

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

06/01/2021 at 08:50:00 PM

Clerk of the Superior Court
By Adriana Ive Anzalone, Deputy Clerk

JENNER & BLOCK LLP
Todd C. Toral (SBN 197706)
TToral@jenner.com
Nayiri Pilikyan (SBN 287614)
NPilikyan@jenner.com
Elizabeth Avunjian (SBN 336216)
EAvunjian@jenner.com
633 West 5th Street, Suite 3600
Los Angeles, CA 90071-2054
Telephone: +1 213 239 5100
Facsimile: +1 213 239 5199

Attorneys for Plaintiff
California Apartment Association

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

CALIFORNIA APARTMENT ASSOCIATION,
a California not-for-profit corporation,

Plaintiff,

v.

THE COUNTY OF SAN DIEGO, a political
subdivision of the State of California, THE
BOARD OF SUPERVISORS OF THE
COUNTY OF SAN DIEGO, the elected
governing body of the County of San Diego, and
DOES 1 through 10,

Defendants.

Case No. 37-2021-00023731-CU-MC-CTL

**PLAINTIFF CALIFORNIA APARTMENT
ASSOCIATION'S MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
OF ITS *EX PARTE* APPLICATION FOR
TEMPORARY RESTRAINING ORDER AND
ORDER TO SHOW CAUSE RE
PRELIMINARY INJUNCTION**

IMAGED FILE

Judge: Honorable Richard S. Whitney

Dept.: C-68
Hearing Date: June 3, 2021
Time: 8:45 AM

Action Filed: May 28, 2021

TABLE OF CONTENTS

1

2 I. INTRODUCTION1

3 II. FACTUAL BACKGROUND2

4 A. California’s Eviction Moratorium.....3

5 B. San Diego County’s Eviction Moratorium4

6 1. The Board of Supervisors Failed to Pass the Ordinance as an “Urgency

7 Statute”5

8 2. The Ordinance is Not Necessary to Protect Public Health.6

9 C. The Impact Of The Ordinance On CAA And Its Members6

10 1. Georgina Kleinsmith Has Been Unable to Seek Possession of Her Rental

11 Unit to House Her Son.7

12 2. Charles Banker Has Been Subjected To Threats And Harassment From

13 Disorderly Tenants Whom He Cannot Evict Due To The Ordinance.8

14 III. LEGAL STANDARD9

15 IV. ARGUMENT10

16 A. CAA Has Standing To Seek A TRO On Behalf Of Its Members10

17 B. CAA Is Likely to Succeed On The Merits To Enjoin The Ordinance.11

18 1. The Ordinance is Preempted by the CTRA.11

19 2. The Ordinance is Unconstitutional Because It Exceeds the County’s

20 Authority.12

21 3. The County Exceeded Its Authority by Extending the Ordinance’s Reach

22 to Incorporated Cities.13

23 C. CAA’s Members Will Be Harmed If The Ordinance Is Not Restrained.14

24 V. CONCLUSION15

25

26

27

28

TABLE OF AUTHORITIES

Page(s)

Cases

14859 Moorpark Homeowner’s Ass’n v. VRT Corp.,
63 Cal. App. 4th 1396 (1998)15

A&B Cattle Co v. City of Escondido,
192 Cal. App. 3d 1032 (1987)11, 14

California Dental Assn. v. California Dental Hygienists’ Assn.,
222 Cal. App. 3d 49 (1990)11

Church of Christ in Hollywood v. Superior Ct.,
99 Cal. App. 4th 1244 (2002)9, 10, 11, 14

City of Dublin v. County of Alameda,
14 Cal. App. 4th 264 (1993)14

Cohen v. Board of Supervisors,
40 Cal. 3d 277 (1985)12

County Sanitation Dist. No. 2 v. County of Kern,
127 Cal. App. 4th 1544 (2005)14

People ex rel. Deukmejian v. County of Mendocino,
36 Cal. 3d 476 (1984)11

Ebel v. City of Garden Grove,
120 Cal. App. 3d 399 (1981)10

King v. Meese,
43 Cal. 3d 1217 (1987)15

Landmark Holding Grp., Inc. v. Superior Ct.,
193 Cal. App. 3d 525 (1987)10

Property Owners of Whispering Palms, Inc. v. Newport Pacific, Inc.,
132 Cal. App. 4th 666 (2005)11

San Diego Tuberculosis Ass’n v. City of E. San Diego,
186 Cal. 252 (1921)10

Sherwin-Williams, Co. v. City of Los Angeles,
4 Cal. 4th 893 (1993)12

United Farmers Agents Assn., Inc. v. Farmers Group, Inc.,
32 Cal. App. 5th 478 (2019)10

Statutes

Government Code § 86341, 12, 13

1 Health and Safety Code § 10100013

2 Health and Safety Code § 10102513

3 **Other Authorities**

4 Assembly Bill 3088.....1, 3

5 California Constitution, Article XI, § 711, 14

6 Executive Order N-28-20.....3

7 Executive Order N-66-20.....3

8 Senate Bill 911, 3, 4

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 **I. INTRODUCTION**

2 In Assembly Bill 3088, the COVID-19 Tenant Relief Act (CTRA), the State of California enacted
3 an eviction moratorium in response to the COVID-19 public health emergency. The CTRA provided for
4 a statewide eviction moratorium through February 1, 2021, proclaiming that the public health crisis was
5 “a matter of statewide concern.” Senate Bill 91 extended the moratorium to June 30, 2021.

