB 3088, at 17 (Aug. 29, 2020) (noting that the legislation was held in the Assembly Appropriations Committee).

81. See Adam Beam, *California Governor Signs Eviction Relief Bill Amid Virus*, SACRAMENTO BEE (Sept. 1, 2020), <https://www.sacbee.com/news/article245395075.html> (on file with the *University of the Pacific Law Review*) (quoting Assembly Member David Chiu: “It's often said a sign of compromise is both sides are dissatisfied, and that's certainly true here”); see also Letter from California Banking Ass'n. et al to the Senate Comm. on Judiciary (Aug. 5, 2020), available at <https://www.aba.com/-/media/documents/letters-to-congress-and-regulators/ab-1436-opposition-letter-080620.pdf> (on file with the *University of the Pacific Law Review*) (stating opposition to AB 1436); Press Release, California Apartment Ass'n, CAA Negotiates Alternative to AB 1436 (Aug. 28, 2020), available at <https://caanet.org/caa-negotiates-alternative-to-AB1436/> (on file with the *University of the Pacific Law Review*) (taking credit for the AB 1436's defeat).

82. Hannah Wiley, *Gavin Newsom Has a Deal on a California Eviction Ban. Here Is What You Need to Know*, SACRAMENTO BEE (Aug. 28, 2020), <https://www.sacbee.com/news/article245395075.html> (on file with the *University of the Pacific Law Review*).

83. CAL. CIV. PROC. CODE § 1179.01.5 (enacted by Chapter 37).

84. *Id.* § 1179.03 (enacted by Chapter 37).

85. *Id.* § 1179.02 (enacted by Chapter 37).

86. *Id.* § 1161.2 (enacted by Chapter 37).

February 2021.<sup>87</sup> “COVID-19 financial distress” is lost income or increased out-of-pocket expenses related to essential work, childcare, care for elderly or sick family members, and other circumstances related to COVID-19.<sup>88</sup> If a landlord has proof indicating a tenant’s income is 130% of median income for the county, the landlord may require the tenant to provide documentation of lost income.<sup>89</sup> Otherwise, a tenant is not required to provide documentation of COVID-19 financial distress beyond the declaration.<sup>90</sup>

Chapter 37 temporarily increases the written notice requirement to evict a tenant from three to fifteen days.<sup>91</sup> The act requires landlords to provide tenants with an unsigned declaration of financial distress due to COVID-19 when serving a notice of eviction.<sup>92</sup> Chapter 37 also increases a landlord’s liability for self-help evictions by \$1,000–\$2,500 where a tenant has signed a declaration of COVID-19 financial distress.<sup>93</sup> A landlord engaging in retaliatory conduct against a tenant who exercises Chapter 37 rights—such as reporting tenants to immigration authorities—may not recover possession for six months.<sup>94</sup>

Chapter 37 converts a tenant’s COVID-19 rental debt to civil debt, which can be legally pursued through methods such as tax levies and wage garnishment.<sup>95</sup> The act also provides procedural protections in the event of foreclosure, until January 1, 2023.<sup>96</sup> If a mortgage servicer denies requested forbearance to a covered borrower, the lending institution must provide a reason for that denial.<sup>97</sup> Chapter 37 also requires mortgage servicers to review borrowers for “solutions” that government agencies permit and provide twenty-one days to fix errors in an application for forbearance.<sup>98</sup> However, Chapter 37 does not require a mortgage servicer to provide forbearance to borrower.<sup>99</sup>

#### IV. ANALYSIS

Chapter 37—as well as AB 1436 and SB 1410—constitutionally delay the enforcement of contractual remedies using an eviction moratorium as an exercise

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87. *Id.* § 1179.03 (enacted by Chapter 37).

88. CIV. PROC. § 1179.03.5 (enacted by Chapter 37).

89. *Id.* § 1179.02 (enacted by Chapter 37) (basing median income on data from the Department of Housing and Community Development).

90. *Id.*

91. *Id.* § 1179.03 (enacted by Chapter 37).

92. *Id.*

93. CAL. CIV. CODE § 789.4 (enacted by Chapter 37).

94. *Id.* § 1942.5 (enacted by Chapter 37).

95. *See generally* CIV. PROC. § 116.223 (enacted by Chapter 37) (waiving jurisdictional limits on small claims courts).

96. CIV. § 2924.15 (enacted by Chapter 37).

97. *Id.* § 3273.10 (enacted by Chapter 37).

98. *Id.* § 3273.11 (enacted by Chapter 37).

99. *Id.* § 3273.10 (enacted by Chapter 37).

