California State Assembly

PUBLIC SAFETY

KEVIN MCCARTY
CHAIR

1020 N Ste, Room 111
(916) 319-3744
FAX: (916) 319-3745

AGENDA

Tuesday, April 9, 2024
9 a.m. -- State Capitol, Room 126

REGULAR ORDER OF BUSINESS

HEARD IN SIGN-IN ORDER

1.	AB 1772	Ramos	Theft.
2.	AB 1779	Irwin	Theft: jurisdiction.
3.	AB 1794	McCarty	Crimes: larceny.
4.	AB 1802	Jones-Sawyer	Crimes: organized theft.
5.	AB 1831	Berman	Crimes: child pornography.
6.	AB 1845	Alanis	Crimes: Grant program for identifying, apprehending, and prosecuting resale of stolen property.
7.	AB 1872	Sanchez	Crimes: extortion.
8.	AB 1873	Sanchez	PULLED BY THE AUTHOR.
9.	AB 1960	Soria	Sentencing enhancements: property loss.
10.	AB 1962	Berman	Crimes: disorderly conduct.
11.	AB 1972	Alanis	Organized retail theft: cargo.
12.	AB 1990	Wendy Carrillo	Criminal procedure: arrests: shoplifting.
13.	AB 2042	Jackson	Police canines: standards and training.
14.	AB 2045	Hoover	Controlled substances: fentanyl trafficking penalties.
15.	AB 2064	Jones-Sawyer	Community Violence Interdiction Grant Program.
16.	AB 2209	Sanchez	California Values Act: exception.
17.	AB 2281	Soria	Tribal judges.
18.	AB 2406	Davies	Crimes: theft.
19.	AB 2432	Gabriel	Corporations: criminal enhancements.
20.	AB 2438	Petrie-Norris	Property crimes: enhancements.
21.	AB 2531	Bryan	Deaths while in law enforcement custody: reporting.
22.	AB 2625	Bryan	Courts: notification system.
23.	AB 2645	Lackey	Electronic toll collection systems: information sharing: law enforcement.
24.	AB 2681	Weber	Weapons: robotic devices and unmanned aircrafts.
25.	AB 2790	Pacheco	PULLED BY THE AUTHOR.
26.	AB 2814	Low	Crimes: unlawful entry: intent to commit package theft.

27.	AB 2943	Zbur	Crimes: shoplifting.
28.	AB 3027	Bains	Crime: transnational repression.
29.	AB 3209	Berman	Crimes: theft: retail theft restraining orders.
30.	AB 3241	Pacheco	Law enforcement: police canines.

Date of Hearing: April 9, 2024
Counsel: Liah Burnley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 1772 (Ramos) – As Amended April 3, 2024

SUMMARY: Requires the Department of Justice (DOJ) to determine the number of misdemeanor convictions for a crime of theft for which property was taken from a retail establishment during the Governor's declared state of emergency related to the COVID-19 pandemic, and to report that information to the Legislature on or before January 1, 2026.

EXISTING LAW:

1) Makes shoplifting a crime, punishable as a misdemeanor. (Pen. Code, § 459.5, subd. (a).)

2) Makes organized retail theft a crime, punishable as an alternative misdemeanor-felony. (Pen. Code, § 490.4)

3) Makes grand theft a crime punishable as an alternative misdemeanor-felony. (Pen. Code, §§ 487, 489.)

4) Makes petty theft a crime punishable as a misdemeanor. (Pen. Code, § 490.)

5) Makes burglary in a commercial establishment a crime. Burglary in the second degree is punishable as an alternative misdemeanor-felony (Pen. Code, §§ 459, 461.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "AB 1772 would direct the Department of Justice to engage in collecting data on the number of arrests and convictions that took place for theft during the Covid-19 pandemic. This would help shed light on what the scope of the issue is in regards to retail theft, and just how much the losses were during the pandemic."