6 The CTRA currently prohibits a California landlord from evicting a tenant except for certain,
7 enumerated “just cause” reasons, including, among others: (1) a material breach of the lease; (2)
8 maintaining or committing a nuisance; (3) criminal activity by the tenant on the property; (4) subletting
9 the premises in violation of the lease; (5) intent to occupy the property by the owner or their family
10 member; and (6) withdrawal of the property from the rental market. The CTRA also contains strong
11 preemption language prohibiting other eviction measures that go into effect before July 1, 2021.

12 Despite the CTRA’s reach, on May 4, 2021, the San Diego County Board of Supervisors passed
13 Ordinance No. 10724 (“Ordinance”),¹ which, among other things, provides for more restrictive eviction
14 prohibitions in San Diego County than those permitted by the CTRA; adopts certain new rent control
15 measures; purports to reach both unincorporated areas in the County *and* incorporated cities within San
16 Diego County; and unless restrained, will go into effect on June 3, 2021.

17 The Ordinance is unconstitutional under the California Constitution and violates California state
18 law. First, the Ordinance is preempted by the CTRA because the CTRA prohibits any different eviction
19 measure from going into effect before July 1, 2021, as the Ordinance is set to do. This is dispositive.

20 Second, the Ordinance conflicts with the CTRA by purporting to override the CTRA’s *just cause*
21 provisions. Indeed, the Ordinance prevents owners—many of whom are small “mom and pop”
22 landlords—from evicting tenants under all circumstances except if the landlords can prove that the tenant
23 presents a “hazard to the health or safety of other tenants or occupants of the same property,” subject to a
24 balancing test that takes numerous factors into account. The Ordinance does not define the term “hazard.”

25 Third, the Ordinance exceeds the County’s authority, in violation of California Government Code
26 section 8634, because the Ordinance is not “necessary to provide for the protection of life and property.”

27 _____
28 ¹ A true and correct copy of the Ordinance is attached as **Exhibit A** to the Request for Judicial Notice
 (“RJN”) filed concurrently herewith.

1 After all, it cannot be reasonably disputed that the public health situation due to COVID-19 is improving
2 dramatically in San Diego County (as elsewhere), with declining infection and rising vaccination rates.
3 What is more, the Ordinance was not passed with reference to any Public Health Order necessary to justify
4 the Ordinance, and nothing in the San Diego County Public Health Orders provides a basis for the County
5 to enact an eviction moratorium that goes beyond that issued by the State.

6 Last, the County exceeded its authority because the Ordinance purports to apply to *incorporated*
7 cities within the County. The California Constitution and California state law are clear that a County's
8 jurisdiction extends only to *unincorporated* areas within its borders.

9 Plaintiff California Apartment Association (CAA) is an association of rental housing providers
10 active in California and San Diego County. Many of its members will be subject to, and injured by, the
11 Ordinance's eviction moratorium and rent control measures. For example, the restrictions prevent
12 landlords from moving themselves, and/or members of their families, into their units, due to financial
13 hardship, housing displacement, or some other circumstance. The Ordinance also prevents landlords from
14 evicting tenants who flout their rental agreements, harass them, or are a nuisance.

15 CAA, therefore, brings this *ex parte* application for a TRO to preserve the status quo until the
16 Court can weigh and evaluate the facts and law to determine the merits of the requested prohibitory
17 injunction. Immediate relief is appropriate in this case because (1) CAA is likely to prevail on the merits,
18 and (2) the harm CAA's members will suffer if the Ordinance takes effect far outweighs any harm
19 Defendants may experience if the Court enjoins the Ordinance and maintains the status quo.² This Court
20 has abundant authority and substantial discretion to enter a TRO. It can and should do so.

21 II. FACTUAL BACKGROUND

22 The basis for California's eviction moratoriums stem from a March 4, 2020 Governor's declaration

23
24 ² In *Southern California Rental Housing Association v. County of San Diego, et al.*, Case No. 21-cv-
25 00912, Judge M. James Lorenz entered an order denying the plaintiff's *ex parte* request to shorten time to
26 brief a preliminary injunction and a related request for a TRO to restrain the Ordinance from taking effect.
27 See ECF No. 13 (S.D. Cal. June 1, 2021). It is important to note that the plaintiff there sought a TRO on
28 two grounds not at issue in this Application: (1) that any suspension of a persons' contractual and property
rights under the United States Constitution constitutes irreparable harm; and (2) emotional and mental
suffering in and of itself constitutes irreparable harm. This Application relies on different theories,
specifically, California Constitution and statutory claims, on one hand, and that the Ordinance prevents
CAA's members from actually remediating their tenant-caused distress, on the other. Accordingly, Judge
Lorenz's order does not bear on this Court's analysis of, and ruling on, CAA's Application.