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of the police power.<sup>100</sup> Section A explains how an eviction moratorium substantially impairs the contractual relationship between a tenant and a landlord.<sup>101</sup> Section B argues that an eviction moratorium during the COVID-19 crisis reasonably advances “a significant and legitimate public purpose” by considering the character of the crisis for landlords and tenants.<sup>102</sup> Section C proposes that integrating provisions from AB 1436 and SB 1410 with Chapter 37 could create a more comprehensive approach to protecting California’s tenants and landlords during and after the COVID-19 pandemic.<sup>103</sup>

*A. An Eviction Moratorium Substantially Impairs the Contractual Relationship Between Landlords and Tenants*

To determine whether a law substantially impairs a contractual relationship, the Supreme Court evaluates “the extent to which the law undermines the contractual bargain, interferes with a party’s reasonable expectations, and prevents the party from safeguarding or reinstating his rights.”<sup>104</sup> A tenant’s promise to make timely rent payments is part of the contractual bargain of a lease.<sup>105</sup> Landlords reasonably rely on steady rental revenue to pay mortgages, maintenance costs, and property taxes—the latter of which fund essential community services like schools, police, and fire departments.<sup>106</sup>

A landlord’s obligations may compel the landlord, particularly an individual investor with few properties, to replace a tenant who fails to pay rent with a paying tenant.<sup>107</sup> Some small landlords, such as Councilmember Peralez’s former landlord, use their properties to directly finance their retirement.<sup>108</sup> Without

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100. See AB 1436, 2019 Leg., 2019–2020 Sess. § 1 (Cal. 2020) (as amended Aug. 14, 2020, but not enacted) (listing the intent as avoiding “widespread economic and social harm . . . until after the public health emergency passes and the financial consequences begin to ease”).

101. *Infra* Section IV.A.

102. *Infra* Section IV.C.

103. *Infra* Section IV.B.

104. *Sveen v. Melin*, 138 S. Ct. 1815, 1817 (2018).

105. See *DUKEMINIER ET AL.*, *supra* note 27, at 469 (explaining that a lease is both a conveyance and an agreement creating contractual rights).

106. See Robert Pinnegar, *The Long-Term Impact of Unpaid Rent Must Be Acknowledged*, WASH. POST. (May 12, 2020), <https://www.washingtonpost.com/business/2020/05/11/long-term-impact-unpaid-rent/> (on file with the *University of the Pacific Law Review*) (claiming that 14% of landlord revenue from rent goes to property taxes which funds “schools and teachers, police, firefighters and other essential services on which all community members rely”); see also Jacob Passy, *Landlords Are Just Trying to Pay Bills Like Everyone Else.* *The Coronavirus Could Hit Mom-and-Pop Landlords Hard as Tenants Miss Rent Payments*, MARKETWATCH (Mar. 26, 2020), <https://www.marketwatch.com/story/landlords-are-just-trying-to-pay-bills-like-everyone-else-the-coronavirus-could-hit-mom-and-pop-landlords-hard-as-tenants-miss-rent-payments-2020-03-25> (on file with the *University of the Pacific Law Review*) (detailing these expenses and noting “property taxes can add up to the same amount or more than the mortgage payment on a property, depending on where it is located”).

107. See Gerchick, *supra* note 28, at 767 (observing that “filing an eviction suit is a last resort taken after weeks or months of allowing the tenant additional opportunities to cure his default”).

108. See Lopez, *supra* note 5 (noting Councilmember Peralez’s landlord “decided to sell the property and

financial assistance, small landlords may lose everything they worked for.<sup>109</sup>

However, Chapter 37 does not prevent a landlord from safeguarding or reinstating their rights.<sup>110</sup> Legislation such as Chapter 37 is temporary, so a landlord remains entitled to the entire original debt due under the lease after the effective time period.<sup>111</sup> If a tenant has a high income, Chapter 37 provides a mechanism for landlords to require documentation from the “unscrupulous tenant[] who would lie and claim a hardship.”<sup>112</sup> On balance, an eviction moratorium does substantially alter the relationship between landlords and tenants but limits that alteration to the remedy of eviction.<sup>113</sup>

*B. An Eviction Moratorium Reasonably and Appropriately Advances the Fight Against COVID-19.*

Because an eviction moratorium substantially alters contractual relationships, an eviction moratorium violates the Contract Clause unless it appropriately and reasonably advances “a significant and legitimate public purpose.”<sup>114</sup> State governments have not only a significant and legitimate interest in fighting the spread of COVID-19, but a compelling interest.<sup>115</sup> Subsection 1 describes the character of the COVID-19 crisis specifically as it applies to tenants and landlords.<sup>116</sup> Subsection 2 argues that keeping people sheltered reasonably advances the fight against COVID-19.<sup>117</sup>

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retire”); see also *Landlord Toolkit: How to Fund Your Retirement with Rental Income*, THE ALLSTATE BLOG (Dec. 21, 2017), <https://www.allstate.com/blog/landlord-toolkit-fund-retirement-rental-income/> (on file with the *University of the Pacific Law Review*) (advertising insurance to prospective individual investors).