2) **Need for This Bill**: According to the National Retail Foundation, the pandemic led to an increase in retail security threats:

> Most retailers attribute the increase in criminal activity to the pandemic, according to the 2021 Retail Security Survey released today by the National Retail Federation. […]
>
> Mandated store shutdowns and other shopping restrictions that occurred throughout 2020 had an impact on where fraudulent activity occurred. More than one-third (39 percent) of respondents

> said they saw the greatest increase in fraud in multichannel sales channels such as buy online pick up in store, up from 19 percent the year before. In contrast, just 28 percent said the greatest increase in fraud came from in-store-only sales, down from 49 percent the year before. The percent of those who pointed to online-only sales fraud remained flat.
>
> The survey found that while the overall shrink rate remained relatively steady compared with 2019, it remains above the average of the last five years. Respondents reported an average shrink rate of 1.6 percent, unchanged from last year's high.
>
> Apprehensions and prosecutions of dishonest employees are down compared with last year and with the five-year average. However, the cost per dishonest employee case is increasing. Half (50 percent) of respondents reported an average dollar loss of at least $1,000 compared with 29 percent in 2019.
>
> Perhaps more concerning is the fact that a majority of retailers (65 percent) agree that ORC [organized retail crime] gangs are exhibiting higher levels of aggression and violence than they did the year before. Retailers cited COVID-19, policing and changes to sentencing guidelines, and the growth of online marketplaces as top reasons behind the increase in ORC activity.

(National Retail Federation, *Pandemic Led to Increase in Retail Security Threats, According to NRF Study* (August 18, 2021). Available at <https://nrf.com/media-center/press-releases/pandemic-led-increase-retail-security-threats-according-nrf-study> [as of April 5, 2024].)

However, some complaints of retail theft were overstated. For example, in 2021, Walgreens closed five stores in San Francisco purportedly due to retail theft. However, the San Francisco Police Department's data on shoplifting did not support this explanation for the closures. Recently, the chief financial officer of Walgreens acknowledged the shoplifting threat had probably been overstated. The company likely spent too much on security measures and mischaracterized the amount of theft at stores. In fact, shrinkage (the inventory that was bought but could not be sold primarily due to shoplifting) actually decreased to around 2.5 to 2.6 percent of sales, compared to 3.5 percent the prior year. (*See* New York Times, *Walgreens Executive Says Shoplifting Threat Was Overstated* (Jan. 6, 2023). Available at: < https://www.nytimes.com/2023/01/06/business/walgreens-shoplifting.html?login=email&auth=login-email> [as of April 5, 2024].) *See also* (Los Angeles Times, *Retailers Say Thefts Are at Crisis Level. The Numbers Say Otherwise* (Dec. 15, 2021) < https://www.latimes.com/business/story/2021-12-15/organized-retail-theft-crime-rate> [as of April 5, 2024]; CNN Business, *'Maybe We Cried Too Much' Over Shoplifting, Walgreens Executive Says* (Jan. 7, 2023) <https://www.cnn.com/2023/01/06/business/walgreens-shoplifting-retail/index.html>; The Atlantic, *The Great Shoplifting Freak-Out* (Dec. 23, 2021) <https://www.theatlantic.com/health/archive/2021/12/shoplifting-holiday-theft-panic/621108/> [as of Dec. 23, 2021].)

Others say retail theft, while an issue, might be overstated and utilized as an excuse to write off mediocre sales, and historic inflation might be a reason why we're seeing any theft bump at all. Things have become expensive – "we're in an economy right now where some everyday staples have risen in price six times faster than the overall rate of inflation. Until July of this year, American paychecks grew at a slower rate than inflation as a whole." Some retailers lump theft in with heavy discounting, soft sales and macroeconomic conditions as other factors that cut into their margins. (Freight Waves, *What's Behind the Reports of 'Unprecedented' Retail Theft* (Oct. 5, 2023). Available at: <https://www.freightwaves.com/news/whats-behind-the-reports-of-unprecedented-retail-theft> [as of April 5, 2024].) *See also* Bloomberg, *Thieves Target Donuts and Ham as Food Prices Jump* (Feb. 23, 2024). Available at: <https://www.bloomberg.com/news/newsletters/2024-02-23/supply-chain-latest-food-theft-rises-on-grocery-inflation> [as of April 5, 2024].)