1 of a State of Emergency to help the State prepare for the broader spread of COVID-19. The San Diego
2 County Health Officer, like public health officials in other California counties, declared a Local Health
3 Emergency, and issued a Proclamation of Local Emergency, in February, 2020. The most recent
4 controlling Public Health Order was issued on May 6, 2021. RJN, Ex. B.

5 **A. California’s Eviction Moratorium**

6 On March 16, 2020, the Governor issued Executive Order N-28-20 establishing an eviction
7 moratorium through May 31, 2020. RJN, Ex. C. The moratorium was extended by 60 days on May 29,
8 2020. Executive Order N-66-20 (RJN, Ex. D). On August 31, 2020, AB-3088, the CTRA, was enacted
9 into law providing for a statewide eviction moratorium through February 1, 2021. On January 29, 2021,
10 Senate Bill 91 (“SB-91”) extended the eviction moratorium through June 30, 2021. It is unclear whether
11 the State will further extend the moratorium beyond June 30th.

12 The California Assembly passed the CTRA as an “urgency statute” deemed “necessary for the
13 immediate preservation of the public peace, health or safety” of California residents. AB-3088, § 24. The
14 statute was passed based on findings that:

- 15 ■ “Millions of Californians are unexpectedly, and through no fault of their own,
16 facing new public health requirements and unable to work and cover many basic
17 expenses, *creating tremendous uncertainty for California tenants, small
landlords, and homeowners.*” *Id.* at § 2(c) (emphasis added)
- 18 ■ “Stabilizing the housing situation for tenants and landlords is to *the mutual
benefit of both groups* and will help the state address the pandemic, protect
19 public health and set the stage for recovery.” *Id.* at § 2(f) (emphasis added).

20 Through these findings, the Legislature stated its intent to establish the moratorium “to establish
21 through statute a framework for all impacted parties [both landlords and tenants] to negotiate and avoid
22 as many evictions and foreclosures as possible.” *Id.* at § 2(f). AB-3088 sought to “forestall massive social
23 and public health harm by preventing unpaid rental debt from serving as a cause of action for eviction or
24 foreclosure during this historic and unforeseeable period.” *Id.* at § 2(g). The framework was designed to
25 provide “temporary emergency relief for financially distressed tenants, homeowners, and small landlords”
26 to “help stabilize Californians through the state of emergency in protection of their health and without the
27 loss of their homes and property.” *Id.*

1 The CTRA explicitly prohibits landlords from evicting tenants absent specifically-enumerated
2 “just cause” reasons, such as “a breach of a material term of the lease” (AB-3088, § 8(b)(1)(B)),
3 “maintaining, committing, or permitting the maintenance or commission of a nuisance” (*id.* at §
4 8(b)(1)(C)), “criminal activity by the tenant” on the property (*id.* at § 8(b)(1)(F)), “assigning or subletting
5 the premises in violation of the tenant’s lease” (*id.* at § 8(b)(1)(G)), “intent to occupy the property by the
6 owner or their spouse, domestic partner, children, grandchildren, parents, or grandparents” (*id.* at §
7 8(b)(2)(A)), and “withdrawal of the property from the rental market” (*id.* at § 8(b)(2)(B)). The CTRA also
8 contains broad preemption language: “Any extension, expansion, renewal, reenactment or new adoption
9 of a measure, however delineated, that occurs between August 19, 2020, and June 30, 2021, shall have no
10 effect before July 1, 2021.” SB-91, § 21. The CTRA further specifies that the statewide moratorium
11 addressed “a matter of statewide concern rather than a municipal affair.” *Id.*

12 **B. San Diego County’s Eviction Moratorium**

13 On May 4, 2021, Defendant Board of Supervisors passed the Ordinance, which provides for a
14 moratorium on evictions and limitations on residential rent increases throughout the County. The
15 Ordinance applies to “cities within the County of San Diego and unincorporated areas of the county. . . .”
16 *Id.* at § 8(a). The intent of the Ordinance is to protect San Diego County tenants who are left “unprotected
17 from eviction” by AB-3088 and SB-91. *Id.* at § 1(w). The Ordinance, prohibiting residential evictions and
18 limiting rent increases throughout the County, is effective “until 60 days after the Governor lifts all
19 COVID-19-related stay-at-home and work-at-home orders.” *Id.* at § 3(a).