109. See Tim Logan, *As Eviction Bans Continue, Small Landlords Feel the Squeeze*, BOS. GLOBE (July 27, 2020), <https://www.bostonglobe.com/2020/07/27/business/eviction-ban-continues-small-landlords-feel-squeeze/> (on file with the *University of the Pacific Law Review*) (quoting a landlord in a dispute with her tenant).

110. See *Sveen v. Melin*, 138 S. Ct. 1815, 1817 (2018) (defining the second prong of the test for violations of the Contract Clause).

111. See *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 447 (1934) (requiring that legislation that impairs the obligations of contracts be temporary to be constitutional).

112. See Senate Judiciary Committee, Committee Analysis of AB 3088, at 9 (Aug. 29, 2020) (noting that a major point of contention regarding AB 1436 was whether AB 1436 required tenants to provide documentation).

113. Cf. *Sveen*, 138 S. Ct. at 1830 (Gorsuch, J., dissenting) (distinguishing *Sveen* from *Blaisdell* noting that *Blaisdell* only affected “remedial processes”).

114. See *id.* at 1817 (quoting *Energy Reserves Grp. Inc., v. Kan. Power & Light Co.* 459 U.S. 400, 411–12 (1983)) (turning the inquiry toward “whether the state law is drawn in an ‘appropriate’ and ‘reasonable’ way to advance ‘a significant and legitimate public purpose’” after finding substantial impairment).

115. See *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (noting California’s compelling interest to fight COVID-19 as part of a religious discrimination analysis).

116. *Infra* Subsection IV.B.1.

117. *Infra* Subsection IV.B.2.

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### 1. The Character of the COVID-19 Crisis for Tenants and Landlords in California

California tenants are especially vulnerable to the economic and health impacts of the COVID-19 emergency.<sup>118</sup> In April 2020, the national unemployment rate rose to its highest level since the Great Depression.<sup>119</sup> California's unemployment rate for the same month was the highest recorded since the agency began tracking the data in 1976.<sup>120</sup> Employment rebounded slightly after businesses partially reopened, but millions remain unemployed.<sup>121</sup> Economists warned that jobs the crisis destroyed might never return; a study from the University of Chicago forecasted that “32 to 42 percent of COVID-induced layoffs will be permanent.”<sup>122</sup>

Job losses impacted renters in California especially hard.<sup>123</sup> Renters in the state are more likely to work in sectors directly impacted by COVID-19, including service and entertainment industries.<sup>124</sup> University of California Berkeley researchers estimated that COVID-19 immediately impacted industries employing

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118. Elizabeth Kneebone & Cecile Murray, *COVID-19 and California's Vulnerable Renters*, TERNER CTR. BLOG: NO LIMITS (Aug. 4, 2020), <https://ternercenter.berkeley.edu/blog/covid-19-and-vulnerable-renters-california> (on file with the *University of the Pacific Law Review*).

119. See Greg Iacurci, *Unemployment is Nearing Great Depression Levels*, CNBC (May 19, 2020), <https://www.cnbc.com/2020/05/19/unemployment-today-vs-the-great-depression-how-do-the-eras-compare.html> (on file with the *University of the Pacific Law Review*) (“The official unemployment rate hit 14.7% in April, its highest since the Great Depression . . .”); see also Samantha Fields, *How Did Everyone Get the Unemployment Rate Wrong?*, MARKETPLACE (June 8, 2020), <https://www.marketplace.org/2020/06/08/how-did-everyone-get-the-unemployment-rate-wrong/> (on file with the *University of the Pacific Law Review*) (reporting that the Bureau of Labor Statistics acknowledged they misclassified “unemployed on temporary layoff workers” and estimating that without this error the rate would have been 19.7%).

120. See Press Release, Emp’t Dev. Dep’t, California Unemployment Lowers Slightly to 16.3 Percent in May (June 19, 2020), available at <https://edd.ca.gov/newsroom/unemployment-june-2020.htm> (on file with the *University of the Pacific Law Review*) (“April’s revisions reflect unprecedented job losses . . . that are a direct result of the impacts of the COVID-19 pandemic.”).

