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Testimony of the Department of Commerce and Consumer Affairs

**Before the
Senate Committee on Commerce and Consumer Protection
Friday, February 12, 2021
9:30 a.m.
Via Videoconference**

**On the following measure:
S.B. 306, RELATING TO THE RESIDENTIAL LANDLORD-TENANT CODE**

Chair Baker and Members of the Committee:

My name is Stephen H. Levins, and I am the Executive Director of the Department of Commerce and Consumer Affairs' (Department) Office of Consumer Protection (OCP). The Department supports this bill.

The purposes of this bill are to: (1) prohibit landlords from recovering possession of dwelling units from tenants if habitability of premises is significantly impaired; (2) set a tenant's liability for rent if habitability of premises is significantly impaired; and (3) specifies that the damages for retaliatory evictions are equal to two months' rent or free occupancy for two months.

The Landlord-Tenant Information Center is staffed by OCP investigators and volunteers who provide landlords and tenants with information regarding landlord-tenant laws to help them resolve disputes relating to security deposits, late fees, and repairs. The most common complaint the center receives from tenants is a landlord failing to make repairs in a timely manner. While it is unclear if this failure would result in a

dwelling unit becoming uninhabitable, this bill will incentivize landlords to keep their rental unit safe and sanitary.

Under Hawaii law, a tenant has the legal right to request necessary repairs without being evicted. If the landlord does not respond to the tenant's written repair request within 12 business days, the tenant can deduct up to \$500 from the following month's rent for the cost of repairs. However, the cost to repair conditions that materially affect health and safety can exceed \$500, leaving the tenant with limited recourse to address, for example, an unsanitary plumbing or a dangerous electrical issue.

Section 3 of this measure establishes a clear standard of damages for tenants who fall victim to retaliatory evictions. Other states, like California, already have minimum damages for tenants who were illegally retaliated against for asserting their lawful rights. In this regard, two months' rent plus court costs represents a reasonable figure, especially when compared to damage claims under current landlord-tenant law. An unlawful eviction is treated in the same manner as an illegal lockout, which provides for damages in an "amount equal to two months' rent" for victimized tenants¹. In view of the foregoing, establishing statutory minimum damages for tenants will be in the interests of justice and will deter unscrupulous landlords from engaging in unlawful conduct.

Thank you for the opportunity to testify on this bill.

¹ Hawaii Revised Statutes section 521-63.

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FEBRUARY 9, 2021

SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

Senator Rosalyn H. Baker, Chair
Senator Stanley Chang, Vice Chair

Re: S.B. No.306 - RELATING TO THE RESIDENTIAL LANDLORD-TENANT CODE.

Dear Senators:

I am an attorney who practices in the field of landlord/tenant law, including residential matters. I have over 28 years' experience in the area and my clients manage over 10,000 residential dwellings across the State of Hawaii. I am writing regarding the above-referenced bill.

I. The Bill Should Be Amended To Prevent Continuation of Unsafe Living Conditions

The proposed bill gives a landlord an incentive to fix their properties quickly since the law will allow a tenant to pay less rent when a unit has a habitability problem. Unfortunately, this can provide an incentive to a tenant to keep the rent low by preventing a landlord from restoring the property to a habitable condition. During an economic crises, this incentive must not be overlooked.

Some tenants are simply willing to live in defective or dangerous conditions if they can get a discount on their rent. **The predictable result of this legislation will be that some tenants may actively prevent a landlord from repairing defective conditions to keep their rent low.** Sometimes, getting a tenant to cooperate to allow a landlord to make repairs can be difficult.

For example, I have seen tenants refuse to move out of a unit temporarily after a kitchen fire, even after the water damage caused black mold. In that instance, repairs to the unit were delayed – and the tenant's health threatened – because the tenants simply refused to move.

Under this bill, the tenant would receive financial benefits from living in a hazardous environment and frustrating the landlord's efforts to repair the premises. We should not incentivize our community members to trade health and well-being for lower rent. Since we want landlords to maintain and repair the homes they rent out the legislature should not erect barriers to that end. To avoid delays in restoring habitability, and to assist landlords who wish to restore their rental properties as soon as possible, please consider changing the amendment as follows (at page 6, line 1):

(1) No action or proceeding to recover possession of the dwelling unit may be maintained against the tenant, nor shall the landlord otherwise cause the tenant to be removed from the dwelling unit involuntarily; provided that:

(A) The tenant cooperates with the landlord to allow for the restoration of the premises to a habitable condition and continues to pay rent equal to the fair rental value of the premises or the agreed upon rent, whichever is less; and

(B) The landlord's ability to recover possession of the unit is restored upon:

(i) Termination of the rental agreement in accordance with law or terms of the agreement; or

(ii) Restoration of the premises to a habitable condition, whichever comes first; and

(2) The tenant's liability for rent, from the date of significant impairment, shall not exceed the fair rental value of the premises.