20 The Ordinance goes beyond the CTRA by creating certain rent control measures and strict
21 evictions prohibitions that are at cross-purposes with the balance struck by the California State Legislature
22 to protect landlords and tenants. For example, the Ordinance’s eviction restrictions conflict with
23 provisions of the CTRA allowing landlords to evict tenants for specific *just cause* reasons, such as breach
24 of the rental agreement or an owner’s intent to occupy the property, which would be disallowed by the
25 Ordinance. Indeed, the Ordinance specifically prohibits landlords from beginning eviction proceedings
26 absent “just cause,” which the Ordinance defines as “an imminent health or safety threat.” *Id.* at § 3(b).
27 “Imminent health or safety threat” is defined as “a hazard to the health or safety of other tenants or
28

1 occupants of the same property taking into account (1) the risk of potential spread of coronavirus caused
2 by the eviction, in case of a Local Emergency due to COVID-19, (2) any public health or safety risk caused
3 by the eviction, and (3) all other remedies available to the landlord and other occupants of the property,
4 against the nature and degree of health and safety risk posed by the tenant’s activity.” *Id.* at § 2(b). The
5 Ordinance excludes from the definition of “imminent health or safety threat” the tenant’s “COVID-19
6 illness or exposure to COVID-19, whether actual or suspected”. *Id.* “Hazard” is not defined. *See id.*

7 The Ordinance’s restrictive definition of the “just cause” exception makes it virtually impossible
8 for a landlord to invoke the exception to evict a tenant, even if the owner wants to use the rental property
9 to shelter a family member in financial distress and in need of immediate housing. Worse, the simple act
10 of invoking the “just cause” exception under the Ordinance will open the landlord up to the potential for
11 *criminal* liability, not to mention costly and time-consuming tenant-initiated litigation, and the risk of
12 being sanctioned by the County. *See id.* at §§ 7(c), (d).

13 Additionally, the Ordinance applies to all rental housing owners and all tenants in the County,
14 including those in incorporated cities. *Id.* at § 8(c). Significantly, the Ordinance protects all tenants
15 regardless of their wealth, income, or COVID-19-related financial distress. Thus, by its own terms, the
16 moratorium is concerned, not with protecting the vulnerable tenants at risk of COVID-19-related financial
17 hardship or from suffering homelessness, but with benefitting tenants as a group (whether needed or not),
18 at the expense of landlords and rental property owners regardless of their circumstances.

19 **1. The Board of Supervisors Failed to Pass the Ordinance as an “Urgency Statute”.**

20 Before its passage on May 4th, the Board of Supervisors passed on an opportunity to enact a near-
21 identical version of the Ordinance as an “urgency statute.” *See* RJN, Exs. E (Draft “urgency” statute
22 considered at an April 6, 2021 meeting of Defendant Board of Supervisors) and F (Minute Order No. 19
23 from April 6, 2021 meeting considering “urgency” statute). Had the Ordinance passed as an “urgency”
24 statute, it would have gone into immediate effect. RJN, Ex. E. Instead, at the April 6th Supervisor’s
25 meeting, discussion and voting on the Ordinance was delayed for a month—to the May 4th meeting (RJN,
26 Ex. F)—and passed as a regular ordinance, which will not take effect for an additional 30 days after its
27 passage—on June 3, 2021. Ordinance. at § 10(a).

1 **2. The Ordinance is Not Necessary to Protect Public Health.**

2 While there is general reference in the Ordinance’s findings section to San Diego’s public health
3 recommendations—along with references to the CDC and California Department of Public Health—the
4 Ordinance does not reference a single finding of why or even how the Public Health Orders in San Diego
5 support its finding that the local eviction moratorium and rent increase limitations are necessary to protect
6 the public health of San Diego tenants in accordance with the local public health order. *See id.* at § 1(g).
7 Further, San Diego’s Public Health Orders do not supply a single reason for why San Diego County would
8 need to go above and beyond California’s eviction moratorium to protect the health of San Diego County
9 tenants and renters. In fact, the Public Health Orders do not reference evictions or rent increases at all.
10 *See, e.g.,* RJN, Ex. B (May 6, 2021 Public Health Order).

11 The public health situation in the County has improved dramatically. As of May 29, 2021, 60.7%
12 of the target population (residents over age 12) have received at least one dose of a COVID-19 vaccine.
13 RJN, Ex. G (San Diego County Daily Vaccination Report). All indicators, *e.g.,* number of cases, infection
14 positivity rates, hospitalizations, and deaths, show marked improvements, further demonstrating that the
15 health situation is not a health emergency requiring county-specific action beyond the State’s eviction
16 moratorium. *See* RJN, Ex. H (San Diego County “Daily Status Update” regarding COVID-19).

17 **C. The Impact Of The Ordinance On CAA And Its Members**

18 CAA, a not-for-profit California corporation, is the largest statewide rental housing association in
19 the country. It represents more than 50,000 property owners and housing operators responsible for nearly
20 two million rental housing units in California, including owners and operators within the County and
21 incorporated cities within the County. Declaration of Tom Bannon (“Bannon Decl.”), ¶¶ 2, 3. Recognizing
22 that the COVID-19 pandemic created hardship for both tenants and landlords throughout California, CAA
23 worked closely with the California Legislature and the Governor’s office to enact robust statewide rental
24 assistance and eviction protections for tenants affected by COVID-19 in AB-3088 and SB-91, and why
25 CAA has been the singular authority on those protections. *Id.* at ¶ 6. CAA represents thousands of San
26 Diego County housing providers, especially “mom and pop” operators who rely on their rental investments
27 to sustain their retirement. *Id.* at ¶ 5. Many of CAA’s members own property in the County and
28

1 incorporated cities within the County, and will be subject to, and injured by, the Ordinance’s eviction
2 moratorium and rent control measures. *Id.* at ¶¶ 7, 8.