121. Kneebone & Murray, *supra* note 118, (reporting that 2.8 million Californians were still unemployed in June 2020).

122. See JOSE MARIA BARRERO ET AL., BECKER FRIEDMAN INST. FOR ECON. AT THE UNIV. OF CHI., COVID-19 IS ALSO A REALLOCATION SHOCK 4 (2020), available at [https://bfi.uchicago.edu/wp-content/uploads/BFI\\_WP\\_202059.pdf](https://bfi.uchicago.edu/wp-content/uploads/BFI_WP_202059.pdf) (on file with the *University of the Pacific Law Review*) (forecasting similar results from recent job losses from other sources); see also Olivia Rockeman & Jill Ward, *One-Third of U.S. Job Losses Are at Risk of Becoming Permanent*, BLOOMBERG L.: DAILY LAB. REP. (June 14, 2020, 4:00 AM), <https://news.bloomberglaw.com/daily-labor-report/one-third-of-u-s-job-losses-are-at-risk-of-becoming-permanent> (on file with the *University of the Pacific Law Review*) (reporting that another study from the Peterson Institute for International Economics said “that the unique shock of the virus means governments may need to do more to preserve businesses and protect workers than they would in a normal recession”).

123. See Elizabeth Kneebone & Cecile Murray, *Estimating COVID-19's Near Term Impact on Renters*, TERNER CTR. BLOG: NO LIMITS (Apr. 24, 2020), <https://ternercenter.berkeley.edu/blog/estimating-covid-19-impact-renters> (on file with the *University of the Pacific Law Review*) (estimating “the number of renter households likely facing income losses due to economic impacts of efforts to slow the spread of COVID-19”).

124. See *id.* (underscoring “the need for targeted rental assistance—especially in higher-cost areas and as arrears mount for households waiting to receive UI (or those unable to claim it)”).

people in 40% of tenant households in California.<sup>125</sup> Housing costs burdened half of these tenants before the pandemic, and researchers expect the economic crisis will increase their burden and introduce burden to new households.<sup>126</sup>

Landlords also face unprecedented challenges.<sup>127</sup> The National Multifamily Housing Council reported nearly one-third of renters failed to pay rent on time during the first full calendar month after the shelter-in-place order.<sup>128</sup> In San Francisco alone, one in thirteen tenants broke their lease in the first 100 days after the order.<sup>129</sup> Across the nation, some landlords forgave rent as a show of empathy in a time of crisis.<sup>130</sup> Other landlords filed eviction notices in defiance or ignorance of government orders.<sup>131</sup> In California alone, landlords evicted more than 1,600 renter households between March 2020 and August 2020.<sup>132</sup>

While tenants and landlords are both affected by the COVID-19 pandemic, they did not enter the crisis on equal footing.<sup>133</sup> On a broad scale, significant tax deductions are available to property owners, but there are no correlating tax benefit for tenants.<sup>134</sup> Low-income tenants are sometimes eligible for housing vouchers,

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125. See *id.* (detailing statistical data by state in the appendix).

126. See *id.* (“While households that did not have cost burdens before the crisis may now be facing housing insecurity or trouble paying rent due to COVID-related income impacts, income losses are likely to make the near-term situation of previously cost-burdened renters particularly acute.”).

127. See generally Passy, *supra* note 106 (warning of a “situation unlike anything landlords today have faced before”).

128. See Chris Arnold, *Nearly a Third of Renters Didn’t Pay by 1st Week of April*, NPR (Apr. 8, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/08/829850505/millions-didnt-pay-rent-last-week-amid-pandemic-woes> (on file with the *University of the Pacific Law Review*) (reporting the National Multifamily Housing Council’s data).

129. See J.K. Dineen, *SF Tenants Break Leases in Startling Numbers, Giving Renters Upper Hand*, S.F. CHRON. (June 18, 2020), <https://www.sfchronicle.com/business/article/SF-tenants-break-leases-in-startling-numbers-15347851.php> (on file with the *University of the Pacific Law Review*) (noting that the industry does not track broken leases as a metric but “it’s clearly way above normal”).

130. See, e.g., Christopher Brito, *Landlord Says He Won’t Collect Rent Because of Coronavirus Outbreak, Urges Others to Do the Same*, CBS NEWS (Mar. 16, 2020), <https://www.cbsnews.com/news/landlord-says-he-wont-collect-rent-because-of-coronavirus-outbreak-urges-others-to-do-the-same-main-renting/> (on file with the *University of the Pacific Law Review*) (reporting on a viral social media post).

