
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No: SB 1133 **Hearing Date:** April 5, 2022
Author: Archuleta
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Urgency: No **Fiscal:** Yes
Consultant: AB

Subject: *Price gouging: state of emergency*

HISTORY

Source: California Apartment Association

Prior Legislation: SB 1196 (Umberg), Ch. 39, Stats. of 2020
AB 1919 (Wood), Ch. 631, Stats. of 2018
AB 2820 (Chiu), Ch. 671, Stats. of 2016
AB 457 (Nunez, 2005), failed passage in the Senate
SB 1363 (Ducheny), Ch. 492, Stats. of 2004
ABX1-57 (McDonald, et al.), Ch. 51, Stats. of 1994
ABX1-36 (Katz), Ch. 52, Stats. of 1994

Support: Apartment Association of Greater Los Angeles; California Association of Realtors; California Rental Housing Association; East Bay Rental Housing Association (support if amended); Apartment Association of Orange County (support if amended); Affordable Housing Management Association – Northern CA Hawaii (support if amended); Affordable Housing Management Association – Pacific Southwest (support if amended)

Opposition: California Rural Legal Assistance Foundation; Western Center on Law & Poverty

PURPOSE

The purpose of this bill is to make California's rent gouging prohibition during a state of emergency or local emergency contingent upon the inclusion of specific findings in the underlying declaration of emergency. The bill also requires the California Office of Emergency Services to post applicable declarations of emergency on its website and makes enforcement of the rent gouging prohibition contingent upon that posting. Additionally, the bill exempts various forms of housing from the rent gouging prohibition.

Existing law empowers the Governor of California to declare a state of emergency under certain circumstances, and establishes related duties and powers. (Gov. Code §8625 et. seq.)

Existing law authorizes the governing body of a city, a county, a city and county, or an official designated by that governing to declare a local emergency, and establishes related duties and powers. (Gov. Code §8630 et. seq.)

Existing law provides that upon the proclamation of a state of emergency declared by the Governor, the California Office of Emergency Services (Cal OES) shall include information on its website regarding Penal Code §396, including information for property owners about the effect of the proclamation on “rental price,” as defined elsewhere in California law. (Gov. Code §8588.8)

Existing law establishes a legislative finding that during state of emergency or local emergency, some merchants have taken unfair advantage of consumers by greatly increasing prices for essential consumer goods and services, and that during states of emergency, the public interest requires the prohibition of excessive and unjustified price increases. (Pen. Code §396(a).)

Existing law establishes the intent of the Legislature to protect citizens from excessive and unjustified increases in the prices charged during or shortly after a declared states of emergency or local emergency for goods and services vital for the health, safety and welfare of consumers, whether they are sold in person, in stores or online. (Pen. Code §396(a).)

Existing law establishes the intent of the Legislature that Penal Code §396 be construed liberally to that its beneficial purposes may be served.

Existing law provides that upon the proclamation of a state of emergency or local emergency, and for a period of 30 days following that proclamation, it is unlawful to sell or offer to sell the following goods and services for a price of more than 10 percent greater than the price charged immediately prior to the proclamation or declaration of emergency:

- Food items or goods
- Goods or services used for emergency cleanup
- Emergency supplies
- Medical supplies
- Home heating oil
- Building materials
- Housing
- Transportation
- Freight
- Storage services
- Gasoline or other motor fuel. (Pen. Code §396(b).)

This bill removes “housing” from the list of goods and services that may not be sold or offered for a price of more than 10 percent greater than the price charged prior to the proclamation of emergency.

Existing law provides that a price increase of 10 percent or greater on the items listed above is not unlawful if the seller can prove that the increase is directly attributable to additional costs imposed on it by the supplier of goods or to additional costs for labor or materials during the state of emergency, and the price is no more than 10 percent greater than the total cost to the seller plus a customary pre-emergency markup. (Pen. Code §396(b).)

Existing law provides that, if the seller did not charge a price for the goods or services immediately prior to the proclamation or declaration of emergency, it may not charge a price that is more than 50 percent greater than the cost to the vendor. (Pen. Code §396(b).)