3 Among other things, the Ordinance prevents small landlords from moving themselves, and/or
4 members of their families, into their rental units, due to financial hardship, housing displacement, or some
5 other circumstance. *Id.* at ¶ 9. The restrictions also subject many of CAA’s members to irreparable injury
6 by virtue of affording protections to some tenants who are creating nuisances and engaging in disturbing
7 behavior—at times both illegal and contrary to rental agreements—to the detriment of other tenants,
8 property owners and managers. *Id.* at ¶ 10. Property managers and owners are frustrated that they are
9 unable to resolve issues with problematic tenants. In turn, neighboring tenants likewise express frustration
10 and go so far as to indicate that they will vacate—subjecting property owners to further distress by losing
11 other, rule-abiding tenants. *Id.* Accordingly, CAA and its members, among others in the County, including
12 the very persons the Ordinance purports to protect—tenants—will be subject to, and injured by, the
13 Ordinance if it is allowed to take effect on June 3. *Id.*

14 **1. Georgina Kleinsmith Has Been Unable to Seek Possession of Her Rental Unit to**
15 **House Her Son.**

16 CAA member, Georgina Kleinsmith, owns a condominium in El Cajon, CA. The property has
17 been rented to two tenants for approximately ten years. Declaration of Georgina Kleinsmith (“Kleinsmith
18 Decl.”), ¶¶ 1, 2. The rental agreement allows either party to terminate the lease on 30-days’ notice. *Id.* at
19 ¶ 3. Throughout the tenancy, Ms. Kleinsmith has had a good relationship with her tenants, and to such a
20 degree that the tenants have benefitted from below market rents. In fact, over the course of the relationship,
21 Ms. Kleinsmith has only increased rent once or twice, and then only minimally. *Id.* at ¶¶ 2, 3.

22 Ms. Kleinsmith’s tenants have never indicated that they have experienced any financial hardship.
23 It is actually to the contrary. For example, the tenants have paid rent timely, and even used their own
24 resources to improve the property. *Id.* at ¶ 4. To Ms. Kleinsmith’s knowledge, her tenants have not been
25 adversely impacted by the COVID-19 pandemic; rather, they recently purchased a lot of land they are now
26 developing for the purpose of improving it with a new home. *Id.* at ¶ 5.

27 Ms. Kleinsmith’s family has not been so fortunate. Ms. Kleinsmith’s son, his girlfriend, and his
28

1 girlfriend's seven-year old daughter are presently facing financial strain and hardship. Due to COVID-19,
2 the young daughter has been unable to attend school. As a result, Ms. Kleinsmith's son's girlfriend's
3 ability to work has been limited, as she could not afford childcare. Worse, they are subjected to increasing
4 rental rates in their current rental arrangement, and are experiencing hardship in accumulating funds for a
5 future rental deposit. *Id.* at ¶ 6. Because of these circumstances, Ms. Kleinsmith suggested that her son
6 and his family move into the condominium until they could get back on their feet. Her son agreed, and
7 relying on Ms. Kleinsmith's ability to convey use and possession of the condominium, terminated his
8 lease. Their lease is up at the end of May, at which point they will have nowhere to go. *Id.* at ¶ 7.

9 Over one month after Ms. Kleinsmith provided notice to her tenants that she was terminating the
10 lease, on or about May 19, 2021, the tenants informed her for the first time that they viewed the notice of
11 termination as illegal. The tenants also informed her that they had no intention of vacating the
12 condominium until the new house they were building could be occupied. *Id.* at ¶ 9. To date, Ms.
13 Kleinsmith's tenants have refused to vacate and return possession of the property indefinitely—despite
14 knowing that her family needs the housing. *Id.* at ¶ 11. Under the current law in California—SB-91— Ms.
15 Kleinsmith would be able to provide the tenants with a 60-day notice to vacate, based on owner move-in
16 characteristics. However, under the recently enacted Ordinance, Ms. Kleinsmith would be unable to
17 provide such a notice to vacate—even to provide much-needed housing for her own son. *See id.* at ¶ 12.

18 **2. Charles Banker Has Been Subjected To Threats And Harassment From Disorderly**
19 **Tenants Whom He Cannot Evict Due To The Ordinance.**

20 CAA member, Mr. Charles Banker, is similarly adversely impacted by the Ordinance. Declaration
21 of Charles Banker (“Banker Decl.”), ¶ 1. Mr. Banker is 74 years old, and owns a home in Lakeside, a city
22 in San Diego County, which is his primary residence. He currently rents out a “granny flat” in the lower
23 level of his home, on a month-to-month basis, to what was intended to be two tenants. *Id.* at ¶ 2. This
24 rental unit is Mr. Banker's only rental property, and he relies on the income to support his retirement.
25 Since March 1, 2020, Mr. Banker has not been paid rent or been able to recover costs and expenses
26 associated with the unit's utilities. He is owed nearly \$28,000 by his tenants (\$24,000 in unpaid rent and
27 approximately \$4,000 in unreimbursed utility costs). He has not received any financial assistance from
28

1 the State through the Rental Assistance Program, despite applying for it some time ago. *Id.* at ¶ 15.