131. See Jeff Ernsthause et al., *Despite Federal Ban, Landlords Are Still Moving to Evict People During the Pandemic*, PROPUBLICA (Apr. 16, 2020), <https://www.propublica.org/article/despite-federal-ban-landlords-are-still-moving-to-evict-people-during-the-pandemic> (on file with the *University of the Pacific Law Review*) (reporting on landlords in four states that violated the federal eviction moratorium).

132. See Matt Levin et al, *Exclusive: More Than 1,600 Californians Have Been Evicted During the Pandemic*, CALMATTERS (Aug. 11, 2020), <https://calmatters.org/housing/2020/08/californians-evicted-coronavirus-pandemic/> (on file with the *University of the Pacific Law Review*) (reporting that 1,600 is “likely a significant undercount of how many renters have been forced to leave” because fourteen county sheriffs’ departments representing fourteen million Californians did not respond to data requests).

133. See DUKEMINIER ET AL., *supra* note 27, at 542–43 (9th ed. 2017) (discussing retaliatory evictions and tenants’ lack of knowledge of protections like the warranty of habitability).

134. See *Publication 936 (2019), Home Mortgage Interest Deduction*, INTERNAL REVENUE SERV., <https://www.irs.gov/publications/p936> (on file with the *University of the Pacific Law Review*) (explaining how to deduct home mortgage interest); see also RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 180 (2017) (arguing that this disparity in the federal tax code perniciously subsidized suburban homeowners without equal treatment for renters).

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but available funding limits the availability of vouchers—unlike guaranteed tax deductions that property owners receive.<sup>135</sup> These disparities between governmental support for property owners and tenants perpetuate residential segregation and other systemic inequities laid bare by the COVID-19 crisis.<sup>136</sup>

At an individual level, many families facing eviction do not have the options that Councilmember Peralez's family had.<sup>137</sup> Before COVID-19, the affordable housing shortage was already “driving poor families into financial ruin and even starting to engulf families with moderate incomes.”<sup>138</sup> Eviction of poor people from their homes is common and, to some extent, part of the landlord's economic model.<sup>139</sup> For the evicted, the experience can foster feelings of insecurity, powerlessness, and depression in people so that eviction not only perpetuates poverty in communities, it creates poverty.<sup>140</sup>

The inalienable rights of “life, liberty and the pursuit of happiness” require stable housing to enjoy.<sup>141</sup> Home is inextricably intertwined with an individual's life, liberty, and happiness because it provides privacy, security, protection, and comfort.<sup>142</sup> Stable housing enables a person to seek and maintain gainful employment that allows them to enjoy their liberty.<sup>143</sup> However, federal and state governments have reduced support for housing assistance in recent years, reflecting the nation's failure to recognize housing as a human right.<sup>144</sup> Before the pandemic, California accounted for 22% of the nation's homeless population, even

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135. See ROTHSTEIN, *supra* note 134, at 209 (highlighting the difference in property owners being guaranteed their benefit, but tenant support like Section 8 public housing are first come first serve).

136. See *id.* at 180 (2017) (“Because de jure policies of segregation ensured that whites would more likely be owners and African Americans more likely be renters, the tax code contributes to making African Americans and whites less equal, despite the code's purportedly nonracial provisions.”); see also Liam Petterson, *Coronavirus Weekly: Racism, COVID-19, and the Inequality That Fuels These Parallel Pandemics*, THE CONVERSATION (June 9, 2020), <https://theconversation.com/coronavirus-weekly-racism-covid-19-and-the-inequality-that-fuels-these-parallel-pandemics-140255> (on file with the *University of the Pacific Law Review*) (identifying reasons why people of color experience a greater impact from the COVID-19 crisis).

137. See *supra* Part I (telling the story of Peralez's eviction and move to a smaller home that cost \$600 more per month). See generally MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (1st Paperback ed. 2017) (detailing the larger system problems affecting eight families in Milwaukee, WI).

138. See DESMOND, *supra* note 137, at 303 (noting “1 in 5 of *all* renting families nationwide spends half of its income on housing”) (emphasis in original).

139. See generally David A. Dana, *An Invisible Crisis in Plain Sight: The Emergence of the “Eviction Economy,” Its Causes, and the Possibilities for Reform in Legal Regulation and Education*, 115 MICH. L. REV. 935 (2017) (reviewing MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (1st Paperback ed. 2017)).

140. See *id.* at 937 (“Desmond explains that this Eviction Economy is terrible not just for the tenants who are part of it but also for the neighborhoods and cities in which these tenants live.”).