Existing law provides that upon the proclamation of a state of emergency or local emergency, and for a period of 180 days following that proclamation, it is unlawful for a contractor to sell or offer to sell any repair or reconstruction services or any services used in emergency cleanup for a price of more than 10 percent above the price charged prior to the declaration of emergency. (Pen. Code §396(c).)

Existing law provides that upon the proclamation of a state of emergency or local emergency, and for a period of 30 days following that proclamation, it is unlawful for an owner or operator of a hotel or motel to increase the hotel or motel's regular rates, as advertised immediately prior to the proclamation or declaration of emergency, by more than 10 percent. (Pen. Code §396(d).)

Existing law provides that upon the proclamation of a state of emergency or local emergency, and for a period of 30 days following that proclamation, or any period the proclamation is extended, it is unlawful to increase the rental price advertised, offered or charged for housing, to an existing or prospective tenant, by more than 10 percent. (Pen. Code §396(e).)

This bill, by striking language related to the extension of a proclamation of emergency, caps at 30 days the period that the prohibition regarding rental price may be in effect.

Existing law specifies that a greater rental price is not lawful if the person or entity setting the price can prove that the increase is directly attributable to additional costs for repairs or additions beyond normal maintenance that were amortized over the rental term that caused the rent increase, or that an increase was contractually agreed upon prior to the proclamation of emergency. (Pen. Code §396(e).)

Existing law provides that it shall not be defense to prosecution that an increase in rental price was based on the length of the rental term, the inclusion of additional goods or services, except as specified with respect to furniture, or that the rent was offered by, or paid by, an insurance company, or other third party, on behalf of a tenant. (Pen. Code §396(e).)

Existing law specifies that, despite the proclamation of a state of emergency, a landlord may not charge a price greater than the amount authorized by a local rent control ordinance. (Pen. Code §396(e).)

This bill provides that the prohibition against rental price increases shall only apply when a proclamation of a state of emergency or local emergency includes specific findings that the emergency has caused or is substantially likely to cause abnormal disruptions of the market for housing such that regulation is necessary to prevent excessive and unjustified increases in rental prices.

This bill requires Cal OES to post on its website all applicable proclamations of a state of emergency and local emergency, including any extensions of the protections related thereto.

This bill provides that the prohibition on rental price increases and related penalties shall not be enforceable until the proclamation of the underlying state of emergency or local emergency is posted on the website of Cal OES.

This bill exempts the following from the prohibition against rental price increases:

- Housing that is subject to certain provisions of the Tenant Protection Act of 2019 (AB 1482, Chiu, Ch. 597, Stats. of 2019), or any ordinance, rule, regulation, or initiative measure adopted by any local governmental entity that establishes a maximum amount that a landlord may charge a tenant for rent.
- Housing restricted by deed, regulatory restriction contained in an agreement with a government agency, or other recorded document as affordable housing for persons and families of very low, low, or moderate income, as those terms are defined elsewhere in existing law.
- The initial rental price charged for any housing that is issued its first certificate of occupancy for residential use within the three months prior to a proclamation of a state of emergency or declaration of local emergency, or during any time that the prohibition against rental price increases is in effect as a result of such proclamation.

Existing law forbids any person or entity from evicting any residential tenant of residential housing after the proclamation of a state of emergency, and for a period of 30 days following that proclamation, or any period that the proclamation is extended, and subsequently renting or offering to rent to another person at a rental price greater than the evicted tenant could be charged under Penal Code §396. This subdivision includes an exception for an eviction process that lawfully began prior to the proclamation of emergency. (Pen. Code §396(f).)

This bill, by striking language related to the extension of a proclamation of emergency, caps the effective period of the eviction prohibition above at 30 days following the proclamation of emergency.

Existing law provides that the prohibitions contained in Penal Code §396 may be extended by the appropriate authority if deemed necessary to protect the lives, property or welfare of the citizens. (Pen. Code §396(g).)

This bill requires that upon an extension of the prohibitions contained in Penal Code §396 by the appropriate authority, that extension shall include the findings required elsewhere in this bill regarding disruptions in the housing market.

Existing law specifies that a violation of the provisions of Penal Code §396 is a misdemeanor punishable by imprisonment in county jail for up to a year, by a fine of not more than ten thousand dollars (\$10,000), or both. (Pen. Code §396(h).)