What's more, the National Retail Federation has not solidified any data around increased rates of organized retail theft or what percentage of external theft is organized crime. Retailers are not required to break down how much they actually lose to theft. "Retailers and trade associations are increasingly using their positions to influence lawmakers to pass new legislation that benefits them, hurts competitors and could disproportionally affect marginalized people." (CNBC, Companies say organized retail crime is on the rise, but there's no data to prove it. (Aug. 9, 2023). Available at <https://www.cnbc.com/2023/08/09/claims-about-organized-retail-theft-are-nearly-impossible-to-verify.html> [as of April 5, 2024].)

From 2020 to 2021, the number of news stories covering smash-and-grab incidents nearly doubled. The author comments that the impetus of this bill is to "fashion sentences that are appropriate for the crime committed, including "smash and grabs" committed by mobs or large groups of people working together." However, the information available shows that the vast majority of shoplifting is not committed by mobs of people. (Council on Criminal Justice, *Shoplifting Trends: What You Need to Know* (Nov. 2023). Available at: < https://counciloncj.org/shoplifting-trends-what-you-need-to-know/> [as of April 5, 2024].)

Additionally, the Federal Trade Commission recently reported that retail stores likely inflated prices to accommodate for lost revenue resulting from the pandemic. The FTC states, in summary, that:

> Notably, consumers are still facing the negative impact of the pandemic's price hikes, as the Commission's report finds that some in the grocery [including drug stores] retail industry seem to have used rising costs as an opportunity to further raise prices to increase their profits, which remain elevated today.

Retail stores actually saw significant profits over the past few years despite claims that stores are losing profits as a result of theft and other market forces.

> "In the first three-quarters of 2023, retailer profits rose even more, with revenue reaching 7% over total costs, casting doubt on the assertions of some companies that rising prices at the grocery store

> are the result of retailers' own rising costs." (Federal Trade Commission, "*Feeding America in a Time of Crisis, The United States Grocery Supply Chain and the COVID-19 Pandemic*" (March 21, 2024).

Finally, the Federal Bureau of Investigation (FBI) data on crime statistics reports that crime is actually down nationwide by a significant margin – contributing to the conclusion that the crime rate was a temporary phenomenon brought on by the pandemic and rapidly escalating costs for basic goods and services.

> The new fourth-quarter numbers [for 2023] show a 13% decline in murder in 2023 from 2022, a 6% decline in reported violent crime and a 4% decline in reported property crime.
>
> After a terrible period of underfunding and understaffing caused by the pandemic, local governments have, by most measures, returned to pre-pandemic levels," wrote John Roman, a criminologist at the University of Chicago. In an interview, Roman said, 'The courts were closed, a lot of cops got sick, a lot of police agencies told their officers not to interact with the public. Teachers were not in schools, not working with kids.

(FTC, *Report on Grocery Supply Chain Disruptions* (March 2024). Available at: <https://www.ftc.gov/news-events/news/press-releases/2024/03/ftc-releases-report-grocery-supply-chain-disruptions>.) Given that claims of massive retail theft appear to be inconsistent with the data, the Legislature should consider evidence-based solutions to address property crimes.

This bill would require the DOJ to determine the number of misdemeanor retail theft convictions during COVID-19 and report that information to the Legislature. This may provide useful comparative data to the Legislature given there is no existing requirement to compile the data on retail thefts before and after the pandemic to use as a comparison.

3) **Argument in Support**: No longer Applicable.

4) **Argument in Opposition**: No longer Applicable.

5) **Related Legislation**:

   a) AB 1802 (Jones-Sawyer) would extend the sunset date for organized retail theft to January 1, 2031. AB 1802 is pending in this Committee.

   b) AB 1960 (Soria) would reenact sentence enhancement for theft offenses when the loss exceeds specified dollar amounts. AB 1960 is pending in this Committee.

   c) AB 1990 (W. Carrillo) would authorize peace officers to make a warrantless arrest for misdemeanor shoplifting, as specified. AB 1990 is pending in this Committee.

d) AB 1779 (Irwin) would allow, a prosecutor to bring a case in any county where theft offenses occurred for offenses that occur in multiple jurisdictions, as specified. AB 1779 is pending in this Committee.

e) AB 1787 (Villapudua) would among other things, repeal the sunset provision in the organized retail theft statute, thereby extending the crime indefinitely. AB 1787 is pending in this Committee.

f) AB 1794 (McCarty) states the intent of the Legislature to enact legislation relating to theft. AB 1794 is pending in this Committee.