Making this small change will encourage everyone to cooperate in the restoration of habitability to any apartment that has been affected.

2. The Bill is Unclear

The amendment, at section (c) (page 5 lines 20-21) includes the phrase, “significant impairment of the habitability of the premises” to trigger the applicability of the bill’s substantive changes. HRS 521-8 defines the term “premises” as: “a dwelling unit, appurtenances thereto, grounds, and facilities held out for the use of tenants generally and any other area or facility whose use is promised to the tenant.” Haw. Rev. Stat. Ann. § 521-8.

The broad definition of the term “premises” could cause the law to be triggered when, for example, the rental community’s pool, gym, or parking lot were closed for repairs. Arguably, when the Governor’s and Mayor’s emergency orders closed pools and gyms because of the pandemic, those facilities were not “habitable” for the duration of the temporary government closure, and this statutory language may apply.

Perhaps more importantly, the phrase “significant impairment of the habitability” is not defined. Since the degree of impairment required to trigger this law is not clear, this law will invite litigation between landlords and tenants to determine whether an impairment is, or is not, significant. If, for example, the pool was closed for a day – would that be considered a significant impairment of the habitability of the premises? If a tenant loses hot water for one day and then decides that he/she is entitled to withhold all of the rent for the month (a scenario that actually happens) would this law justify the tenant’s position?

This law may require the Courts to determine whether the closing of the pool or the loss of hot water for one day is a “significant impairment of the habitability” for the premises, all without significant legislative guidance. Without more precise guidance to the public and the Courts, I anticipate lawsuits being brought because the language is not clear, and the results in Court may not be what the Legislature intends.

3. Hawaii Law Already Does What This Bill Attempts

Current Hawaii already does what this Bill aims to do. Under existing law, there is no doubt that Landlords are already always required to provide and maintain a habitable dwelling. Haw. Rev. Stat. Ann. § 521-42. Also under current law, if a landlord fails to maintain a premises’ habitability, the tenant is not required to pay all of the rent. Souza v. Fisher, 139 Haw. 431, 392 P.3d 1215 (Ct. App. 2017), reconsideration denied, No. CAAP-1-0001699, 2017 WL 1948599 (Haw. Ct. App. May 10, 2017). Finally, under current law, if a landlord wrongfully ousts a tenant from a home overnight, the landlord is liable for twice the rent or two months’ rent (“(c) If the landlord removes or excludes the tenant from the premises overnight without cause or without court order so authorizing, the tenant may recover possession or terminate the rental agreement and, in either case, recover an amount equal to two months’ rent or free occupancy for two months, and the cost of suit, including reasonable attorney’s fees.” Haw. Rev. Stat. Ann. § 521-63.

So, ultimately, this law does not add any new protections for tenants and raises potential barriers to landlords who want to fix their properties. This amendment seems to create more issues than it solves.

Please let me know if you have any questions.

Very truly yours,

/s/ David Chee

David W.H. Chee, Esq.

February 12, 2021

The Honorable Rosalyn H. Baker, Chair

Senate Committee on Commerce and Consumer Protection

Via Videoconference

RE: Senate Bill 306, Relating to the Landlord-Tenant Code

HEARING: Wednesday, February 12, 2021, at 9:30 a.m.

Aloha Chair Baker, Vice Chair Chang and Members of the Committee,

I am Peter Davis, Chair of the Government Affairs Committee, testifying on behalf of the Hawai'i Association of REALTORS® (“HAR”), the voice of real estate in Hawai'i, and its over 10,000 members. HAR **strongly opposes** S.B. 306, which prohibits landlords from recovering possession of a dwelling unit from tenants if habitability of the premises is significantly impaired. Sets a tenant's liability for rent if habitability of the premises is significantly impaired. Specifies that the damages for retaliatory evictions are equal to two months' rent or free occupancy for two months.