Existing law states that the prohibitions on price gouging do not prohibit an owner from evicting a tenant for any lawful reason. (Pen. Code §396(m).)

Existing law, for the purposes of Penal Code §396, defines “rental price” as any of the following:

- For housing rented within one year prior to the time of the proclamation or declaration of emergency, the actual rental price paid by the tenant. For housing not rented at the time

of the declaration or proclamation, but rented, or offered for rent, within one year prior to the proclamation or declaration of emergency, the most recent rental price offered before the proclamation or declaration of emergency. For housing rented at the time of the proclamation or declaration of emergency but which becomes vacant while the proclamation or declaration of emergency remains in effect and which is subject to any ordinance, rule, regulation, or initiative measure adopted by any local governmental entity that establishes a maximum amount that a landlord may charge a tenant for rent, the actual rental price paid by the previous tenant or an amount that equals 160 percent of the fair market rent, whichever is greater. This amount may be increased by 5 percent if the housing was previously rented or offered for rent unfurnished, and it is now being offered for rent fully furnished. This amount shall not be adjusted for any other good or service, including, but not limited to, gardening or utilities currently or formerly provided in connection with the lease.

- For housing not rented and not offered for rent within one year prior to the proclamation or declaration of emergency, 160 percent of the fair market rent established by the United States Department of Housing and Urban Development. This amount may be increased by 5 percent if the housing is offered for rent fully furnished. This amount shall not be adjusted for any other good or service, including, but not limited to, gardening or utilities currently or formerly provided in connection with the lease.
- Housing advertised, offered, or charged, at a daily rate at the time of the declaration or proclamation of emergency, shall be subject to the rental price applicable to housing rented within one year prior to the proclamation or declaration of emergency, if the housing continues to be advertised, offered, or charged, at a daily rate. Housing advertised, offered, or charged, on a daily basis at the time of the declaration or proclamation of emergency, shall be subject to the rental price specified for housing not rented and not offered for rent within one year prior to the proclamation or declaration of emergency, if the housing is advertised, offered, or charged, on a periodic lease agreement after the declaration or proclamation of emergency.
- For mobile home spaces rented to existing tenants at the time of the proclamation or declaration of emergency and subject to a local rent control ordinance, the amount authorized under the local rent control ordinance. For new tenants who enter into a rental agreement for a mobile home space that is subject to rent control but not rented at the time of the proclamation or declaration of emergency, the amount of rent last charged for a space in the same mobile home park. For mobile home spaces not subject to a local rent control ordinance and not rented at the time of the proclamation or declaration of emergency, the amount of rent last charged for the space.

This bill strikes language (in the first bullet above) from the definition of “rental price” providing that, for housing rented at the time of the state of emergency proclamation but which becomes vacant during the state of the emergency and which is subject to a maximum rent restriction, a landlord may charge a tenant either the actual rental price paid by the previous tenant or 160% of the fair market rent established by HUD, whichever is greater.

COMMENTS

1. Need for This Bill

According to the author:

“Penal Code section 396 prohibits many industries from increasing prices by more than 10 percent after an emergency has been declared. The penalty for violating this law include penalties and jail time. The President, the Governor, and local officials can all declare emergencies. Although the price gouging limitation was only intended to apply for 30 days, state and local officials have extended many states of emergency for months thereby making the correct 30-day period unknowable. Over the last two years, some emergencies due to COVID-19, wildfires, and drought have yet to end. Unfortunately, these extensions are not made public by state and local officials, leaving businesses confused on how to properly comply. SB 1133 fixes this problem by requiring CalOES to keep an up to date website regarding the current emergency proclamations by the President, Governor, and local governments.”

2. Background

In October of 2017, massive wildfires scorched large areas of California, destroying more than 10,000 structures across almost 30 counties. In response, Governor Brown declared a state of emergency in eight of those counties, and issued an executive order that extended the prohibition on price gouging until April of 2018.¹ Following the fires, median rents in the hardest-hit counties jumped by as much as 36%, and local newspapers reported stories of homes coming onto the market at nearly double the price of other similar rentals in the same neighborhood.²

At the time, criminal prohibitions on price gouging during states of emergency – governed by Penal Code §396 – only applied to previously rented units, not to rentals that had come on the market since the fires. Additionally, while existing law placed a 10% cap on rental price increases during states of emergency, there was confusion among housing providers as to whether this 10% cap applied to the market rate of the unit or the rate charged to the previous tenant.