141. See DESMOND, *supra* note 137, at 300 (comparing housing to the tenets of the Declaration of Independence).

142. See *id.* (observing that “it's almost impossible to think about one without the other”).

143. See *id.* (“A stable home allows us to strive for self-reliance and personal expression, to seek gainful employment and enjoy individual freedoms.”).

144. See Dana, *supra* note 139 (finding no evidence of the political will necessary to fund affordable housing initiatives).

though the state only represented 12% of the nation's total population.<sup>145</sup> Governor Newsom lamented this failure in his State of the State Address just before the COVID-19 crisis struck.<sup>146</sup> He said, "Let's call it what it is, a disgrace, that the richest state in the richest nation—succeeding across so many sectors—is failing to properly house, heal, and humanely treat so many of its own people."<sup>147</sup>

Economists and housing experts warned that without an intervention, a national surge in evictions could cause the homeless population to increase as much as 45%.<sup>148</sup> The City and County of San Francisco count tents and vehicles to better understand the state of the homeless population.<sup>149</sup> In April 2020, the tent count increased citywide by 71%.<sup>150</sup> In the Tenderloin, a neighborhood with a high population density and acute homelessness, tents and other structures nearly tripled.<sup>151</sup> To protect the city's homeless population from COVID-19, San Francisco relocated nearly 500 people from the Tenderloin encampments into hotels and other shelters.<sup>152</sup>

Spread of COVID-19 through the homeless population threatens the state's ability to control the virus.<sup>153</sup> The homeless population may struggle to comply with the Center for Disease Control's recommendation to socially distance because the population relies on shelters, food distribution centers, and public transportation hubs.<sup>154</sup> Additionally, 25%–50% of the homeless population are

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145. See STATEWIDE HOUSING ASSESSMENT, *supra* note 2, at (describing the California's share of the homeless population as disproportionate).

146. See Governor Gavin Newsom, State of the State Address (Feb. 19, 2020), available at <https://www.gov.ca.gov/2020/02/19/governor-newsom-delivers-state-of-the-state-address-on-homelessness/> (on file with the *University of the Pacific Law Review*) (announcing budget plans and record reserves prior to the arrival of COVID-19).

147. *Id.*

148. See Benjamin Oreskes, *Mass Unemployment over Coronavirus Could Lead to a 45% Jump in Homelessness, Study Finds*, L.A. TIMES (May 14, 2020), <https://www.latimes.com/homeless-housing/story/2020-05-14/coronavirus-unemployment-homeless-study-increase-45-percent> (on file with the *University of the Pacific Law Review*) (reporting primarily on Columbia University economics professor Dan O'Flaherty's study).

149. See HEALTHY STS. OPERATIONS CTR., CITY & CTY. OF S.F., TENDERLOIN NEIGHBORHOOD PLAN FOR COVID-19, at 4 (May 6, 2020), available at [https://sf.gov/sites/default/files/2020-05/Tenderloin\\_Neighborhood\\_Plan\\_May\\_6\\_2020.pdf](https://sf.gov/sites/default/files/2020-05/Tenderloin_Neighborhood_Plan_May_6_2020.pdf) (on file with the *University of the Pacific Law Review*) (ensuring essential services remain available to residents of the city).

150. See *id.* (representing the only tent count since the beginning of the crisis).

151. *Id.*

152. See Rachel Swan & Tal Kopan, *SF Cleans Up Tenderloin—Dramatic, 65% Drop-Off in Homeless Tent Camps*, S.F. CHRON. (July 3, 2020), [www.sfchronicle.com/bayarea/article/SF-cleans-up-Tenderloin-dramatic-65-15383753.php](http://www.sfchronicle.com/bayarea/article/SF-cleans-up-Tenderloin-dramatic-65-15383753.php) (on file with the *University of the Pacific Law Review*) (describing the city's removal of "the appalling crush of tent camps" as "one of the most intensive street-camp cleanups in city history").

153. See Amy Maxman, *Coronavirus Is Spreading Under the Radar in Homeless Shelters*, NATURE (May 7, 2020), <https://www.nature.com/articles/d41586-020-01389-3> (on file with the *University of the Pacific Law Review*) ("Evidence-based solutions might protect not only the roughly 1.4 million people who use a homeless shelter or transitional housing in the United States each year . . . but also other people who don't have the luxury of separating themselves from others.").