Tenant Remedies for Habitability Already Covered Under the Law:

Under the Landlord-Tenant Code, Hawai'i Revised Statutes (HRS) §521, it imposes strict habitability obligations upon landlords and clear remedies for tenants for failure to properly maintain a rental unit or for engaging in improper retaliation evictions.

Regarding repairs and landlord obligations to maintain habitability of a unit and tenant remedies, the Code provides the following:

Landlord Obligations / Tenant Remedies

- HRS §521-64(c) and (d). **Emergency repairs** must be initiated within **3 business days**. If landlord fails to repair the unit, tenant may perform repairs and provide landlord with receipts and deduct up to \$500 from the next month's rent.
- HRS § 521-64(a) and (b). Repairs for **law, code or ordinance violations** must be initiated **within 5 business days**. If landlord fails to repair unit, tenant may perform repairs and provide landlord with receipts and deduct up to \$500 or one month's rent, whichever is greater.
- HRS §521-64(c). **General repairs** must be initiated **within 12 business days**. If landlord fails to repair unit, tenant may perform repairs and provide landlord with receipts and deduct up to \$500 from next month's rent.

Additionally, under HRS §521-42, a landlord has a duty to supply and maintain a fit premises at all times during the tenancy, which includes the following under subsection (a):

1. Complying with all applicable building and housing laws materially affecting health and safety.
2. Keeping the common areas of a multi-dwelling unit clean and safe
3. Making all repairs to keep the unit in a livable condition.
4. Maintaining electrical, plumbing and other facilities in good working order.
5. Providing garbage bins and frequent waste removal.
6. Providing running water.

Also, under HRS §521-74, a landlord is prohibited from doing a retaliatory eviction and rent increase if a tenant in good faith requested repairs or complained in good faith to a governmental agency concerned with landlord-tenant disputes or to the landlord directly.

If a landlord violates this section, a tenant can recover damages, legal costs and reasonable attorney fees.

Due Process Concerns:

This measure, allows tenants to unilaterally assert that their unit is "significantly impaired". There is no provision for an owner to dispute or seek impartial review of whether "significant impairment" has occurred. Moreover, if the tenant caused the unit to become uninhabitable, there is no opportunity for the landlord to assert that defense.

Additional Concerns with the Measure:

Additionally, significantly impaired is not defined and subjective and could open the door to abuse.

Furthermore, if a unit does become uninhabitable and a tenant cannot be temporarily removed from the dwelling to conduct repairs, there would be no recourse for a property owner to fix the damaged unit.

Based on existing law regarding landlord obligations and tenant remedies, this measure does not seem necessary. Furthermore, existing law seems to sufficiently cover damages for retaliatory evictions and habitability of a unit.

For the foregoing reasons, we respectfully request that this measure be held.

Mahalo for the opportunity to testify on this measure.



SB 306, RELATING TO THE LANDLORD-TENANT CODE

FEBRUARY 12, 2021 · SENATE COMMERCE AND
CONSUMER PROTECTION COMMITTEE · CHAIR
SEN. ROSALYN H. BAKER

POSITION: Support.

RATIONALE: Imua Alliance supports SB 306, relating to the landlord-tenant code, which prohibits landlords from recovering possession of a dwelling unit from tenants if habitability of the premises is significantly impaired; sets a tenant's liability for rent if habitability of the premises is significantly impaired; and provides remedies for retaliatory evictions.

Hawai'i is facing a looming eviction crisis. During COVID-19, unemployment skyrocketed to levels not seen since the Great Depression. A recent study found that our state is experiencing the slowest unemployment rate recovery in the nation, moreover, with our rate hovering at approximately 9 percent in December. Thousands of people who haven't lost their jobs have instead seen their employment hours and earnings slashed, as the economic downturn lingered throughout 2020 and into the new year.

Financial precarity has become the norm for many families, who are unable to pay their full rent and have accumulated rental debts. Currently, the state's eviction moratorium protects these families from being removed from their homes. Yet, the eviction moratorium will eventually expire as the public health emergency passes, leaving thousands of people at risk of losing their housing.

Retaliatory evictions are a real threat for renters who've been harmed by the recession and

are navigating a path back to financial and housing security, especially low-income families who are relying on expiring rental subsidies to survive.