In order to resolve this ambiguity, and prevent housing providers from unnecessary exposure to criminal liability simply due to a lack of clarity in the law, the Legislature passed AB 1919 (Wood, Ch. 631, Stats. of 2018). Among other provisions, AB 1919 established a definition of “rental price” in the price gouging law that applied the 10% cap differently depending on whether or not the unit had been rented within one year prior to the declaration of emergency. That bill also established different definitions of “rental price” for daily rate housing and mobile homes. For new rentals, “rental price” was defined as 160% of the fair market rent established by the U.S. Department of Housing and Urban Development.

¹ California Governor’s Executive Order B-43-17.

² “California fires took thousands of homes. Now rent in the hardest-hit counties is soaring.” *The Guardian*. 23 October 2017. <https://www.theguardian.com/us-news/2017/oct/23/california-wildfires-santa-rosa-sonoma-rent-spike-homelessness>

A year later, the Legislature passed the Tenant Protection Act (AB 1482, Chiu, Ch. 597, Stats. of 2019), which established new laws governing the rent setting and eviction practices of residential landlords. Among its provisions, AB 1482 prohibited specified landlords from raising rents on current tenants by more than five percent plus the percentage change in the regional consumer price index, up to a maximum of 10 percent per year. However, the measure specified that certain rentals and other housing types were exempt from that limitation.³ Many local jurisdictions have their own rent control regulations, which are not preempted by AB 1482.

On March 4, 2020, Governor Newsom declared a statewide emergency to address the COVID-19 pandemic, triggering the price gouging protections of Penal Code §396. In addition, several local jurisdictions enacted their own emergency protections, many of which included temporary bans on rent increases. In March 2021, Governor Newsom allowed the ban on rent-gouging to lapse, but maintained the protections of §396 for other goods and services.⁴ Some local rent increase prohibitions remain in effect.⁵

3. Effect of this Bill

This bill makes several changes to California’s anti-price gouging law, primarily as it relates to rental housing. In the analysis below, the terms “price gouging statute” and “§396” will be used interchangeably.

a. Removal of “Housing” from Penal Code §396(b)

Existing law includes “housing” in the list of goods and services subject to a 10% price increase cap after to a declaration of emergency, based on the price prior to the declaration.⁶ According to the Author, “subdivision (b) of Penal Code §396 is very broad and [...] there is an ambiguity as to whether Section 396’s price gouging provisions apply to housing anytime subdivision (b)’s protections are triggered or only when subdivision (e)’s protections are triggered.” This bill removes “housing” from the list of goods and services subject to a 10% price increase cap under §396(b).

This bill’s deletion of “housing” from the price increase cap in §396(b) is premised on the notion that it is unclear whether that subdivision applies to rental housing. However, it is clear from the plain language of subdivision (e) that that provision does apply to rental housing. Additionally, while “housing” as specified in subdivision (b) may apply to rental housing as well, it also likely applies to non-rental housing. Rather than remove housing from subdivision (b) altogether, the Author may wish to amend the bill to clarify that it applies solely to non-rental housing.

³ Civil Code §§1947.12(a),(b), 1947.13.

⁴ Governor’s Executive Order N-03-21. <https://www.gov.ca.gov/wp-content/uploads/2021/03/3.4.21-EO-N-03-21.pdf>

⁵ “Even in a hot market, L.A. won’t allow rent hikes for most tenants until 2023.” *Los Angeles Times*. 3 January 2022. <https://www.latimes.com/homeless-housing/story/2022-01-03/even-in-hot-market-most-l-a-tenants-wont-face-rent-increases-for-at-least-another-year>

⁶ Penal Code §396(b)

b. When State of Emergency Proclamations are Extended

Existing law makes it unlawful for a person, business or other entity to increase the rental price advertised, offered or charged to a prospective tenant by more than 10 percent for 30 days after a declaration of emergency, subject to certain conditions.⁷ Existing law also makes it unlawful for a person, business or other entity to evict a residential tenant within 30 days after the declaration of a state of emergency and then charge a new tenant a higher rental price than the evicted tenant could be charged.⁸ Additionally, existing law allows these prohibitions, and others in §396, to be extended when a declaration of emergency is extended, but for no more than 30 days per extension.⁹