154. See *generally* People Experiencing Homelessness, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/homelessness.html> (last updated Aug. 10, 2020) (on file with the *University of the Pacific Law Review*) (outlining the struggles of the population without

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employed, many of them as low-wage essential workers, further increasing their risk of contracting and spreading the virus to other groups.<sup>155</sup>

*2. Delaying Enforcement of Lease Obligations Reasonably Advances the Fight to Stop the Spread of COVID-19*

An eviction moratorium may prevent a rise in homelessness, which could lead to further spread of COVID-19.<sup>156</sup> Chapter 37 also leverages notice requirements to ensure that a landlord may not legally evict a tenant without providing information about how these laws affect their ability to stay housed.<sup>157</sup> Chapter 37 voids any unlawful detainer claim where the landlord fails to provide the tenant with an unsigned attestation of financial hardship when serving a notice of eviction.<sup>158</sup> Without these requirements, many tenants may not be aware of the protections available to them.<sup>159</sup>

Chapter 37 also protects tenants against retaliatory evictions—evictions initiated in response to behavior “with which the landlord does not agree.”<sup>160</sup> Retaliatory evictions not only punish tenants for undesirable behavior, but also send messages to the landlord’s surrounding tenants about the behavior.<sup>161</sup> Without this important protection, landlords could leverage the affordability crisis against tenants who caused them the trouble of complying with Chapter 37.<sup>162</sup> Masking COVID-19 credit debt further promotes tenants finding new housing and protects tenants from “unscrupulous” operators that use the information to prey on evicted tenants.<sup>163</sup>

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adequate shelter during the COVID-19 crisis).

155. See Megan Lupo et al, *Homeless Essential Workers Face Greater Risk of COVID-19*, ABC NEWS (Aug. 26, 2020), <https://abcnews.go.com/Health/wireStory/homeless-essential-workers-face-greater-risk-covid-19-72624388> (on file with the *University of the Pacific Law Review*) (noting the “common misconception that homeless people are unemployed”).

156. See *supra* Subsection IV.B.1 (arguing that mass evictions could lead to a rise in homelessness, which could hinder the state’s ability to fight COVID-19).

157. See CAL. CIV. PROC. CODE § 1179.03 (enacted by Chapter 37) (requiring landlords who intend to evict to provide an unsigned declaration of COVID-19 financial distress).

158. *Id.*

159. Cf. *DUKEMINIER ET AL.*, *supra* note 27, at 542–43 (discussing tenants’ lack of use of the warranty of habitability).

160. *Ejection*, BLACK’S LAW DICTIONARY (11th ed. 2019).

161. See *DUKEMINIER ET AL.*, *supra* note 27, at 542–43 (noting most jurisdictions today prohibit the practice).

162. Cf. *id.* (observing few jurisdictions extend the protection to commercial tenants).

163. See Senate Judiciary Committee, Committee Analysis of AB 3088, at 11 (Aug. 29, 2020) (specifically referencing “eviction defense” schemes that charge fees with little or no hope to help the tenant prevail).

*C. Provisions from AB 1436 and SB 1410 Can Provide Landlords and Tenants More Comprehensive Relief*

Chapter 37 is a bold plan that could prevent a disastrous rise in evictions threatening to compound this public health catastrophe.<sup>164</sup> However, a multi-faceted approach that incorporates provisions from AB 1436 and SB 1410 could provide more comprehensive protection reasonably “of a character appropriate” to the COVID-19 emergency.<sup>165</sup>

The provisions of AB 1436 would dramatically increase protections for struggling tenants by providing fifteen months to pay missed rent before incurring liability for unlawful detainer.<sup>166</sup> However, even fifteen months may not be enough time for tenants to financially stabilize after changing careers in the face of permanent job loss in their industry.<sup>167</sup> The provisions of SB 1410 could also provide landlords and tenants an option to enter into an agreement to give tenants a longer time to repay the rent.<sup>168</sup> Also, SB 1410 would authorize the FTB to reduce or forgive the debt for covered tenants with lower-income when payments come due in 2024.<sup>169</sup> Under SB 1410, the state government would provide a landlord who enters into a COVID-19 eviction relief agreement compensation in the form of tax credits beginning in 2024.<sup>170</sup> Landlords who could not afford to wait several years for unpaid rent would be able to sell the interest in their tax credits to investors for immediate relief.<sup>171</sup>

Moreover, the provisions of AB 1436 could improve on Chapter 37 by requiring mortgage forbearance rather than merely encouraging it through procedural protections.<sup>172</sup> While landlords may have had to demonstrate financial hardship under AB 1436, the plan would require lending institutions to provide up

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164. See *supra* Subsection IV.B.2 (arguing that keeping people in their homes advances the cause of fighting COVID-19).