Today, **our state's ongoing lack of affordable housing exacerbates the economic insecurity suffered by local families, which sex traffickers use to prey upon potential victims with false promises of financial stability and prosperity.** Hawai'i residents face the highest housing costs in the nation, at more than twice the national average. Researchers who authored the National Low Income Housing Coalition's *Out of Reach 2020* report found that a full-time worker would need to earn \$38.76/hour to afford a two-bedroom apartment at fair market value in our state, with Honolulu experiencing a 67 percent increase in fair market rent between 2005 and 2015. Average rent for a two-bedroom unit surpassed \$2,000 in recent years, with minimum wage workers needing to log 117 hours per week to afford a modest one-bedroom apartment at fair market value and 153 hours per week to afford a two-bedroom—a number that is equivalent to working over 20 hours a day with no days off year-round. In the past five years alone, Honolulu rent has increased by more than 25 percent. While 42 percent of Hawai'i residents are renters (a number that does not include individuals and families renting outside of the regulated rental market), they earn an average wage of \$17.17/hour, according to NLIHC, scarcely enough to meet their basic needs.

One out of every four households in Hawai'i report that they are “doubling up” or are three paychecks or less away from being homeless, per the Hawai'i Appleseed Center for Law and Economic Justice. Additionally, over 60 percent of households are severely cost-burdened, following NLIHC data, meaning that they pay more than 30 percent of their income for housing costs, a number that rises to over 80 percent of extremely low-income households, with only 74 homes available for every 100 households earning 80 percent of their respective area's median income.

Unsurprisingly, our state is now experiencing population decline. Hawai'i saw domestic out-migration increase for a third consecutive year in 2019, as the state's high cost of living continued to push people to the mainland. Census estimates show that our state's population dropped by 8,866 people from July 2019 to July 2020, when births, deaths, and migration were accounted for. That population drop is nearly double the loss seen in 201, when Hawai'i one of just ten states in

the country to lose population, according to the U.S. Census Bureau. People are simply being priced out of paradise.

Without question, Hawai'i's lack of affordable housing exacerbates our state's homelessness crisis. In a recently released report, Chief Medical Examiner Dr. Masahiko Kobayashi said that 127 people who were considered homeless at the time of their deaths died on O'ahu in 2019, up from 120 deaths in 2018 and an increase of 46 percent from 2017 (87 deaths).

Furthermore, over 30 percent of juvenile arrests in Hawai'i are for running away from home, the highest proportion in the nation. Nationally, one in seven young people between the ages of 10 and 18 will run away. Approximately 75 percent of runaways are female, while 46 percent of runaway and homeless youth report being physically abused, 38 percent report being emotionally abused, and 17 percent report being forced into unwanted sexual activity by a family or household member, according to the National Conference of State Legislatures.

Roughly 30 percent of runaway children will be approached for sexual exploitation within 48 hours of being on the run, according to the National Center for Missing and Exploited Children, with over 80 percent being approached for the commercial sex trade during the course of their time on streets. A federal study found that an estimated 38,600 runaway youth have been sexually assaulted, in the company of someone known to be sexually abusive, or engaged in sexual activity in exchange for money, food, or shelter.

Runaways are perceived as easy targets for sex traffickers because they lack stable shelter, a supportive environment, and financial resources, placing them at greater risk of forced prostitution and sexual servitude. Traffickers exploit our limited number of available shelter beds to lure young people into exploitation. As the homeless childcare provider Covenant House observes, traffickers tell homeless youth that shelters are full and ask, "Where are you going to go? Why don't you come with me? I'll take care of you." Coupled with threats of and actual physical and sexual violence against the victims or their families, these coercive techniques compel runaway youth to remain enslaved.

LGBTQ youth, who comprise an estimated 40 percent of the runaway and homeless youth population in the United States, are exponentially more likely to fall prey to human traffickers because of discrimination, family and community trauma, and a longing for comfort and acceptance (an estimated 26 percent of LGBTQ adolescents are rejected by their families and put out of their homes simply for being open and honest about who they are). In providing care for victims of human trafficking, we have heard their stories hundreds of times.

We cannot continue to allow the islands to be used as a private Monopoly board for real estate speculators. To ensure that our islands are affordable for ourselves and future generations, we must take bold action **now** to increase our affordable housing supply for working families and ensure that low-income families who are participating in our state's rental market—and who are often Native Hawaiian, Micronesian, Pacific Islander, or other people of color—do not face retaliation as a result of economic hardship.