This bill strikes language within the prohibitions on rental price increases and price increases after eviction providing that those prohibitions can be extended when a declaration of emergency is extended. Given that a separate provision in §396 (subd. (g)) authorizes the governmental body declaring the emergency to extend that declaration and any appropriate price gouging protections, these strikeouts merely conform the language establishing the rental price and eviction protections to language establishing other price-gouging bans in §396.

c. Findings Requirement

As mentioned above, §396 prohibits a person, business or other entity from increasing the rental price advertised, offered or charged to a prospective tenant by more than 10 percent for 30 days after a declaration of emergency, subject to certain conditions. This bill provides that this prohibition only applies when the declaration of emergency includes specific findings that the emergency has caused or is substantially likely to cause abnormal disruptions of the market for housing such that regulation is necessary to prevent excessive and unjustified increases in rental prices. This bill also requires that any extensions of a declaration of emergency include these findings as well. Considering the significant demands on local and state governments during emergencies, is it reasonable to require a declaration of emergency to include such findings, especially given that they are not required to justify the operation of other price gouging protections?

d. Requirements Related to the California Office of Emergency Services (Cal OES)

Existing law requires Cal OES, upon a declaration of emergency by the Governor, to include on its website information about §396, including information for property owners about the effects of the declaration on rental prices. However, according to the author, that information “is regularly out of date and does not include price gouging restrictions triggered by proclamations of local governments. This leaves the citizens with no official list of applicable states of emergency, making compliance with Section 396 a challenge.”

⁷ Penal Code §396(e)

⁸ Penal Code §396(f)

⁹ Penal Code §396(g)

This bill requires Cal OES to post on its website all applicable proclamations and declarations of a state of emergency and declarations of local emergency, including any extensions of the protections in §396. Additionally, this bill provides that the prohibition against rental price gouging and related penalties are not enforceable until the declaration of the underlying emergency or local emergency is posted on Cal OES' website. Given the pace of emergencies and the various other duties of Cal OES during emergencies, is it reasonable to condition the operation of specific price gouging protections on whether its website has been updated?

e. Exemptions from Prohibition on Rental Price Increases

As mentioned above, existing law makes it unlawful for a person, business or other entity to increase the rental price advertised, offered or charged to a prospective tenant by more than 10 percent for 30 days after a declaration of emergency. This bill establishes exemptions to that prohibition for three separate types of housing – housing subject to state or local rent controls, affordable housing, and new housing that becomes available no more than 3 months before the declaration of emergency or during the state of emergency.

First, with regard to the exemption for rent controlled units, AB 1482 (Chiu, Ch. 597, Stats. of 2019) and local rent control ordinances generally set upper limits on the amount that a rental price may be increased annually. Specifically, AB 1482 limits annual rent increases to either five percentage points plus the percentage change in the cost of living *or* ten percentage points, whichever is greater. Many local rent regulations are more restrictive, capping rent increases at a lower percentage of the base rent.¹⁰ According to the author, “§396’s complex rental increase calculations could be simplified by referencing AB 1482 and local rent control laws as the process for establishing rents.” During shorter emergencies, this may in fact be true: §396 and AB 1482 both cap rent increases at a maximum of ten percent of the base rental price, so exempting rent controlled units from §396 would still prohibit landlords from increasing rent by an amount greater than that section allows. Conversely, for longer states of emergency (those greater than a year), landlords of rent controlled units would be able to increase rent far beyond what §396 otherwise allows, even if the government has established the necessary findings required by this bill. For instance, the COVID-19 state of emergency declared by the Governor has been in effect for over 2 years, and under §396, the maximum allowable rent increase for rent controlled units during that period is 10% of the pre-emergency rental price. Under this bill, however, rents for those units could have been increased 20% - 30% (a max of 10%/year) depending on when past increases took place.¹¹

Second, this bill exempts affordable housing from §396’s prohibition against rental gouging. During times of emergency, individuals and families living in affordable

¹⁰ Many jurisdictions cap allowable rent increases directly to the percentage increase of the regional Consumer Price Index.