2 In violation of the written rental agreement, Mr. Banker’s tenants have repeatedly sublet a room
3 in the unit to others. *Id.* at ¶ 5. Over the course of the tenancy, including just a few weeks ago, unauthorized
4 individuals have been moving in and out of the unit. By his count, this has happened approximately
5 thirteen times. These unauthorized individuals, and the tenants, have repeatedly subjected Mr. Banker and
6 his fiancé to various forms of physical and emotional abuse, causing significant distress and harm. *Id.* at
7 ¶ 6. These unauthorized individuals frequently block Mr. Banker’s driveway, preventing him from
8 accessing his property and otherwise impeding his freedom of movement from and to it. In fact, on several
9 occasions—between approximately eight to twelve times—Mr. Banker has had no choice but to call the
10 police to have the vehicles towed. *Id.* at ¶ 7. Mr. Banker’s neighbors have similarly suffered from these
11 unauthorized visitors, who park on his neighbor’s property blocking their access. *Id.* at ¶ 9. In response to
12 towing the vehicle, Mr. Banker was stalked and threatened, which required him to call the police and
13 lodge reports. *Id.* at ¶ 8. One of the original tenants has attempted to tow Mr. Banker’s car. *Id.* at ¶ 10.
14 Another time, the tenant attempted to ram Mr. Banker’s car with another car. This tenant even put an
15 advertisement in the paper to sell Mr. Banker’s car. *Id.* Yet another time, one of the original tenants spit
16 in Mr. Banker’s face and has, on other occasions, blown smoke on his face and has further attempted to
17 get him to react with physical force. *Id.* at ¶ 11.

18 While Mr. Banker suffers from this unceasing harassment and financial loss, the tenants laugh,
19 boasting about how Mr. Banker cannot evict them. To date, the tenants have refused to vacate the premises
20 and will not return possession of the property. *Id.* at ¶ 14. The Ordinance prevents Mr. Banker from taking
21 the steps necessary to evict the tenants—even to protect himself and his fiancé from harm. *Id.* at ¶ 16.

22 III. LEGAL STANDARD

23 In determining whether to issue a TRO, trial courts evaluate two interrelated factors: (1) the
24 “likelihood that the plaintiff will prevail on the merits at trial,” and (2) the “interim harm that the plaintiff
25 is likely to sustain if the [restraining order] were denied as compared to the harm that the defendant is
26 likely to suffer if the [order] were issued.” *Church of Christ in Hollywood v. Superior Ct.*, 99 Cal. App.
27 4th 1244, 1251 (2002) (internal citations and quotes omitted). These two factors operate on a sliding scale
28

1 where “the greater the plaintiff’s showing on one, the less must be shown on the other....” *Id.* at 1251-52.

2 “At an ex parte hearing on a TRO, a lesser standard is used. The ex parte hearing concerning a
3 TRO is no more than a review of the conflicting contentions to determine whether there is a sufficiency
4 of evidence to support the issuance of an interlocutory order to keep the subject of litigation in status quo
5 pending a full hearing to determine whether the applicant is entitled to a preliminary injunction.”
6 *Landmark Holding Grp., Inc. v. Superior Ct.*, 193 Cal. App. 3d 525, 527 (1987) (internal citations
7 omitted). “All that is determined is whether the TRO is necessary to maintain the status quo pending the
8 noticed hearing on the application for preliminary injunction.” *Id.*

9 **IV. ARGUMENT**

10 “The doctrine that an action will lie to enjoin the enforcement of an [invalid] municipal ordinance
11 in cases where such enforcement will cause substantial and irreparable injury to private property or private
12 property rights, and in which there is no adequate remedy in the ordinary course of law, is now too well
13 settled to require discussion.” *San Diego Tuberculosis Ass'n v. City of E. San Diego*, 186 Cal. 252, 255
14 (1921); *see also Ebel v. City of Garden Grove*, 120 Cal. App. 3d 399, 410 (1981) (“[i]t is well settled that
15 where the enforcement of an ordinance may cause irreparable injury, the injured party may attack its
16 constitutionality by an action to enjoin its enforcement.”). Here, CAA and its members will undoubtedly
17 suffer substantial and irreparable injury to their property rights if the Ordinance is not enjoined from going
18 into effect on June 3, 2021.

19 **A. CAA Has Standing To Seek A TRO On Behalf Of Its Members.**

20 CAA has standing to pursue claims on behalf of its members—like Ms. Kleinsmith and Mr.
21 Banker. An association has standing to pursue claims on its members’ behalf when “(a) its members would
22 otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the
23 organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation
24 of individual members in the lawsuit.” *United Farmers Agents Assn., Inc. v. Farmers Group, Inc.*, 32 Cal.
25 App. 5th 478, 488 (2019) (quoting *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333.343 (1977)).