165. See generally AB 1436, 2019 Leg., 2019–2020 Sess. (Cal. 2020) (as amended Aug. 14, 2020, but not enacted) (granting fifteen months for tenants to repay rent and landlords up to six months of mortgage forbearance); SB 1410, 2019 Leg., 2019–2020 Sess. (Cal. 2020) (as amended Aug. 5, 2020, but not enacted) (creating a ten-year program to pay back rent). See also *supra* Section II.C (arguing that provisions must be “of a character appropriate” to the circumstances in order to be constitutional) (quoting *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 445).

166. See Cal. AB 1436 § 6 (amending CAL. CIV. PROC. CODE § 1179.02).

167. See Rockeman & Ward, *supra* note 122 (predicting the “labor market will initially recover swiftly, but then level off with millions still unemployed”).

168. See generally Cal. SB 1410 (creating a program to repay rent over ten years through the FTB).

169. See *id.* § 5 (creating COVID-19 eviction relief agreements between a landlord and tenant).

170. See *id.* § 1 (allowing participating landlords to claim the tax credit any year between 2024 and 2033).

171. See John Myers, *California Considers Unprecedented \$25-billion Economy Recovery Fund, Rental Relief*, L.A. TIMES (May 12, 2020), <https://www.latimes.com/california/story/2020-05-12/coronavirus-rent-relief-tax-vouchers-plan> (on file with the *University of the Pacific Law Review*) (observing that vouchers for future tax credits could be “valuable to a variety of investors”).

172. See CAL. CIV. CODE § 3273.10 (enacted by Chapter 37) (providing procedural protections for borrowers in case the lender refuses forbearance).

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to six months forbearance if landlords requested it.<sup>173</sup> Including mortgage forbearance can provide security for landlords and provides a better alternative than self-help evictions or retaliatory conduct.<sup>174</sup>

V. CONCLUSION

By the end of 2020, COVID-19 killed over 25,000 people in California and nearly 350,000 nationwide.<sup>175</sup> Public health officials hope safe vaccines will be widely available in 2021.<sup>176</sup> Days before Chapter 37's provision expired, state lawmakers extended California's eviction moratorium through June 30, 2021.<sup>177</sup> In the meantime, COVID-19 continues to batter the economy and may create long-term damage.<sup>178</sup>

Chapter 37 offers a bold solution to a potential eviction crisis, but it is a temporary program.<sup>179</sup> The rejected provisions of AB 1436 and SB 1410 are costly, but they offer possibilities for more comprehensive protection.<sup>180</sup> However, inequities between landlords and tenants will persist until housing is recognized as a basic human right.<sup>181</sup> This pandemic furnishes the occasion for California to find the political and financial will to recognize that universal access to decent, affordable housing protects us all.<sup>182</sup>

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173. See AB 1436, 2019 Leg., 2019–2020 Sess. § 4 (Cal. 2020) (as amended Aug. 14, 2020, but not enacted) (requiring landlords to show a drop of rental revenue but servicer to offer forbearance).

174. Cf. Gerchick, *supra* note 28, at 765–66 (making recommendations to further improve summary proceedings to discourage the use of extrajudicial evictions).

175. Jason Green, *Coronavirus: After Record Deaths End 2020, California's Year of COVID-19 in Perspective*, MERCURY NEWS (Jan. 1, 2021), <https://www.mercurynews.com/2021/01/01/coronavirus-after-record-deaths-end-2020-californias-year-of-covid-19-in-perspective/> (on file with the *University of the Pacific Law Review*).

176. Berkeley Lovelace, Jr., *Dr. Fauci Says Coronavirus Vaccine Likely Won't Be "Widely" Available Until Months into 2021*, CNBC (July 24, 2020), <https://www.cnbc.com/2020/07/24/dr-fauci-says-coronavirus-vaccine-likely-wont-be-widely-available-until-months-into-2021.html> (on file with the *University of the Pacific Law Review*).

177. CAL. CIV. PROC. CODE § 1179.02 (enacted by 2021 Stat. Ch. 2).

178. Paul Davidson, *Coronavirus Likely to Leave Legacy of Fear and Uncertainty That Holds Back Economy for Decades*, U.S.A. TODAY (Sept. 3, 2020), <https://www.usatoday.com/story/money/2020/09/03/economy-covid-19-pandemic-long-term-economic-effects/5696187002/> (on file with the *University of the Pacific Law Review*).

179. See *infra* Part III and Sections IV.A–B (reviewing the provisions and arguing that its measures are permissible under the Contract Clause).

180. See *infra* Sections II.D, IV.C (highlighting provisions that can offer more comprehensive protection).

181. See *infra* Section IV.B (discussing the disparity in support available for homeowners compared to tenants).

182. Cf. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) (“While emergency does not create power, emergency may furnish the occasion for the exercise of power.”).