g) AB 2406 (Davies) would make it a felony, punishable by imprisonment in state prison, to use two or more minors to engage in theft related offenses. AB 2406 is pending in this Committee.

h) AB 2438 (Petrie-Norris) would make any person who acts in concert with two or more persons to take, attempt to take, damage, or destroy any property in the commission or attempted commission of a felony punishable by an additional and consecutive term of imprisonment of one, two or three years. AB 2438 is pending in this Committee.

i) AB 2790 (Pacheco) would define organized retail theft to include acting in concert with one or more persons to steal specified types of merchandise, including infant formula, baby food, over-the-counter medications, and blood glucose testing strips, with the intent to sell those items. AB 2790 is pending in this Committee.

j) AB 2943 (Zbur) would, among other things, extend the organized retail theft statute until January 2031, and make it a crime for any person to possess property unlawfully that was acquired through one or more acts of shoplifting, theft, or burglary from a retail business, if the property is not possessed for personal use and the person has intent to sell, exchange, or return the merchandise for value, or the intent to act in concert with one or more persons to sell, exchange, or return the merchandise for value, and the value of the possessed property exceeds $950. AB 2943 is pending in this committee.

k) SB 923 (Archuleta) would revise the definition of shoplifting to require an intent to steal retail property or merchandise and would require a person convicted of petty theft or shoplifting, if the person has two or more prior convictions for specified theft-related offenses, to be punished by imprisonment in the county jail for up to one year, or for 16 months, or two or three years. SB 923 is pending in Senate Public Safety Committee.

l) SB 928 (Niello) would remove the sunset date for organized retail theft. SB 928 is pending in Senate Public Safety Committee.

m) SB 982 (Wahab) would remove the sunset date for organized retail theft. SB 982 is pending in Senate Appropriations Committee.

n) SB 1416 (Newman) would create sentencing enhancements for selling, exchanging, or returning for value, or attempting to sell, exchange, or return for value, any property acquired through one or more acts of shoplifting, theft, or burglary from a retail business, if the property value exceeds specified amounts and would make these enhancements

apply to any person acting in concert with another person to commit these offenses. SB 1416 is pending in Senate Public Safety Committee.

6) **Prior Legislation**:

a) AB 329 (Ta), of the 2023-2024 Legislative Session, would have expanded the territorial jurisdiction in which the Attorney General can prosecute specified theft offenses and associated offenses connected together in their commission to include cargo theft. AB 329 failed passage in this Committee.

b) AB 335 (Alanis), of the 2023-2024 Legislative Session, would have required the Little Hoover Commission to submit a report to the Legislature describing the reported retail thefts, as specified. AB 335 was held under submission in Assembly Appropriations Committee.

c) AB 331 (Jones-Sawyer), Chapter 113, Statutes of 2021, extended the sunset date for organized retail theft through January 1, 2026.

d) AB 23 (Muratsuchi), of the 2023-2024 Legislative Session, would have decreased the threshold amount for grand theft from $950 to $400. The hearing on AB 23 was canceled the request of the author.

e) AB 75 (Hoover), of the 2023-2024 Legislative Session, would have reinstated the offense of petty theft with a prior as it existed before it was eliminated by Prop. 47 and makes it applicable to the offense of shoplifting created by Prop.47, subject to approval by the voters. AB 75 failed passage in this committee.

f) AB 329 (Ta) would have imposed higher penalties for shoplifting and petty theft if the crime is committed by a non-citizen of the state of California. AB 329 failed passage in this committee.

g) SB 316 (Niello), of the 2023-2024 Legislative Session, would have reinstated the offense of "petty theft with a prior" as it existed prior to the passage of Proposition 47 and includes shoplifting in the list of eligible prior crimes. SB 316 failed passage in Senate Public Safety Committee.

h) AB 2294 (Jones-Sawyer), Chapter 856, Statutes of 2022, authorized the misdemeanor arrest of a person that has a prior arrest, citation or conviction for theft, as specified, and authorized a city or county prosecuting authority or county probation department to create a diversion or deferred entry of judgment program for persons who commit a theft offense or repeat theft offenses.

i) AB 2356 (Rodriguez), Chapter 22, Statutes of 2022, expanded the definition of "grand theft" where the aggregate amount taken by all participants exceeds $950.