26 CAA easily meets the test for associational standing. First, CAA’s members would face significant
27 harm if the Ordinance went into effect, and thus have standing to sue in their own right. CAA’s members
28

1 “are suffering immediate or threatened injury as a result of the challenged action of the sort that would
2 make out a justiciable case had the members themselves brought suit.” *Property Owners of Whispering*
3 *Palms, Inc. v. Newport Pacific, Inc.*, 132 Cal. App. 4th 666, 673 (2005) (quoting *Hunt*, 432 U.S. at 342)).
4 Second, this lawsuit seeks to protect rental property owners from unconstitutional overreach. These
5 interests are highly germane to CAA’s mission to represent the interests of its members, particularly “mom
6 and pop” landlords, who rely on their rental investments for financial support to sustain their retirement,
7 or to protect their family members. *See* Bannon Decl., ¶ 5. Third, neither the claim asserted, nor the
8 preliminary prospective relief requested, requires the participation of individual members in this lawsuit.
9 “If in a proper case the association seeks a declaration, injunction, or some other form of prospective
10 relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members
11 of the association actually injured.” *California Dental Assn. v. California Dental Hygienists’ Assn.*, 222
12 Cal. App. 3d 49, 62 (1990) (quoting *Warth v. Seldin*, 422 U.S. 490, 515 (1975)).

13 **B. CAA Is Likely to Succeed On The Merits To Enjoin The Ordinance.**

14 The first factor in determining whether to grant a TRO is an analysis of whether the plaintiff can
15 demonstrate a *possibility* of prevailing on the merits of its claim. *See Church of Christ in Hollywood*, 99
16 Cal. App. 4th at 1251-52. Here, CAA can easily meet and overcome this standard.

17 **1. The Ordinance is Preempted by the CTRA.**

18 It is undisputed that San Diego County has the power to “make and enforce within its limits all
19 local police, sanitary, and other ordinances and regulations not in conflict with general laws.” CAL.
20 CONST. art. XI, § 7. As a result, the County has “plenary authority to govern, *subject only to the*
21 *limitation that they exercise this power . . . subordinate to state law.*” *A&B Cattle Co v. City of Escondido*,
22 192 Cal. App. 3d 1032, 1037 (1987) (emphasis added). Where local ordinances conflict with state law,
23 they are preempted and void. *Id.*; *see also People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d
24 476, 484 (1984). Conflicts between a local ordinance and state law “exist if the ordinance duplicates,
25 contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.”
26 *Cohen v. Board of Supervisors*, 40 Cal. 3d 277, 290 (1985).

27 Here, the CTRA declares that it was “address[ing] a matter of statewide concern rather than a
28

1 municipal affair,” and states further that “[a]ny extension, expansion, renewal, reenactment, or new
2 adoption of a measure . . . that occurs between August 19, 2020, and June 30, 2021, shall have no effect
3 before July 1, 2021.” SB-91 at § 21. While the CTRA explicitly allows local jurisdictions to “extend,
4 expand, renew, reenact, or newly adopt an ordinance that requires just cause for termination of a residential
5 tenancy,” the Ordinance goes well beyond this legislative grace by prohibiting all evictions with only the
6 narrowest exception for “imminent health or safety threat[s]”. Therefore, facially, the CTRA preempts all
7 local eviction moratoria, particularly those that go into effect before July 1, 2021.

8 The Ordinance, if allowed to take effect on June 3, 2021, would create an emergency eviction
9 moratorium in light of the COVID-19 pandemic. But the State already addressed the challenges facing
10 renters at the height of the pandemic by enacting the CTRA. CTRA’s protections have been extended
11 through the end of June 30, 2021. *See* SB-91, § 21. The Ordinance, therefore, is duplicative of state law
12 in some areas, *e.g.*, by granting protections that already exist under the CTRA, and contradictory to state
13 law in other areas, *e.g.*, by purporting to override provisions of the CTRA that allow landlords to evict
14 tenants under a limited number of carefully considered *just cause* reasons, such as breaches of the lease
15 agreement, the commission of a nuisance, or an owner’s intent to occupy the property. *See* AB-3088, §
16 8(b). Local legislation is contradictory to state law “when it is inimical thereto”—in other words, it is
17 harmful to or obstructive of state law. *Sherwin-Williams, Co. v. City of Los Angeles*, 4 Cal. 4th 893, 898
18 (1993). Here, California resolved any tension between landlords and tenants by providing to landlords a
19 set of *just cause* reasons for eviction through which to protect their legitimate interests. The Ordinance,
20 by contrast, eliminates the ability to terminate a tenancy for just cause reasons and instead seeks to place
21 a moratorium on evictions with a single, extraordinarily narrow exception. *See* Ordinance, § 1(w). This is
22 “inimical” to State law and is therefore preempted and void.