¹¹ To illustrate this point: if a landlord increased rent for a rent controlled unit by 10% on March 19, 2020, a week after the COVID-19 declaration of emergency, this bill would allow that landlord to increase the rent by another 10% on March 19, 2021, and by another 10% on March 19, 2022.

housing often endure the most socioeconomic hardship. According to a study by Human Rights Watch examining the impact of the COVID-19 pandemic on people in poverty, among households with incomes below \$35,000, 47 percent of adults report being behind on housing payments, and 25 percent say they struggle to put food on the table. Additionally, among households making under \$35,000, 57.3 percent experienced income or employment loss during the pandemic, compared with 34.6 percent of those making more than \$150,000 a year.¹² Given the challenges faced by California’s most vulnerable populations during times of emergency, does it make sense to exempt affordable housing from §396’s rent gouging protections?

f. Definition of “Rental Price”

AB 1919 (Wood, Ch. 631, Stats. of 2018) expanded and clarified the definition of “rental price” for the purposes of §396 to distinguish between housing rented within one year prior to the declaration of emergency, housing not rented or offered for rent within one year prior to the declaration of emergency, housing offered at a daily rate, and rental mobile homes. Under existing law, for housing rented within one year prior to the time of the declaration of emergency, “rental price” means the actual rental price paid by the current tenant, or the most recent rental price offered if the unit is vacant at the time of the declaration of emergency. Further, for housing rented at the time of the declaration of emergency, but which becomes vacant during the emergency *and* is subject to a state or local rent control law, “rental price” means the rental price paid by the previous tenant *or* 160% of the fair market rent established by HUD. This bill would strike this provision defining “rental price” when the unit becomes vacant and is subject to rent control.

Given the way that the definition of “rental price” is worded as it applies to housing rented within one year prior to a declaration of emergency, eliminating the provision relating to units that become vacant during a state of emergency, as this bill proposes to do, might create confusion with regard to these units. Put another way, under this bill, it is unclear how §396 would apply, if at all, to units that become vacant during states of emergency. Because AB 1482 does not set limits on rent increases between tenancies, one possible interpretation is that landlords could set rent for recently-vacated units as high as they wish, even during states of emergency. The Author may wish to consider an amendment clarifying how §396’s rent-gouging protection applies to recently vacated units.

4. Argument in Support

According to the Apartment Association of Greater Los Angeles:

We appreciate that the bill would require the Office of Emergency Services to post all applicable proclamations and declarations on its website, and would specify that these provisions would not be enforceable until the proclamation or declaration is posted on the office’s website. This will reduce confusion and misinformation, as well as create more transparency in the process.

¹² “United States: Pandemic Impact on People in Poverty.” *Human Rights Watch*. 2 March, 2021

5. Argument in Opposition

According to the Western Center on Law and Poverty:

Currently, PC 396 provides protections from price gouging on a range of goods and services, protections that are automatically triggered by the declaration of a state of emergency. This bill would single out housing as the only good or service that must be specifically included in the emergency declaration—with findings—to bring it within the protections of PC 396.

This is unnecessary and unworkable impediment to ensuring the application of PC 396's price-gouging protections to vulnerable tenants during an emergency. The requirement to make very specific findings to invoke the housing protections of PC 396 is inconsistent with the broad scope of an emergency declaration and will undoubtedly be often overlooked or omitted. Even if not, it is beyond the expertise of the Governor or other public officials to make findings as to how an emergency "has caused or is substantially likely to cause abnormal disruptions of the market for housing. SB 1133 also proposes to exclude units that are covered by the Tenant Protection Act, (Chapters 597, Statutes of 2019) further narrowing the scope of PC Section 396 and creating confusion and uncertainty for tenants and landlords.

The protections of PC 396 during recent disasters have been critical to ensuring stability for all households. For example, an owner of multifamily housing designated for seniors in Southern California imposed rent increases of nearly 20% on residents during the COVID-19 lock-down period. Impacted residents included seniors with disabilities and medical conditions that make them extremely vulnerable to COVID-19. Only when lawyers for a local legal services program filed litigation citing PC 396 did the landlord agree to roll back rent increases, allowing senior residents to retain their housing during the lockdown period.

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