j) AB 1603 (Salas), of the 2021-2022 Legislative Session, would have reduced the threshold amount for petty theft and shoplifting to be punished as a misdemeanor from $950 to $400. AB 1603 failed passage in this Committee.

k) AB 2390 (Muratsuchi), of the 2021-2022 Legislative Session, would have authorized the aggregation of the value of property from one or more acts of theft or shoplifting, as specified. AB 2390 failed passage in this Committee.

l) AB 1065 (Jones-Sawyer), Chapter 803, Statutes of 2018, created the crime of organized retail theft and expanded jurisdiction to prosecute cases of theft or receipt of stolen merchandise.

m) AB 2369 (Patterson), of the 2015-2016 Legislative Session, would made persons convicted of crimes reduced to misdemeanors eligible for felony prosecution and sentencing if convicted of specified offenses two times within a three-year period. AB 2369 failed passage in this Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

No longer Applicable.

Oppose

No longer Applicable.

Analysis Prepared by: Liah Burnley / PUB. S. / (916) 319-3744

Date of Hearing: April 9, 2024
Chief Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 1779 (Irwin) – As Amended March 11, 2024

SUMMARY: Permits the consolidation of specified theft charges, as well as all associated offenses, occurring in different counties into a single trial if the district attorneys in all involved jurisdictions agree. Specifically, **this bill**:

1) Expands the jurisdiction for charging theft and receiving stolen property to include the county where an offense involving the theft or receipt of the stolen merchandise occurred, the county in which the merchandise was recovered, or the county where any act was done by the defendant in instigating or aiding in the commission of those offenses.

2) Specifies that if multiple offenses of theft or receiving stolen property, either all involving the same defendant or defendants and the same merchandise, or all involving the same defendant or defendants and the same scheme or substantially similar activity, occur in multiple jurisdictions, then any of those jurisdictions are a proper jurisdiction for all of the offenses.

3) States that jurisdiction also extends to all associated offenses connected together in their commission to the underlying theft offenses

4) Requires the prosecution to present written evidence that all district attorneys in counties with jurisdiction of the offenses agree to the venue.

5) Requires charged offenses from jurisdictions where there is no written agreement from the district attorney to be returned to that county.

EXISTING LAW:

1) States that, except as otherwise provided by law, the jurisdiction of every public offense is in any competent court within the jurisdictional territory of which it is committed. (Pen. Code, § 777.)

2) States that when a public offense is committed in part in one jurisdictional territory and in part in another, or the acts constituting or requisite to committing the offense occur in more than one territorial jurisdiction, the jurisdiction of the offense is in any competent court within either jurisdiction. (Pen. Code, § 781.)

3) Permits consolidation of different offenses which do not relate to same transaction or event where there is common element of substantial importance in their commission, such as the same class of crimes. (Pen. Code, § 954.)

4) Allows property crimes occurring in one jurisdictional territory if property is taken to another jurisdictional territory and an arrest is made there, to be prosecuted in either jurisdiction. (Pen. Code, § 786.)

5) Provides that the jurisdiction of a criminal action brought by the Attorney General for theft, as defined, or for receiving stolen property, as well as all associated offenses connected in their commission of the underlying theft, shall also include the county where an offense involving the theft or receipt of the stolen merchandise occurred, the county in which the merchandise was recovered, or the county where any act was done by the defendant. (Pen. Code, § 786.5.)

6) Provides that if one or more violations of specified sex offenses occurs in more than one jurisdictional territory, the jurisdiction of any of those offenses, and for any offenses properly joinable with that offense, is in any jurisdiction where at least one of the offenses occurred, subject to the following conditions:

   a) Consolidation of the cases is subject to a joinder hearing, within the jurisdiction of the proposed trial court;

   b) The prosecution presents written evidence that all district attorneys in counties with jurisdiction of the offenses agree to the venue; and,

   c) Charged offenses from jurisdictions in which there is no written agreement from the district attorney must be returned to that county. (Pen. Code, § 784.7, subd. (a).)