23 **2. The Ordinance is Unconstitutional Because It Exceeds the County’s Authority.**

24 The Ordinance cites California Government Code section 8634 as the basis for implementing the
25 eviction moratorium and rent increase limitations county-wide. Section 8634 provides, in relevant part,
26 that, “[d]uring a local emergency, the governing body of a political subdivision . . . may promulgate orders
27 and regulations *necessary to provide for the protection of life and property . . .*” Gov. Code § 8634
28

1 (emphasis added). Further “[t]he board of supervisors of each county shall take measures as may be
2 necessary to preserve and protect the public health in the unincorporated territory of the county, including,
3 if indicated, the adoption of ordinances, regulations and orders not in conflict with general laws. . . .”
4 Health and Safety Code § 101025. The county health official (appointed by the county board of
5 supervisors pursuant to Health and Safety Code § 101000) “shall enforce and observe in the
6 unincorporated territory of the county . . . (a) Orders and ordinances of the board of supervisors, pertaining
7 to the public health . . . and (c) Statutes relating to public health.” *Id.* at § 101030.

8 Here, the Ordinance goes beyond the County’s constitutional authority “to preserve and protect
9 the public health” of San Diego County tenants for at least three reasons. First, the current public health
10 situation in San Diego County is improving daily, with COVID-19 infections down, vaccinations on the
11 rise, and pandemic-related restrictions being lifted. *See* RJN, Exs. G and H. Second, and more importantly,
12 the Ordinance was not passed in accordance with, or with reference to, any specific Public Health Order
13 issued by the San Diego County Health Department. In addition, those Public Health Orders—dozens of
14 which have been passed since the start of the pandemic—do not reference the health implications of
15 evictions or rent increases at all, and thus do not provide any explanation or rationale as to why the County
16 needs to go beyond the state eviction moratorium that is already in place to protect the health of its resident
17 tenants. *See, e.g.*, RJN, Ex. B (May 6, 2021 Public Health Order). Third, the Supervisors implicitly
18 acknowledged that the Ordinance is not responding to an emergency when it failed to pass a near-identical
19 version of the Ordinance on April 6th as an “urgency statute” that would go into effect immediately.
20 Instead, discussion and a vote on the Ordinance was delayed by a month—to the May 4th Board Meeting—
21 and was delayed even further by operation of law.

22 In summary, the Ordinance is both preempted and is not necessary “to preserve and protect the
23 public health” of San Diego tenants. But even if it could be found constitutional in some limited
24 circumstance, the Ordinance cannot extend to San Diego County’s *incorporated* cities.

25 **3. The County Exceeded Its Authority by Extending the Ordinance’s Reach to**
26 **Incorporated Cities.**

27 The County exceeded its authority when it issued an eviction moratorium that applies to
28

1 incorporated cities in San Diego County. Article XI, § 7 of the California Constitution places two limits
2 on the exercise of the plenary police power that cities and counties share with the state: (1) it must be
3 within the city or county’s “limits”; and (2) it must not conflict with state law. CAL. CONST. art. XI, § 7.;
4 *see also A&B Cattle Co v. City of Escondido*, 192 Cal. App. 3d 1032, 1038 (1987) (*quoting Candid*
5 *Enterprises, Inc. v. Grossmont Union High School Dist.*, 39 Cal. 3d 878, 885 (1985)). The “limits” of a
6 county for the purposes of its police power, as the term is used in Article XI, Section 7 of the California
7 Constitution, are only those areas within the county that are **unincorporated**. *City of Dublin v. County of*
8 *Alameda*, 14 Cal. App. 4th 264, 274-75 (1993); *see also County Sanitation Dist. No. 2 v. County of Kern*,
9 127 Cal. App. 4th 1544, 1612 (2005) (“The incorporated areas of [the] County are necessarily outside the
10 jurisdiction and authority of the County; County's authority extends only to the unincorporated areas
11 within its borders.”).

12 Here, the Ordinance purports to apply to both “cities within the County of San Diego” and the
13 unincorporated areas in the County. Ordinance at § 8(a). Thus, the Ordinance exceeds the County’s
14 authority under the California Constitution and can, assuming it withstands scrutiny under preemption and
15 Government Code section 8634 principles discussed *supra* (which it does not), apply only to the
16 unincorporated areas in San Diego County.

17 **C. CAA’s Members Will Be Harmed If The Ordinance Is Not Restrained.**

18 The second factor in determining the appropriateness of a TRO requires a comparison of the
19 interim harm that CAA and its members are likely to sustain absent an injunction against the harm
20 Defendants are likely to suffer if injunctive relief is granted. *See Church of Christ in Hollywood*, 99 Cal.
21 App. 4th at 1251. Here, the Court need not find the harm severe to order the requested relief. In cases such
22 as this, where the party seeking a TRO has a strong likelihood of success on the merits, and is merely
23 seeking to preserve the status quo, as opposed to seeking affirmative relief, the plaintiff need not allege
24 that the harm it will suffer is severe. *See King v. Meese*, 43 Cal. 3d 1217, 1227 (1987) (en banc) (“[T]he
25 more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they allege
26 will occur if the injunction does not issue. This is especially true when the requested injunction maintains,
27 rather than alters, the status quo.”). In fact, “if the party seeking the injunction can make a sufficiently
28

1 Dated: June 1, 2021

JENNER & BLOCK LLP

2
3 By: /s/ Todd C. Toral
4 Todd C. Toral
5 Nayiri Pilikyan
6 Elizabeth Avunjian

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
Attorneys for Plaintiff
California Apartment Association