7) Provides that if any domestic violence crime, as defined, occurs in more than one jurisdiction, and the defendant and the victim are the same for all the offenses, the jurisdiction of any of the offenses and for any offenses properly joinable with that offense is the jurisdiction where at least one of the offenses occurred, subject to the following conditions:

   a) Consolidation of the cases is subject to a joinder hearing, within the jurisdiction of the proposed trial court;

   b) The prosecution presents written evidence that all district attorneys in counties with jurisdiction of the offenses agree to the venue; and,

   c) Charged offenses from jurisdictions in which there is no written agreement from the district attorney must be returned to that county. (Pen. Code, § 784.7, subd. (b).)

8) Provides that if one or more specified human trafficking, pimping, and pandering offenses occurs in more than one jurisdictional territory, the jurisdiction of any of those offenses, and for any offenses properly joinable with that offense, is in any jurisdiction where at least one of the offenses occurred, subject to the following conditions:

   a) Consolidation of the cases is subject to a joinder hearing, within the jurisdiction of the proposed trial court;

b) The prosecution presents written evidence that all district attorneys in counties with jurisdiction of the offenses agree to the venue;

c) Charged offenses from jurisdictions in which there is no written agreement from the district attorney must be returned to that county; and,

d) The court must consider the location and complexity of the likely evidence, where the majority of the offenses occurred, the rights of the defendant and the people, and the convenience of, or hardship to, the victim or victims and witnesses. (Pen. Code, § 784.7, subd. (c).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Across California, shoppers and retailers are frustrated with the impacts of organized retail theft. Whether they be the violent 'smash-and-grabs' or the clearing of pharmacy shelves by organized groups, these crimes are plaguing our shopping centers and malls along major freeway corridors. The Legislature needs to give our law enforcement and prosecutors the tools to address these sophisticated retail theft rings, who are making it harder for consumers to find the products they need during these tough times and threaten their safety when shopping in local businesses. The efficiency and effectiveness of cross jurisdictional charging that was key for prosecutors between 2019-2021 needs to be restored to secure justice and make sure our investments in addressing retail theft are spent wisely. The restoration of this tool to the Attorney General in 2022 was an important first step, but with more multi-county cases than the Department of Justice can effectively pursue, we must fully leverage our District Attorneys who have already been funded at the state level for this important work. "

2) **Territorial Jurisdiction and Vicinage:** Territorial jurisdiction is the location in which a case may be brought to trial. Ordinarily, the territorial jurisdiction of a superior court is the county in which it sits. (Pen. Code, § 691, subd. (b).) The general rule of territorial jurisdiction is stated in section 777: "except as otherwise provided by law the jurisdiction of every public offense is in any competent court within the jurisdictional territory of which it is committed." When the Legislature creates an exception to the rule of section 777, the statute is remedial and is construed liberally to achieve the legislative purpose of expanding criminal jurisdiction. (*Price v. Superior Court* (2001) 25 Cal.4th 1046, 1055.)

Vicinage is the right to trial by a jury drawn from residents of the area where the offense was committed. Venue and vicinage are closely related, as a jury pool is selected from the area in which the trial is to be held. Vicinage is not a necessary feature to the right of a jury trial as guaranteed by the Sixth Amendment to the United States Constitution because it "does not serve the purpose of protecting a criminal defendant from government oppression and is not necessary to ensure a fair trial." (*Price, supra,* 25 Cal. 4th 1046, 1065-1069.) This does not mean that a state has the right to try a defendant anywhere it chooses. Rather, the right of vicinage in California is derived from the right to jury trial as guaranteed in the California Constitution. (*Id.* at p. 1071.) As the Supreme Court explained, the right to a trial by a jury of the vicinage, as guaranteed by the California Constitution, requires trial in a county that has a reasonable relationship to the offense or to other crimes committed by the defendant against

the same victim. Thus, the Legislature's power to designate the place for trial of a criminal offense is limited by the requirement that there be a reasonable relationship or nexus between the place designated for trial and the commission of the offense. (*Id.* at p. 1075.)

The Legislature has created several exceptions to the general rule that a case must be tried in the jurisdiction where the offense was committed if a defendant commits multiple offenses in different jurisdictions. For example, Penal Code section 784.7, subdivision (b), permits more than one violation of specified domestic violence offenses that occur in more than one territorial jurisdiction to be consolidated in a single trial in any county where at least one of the offenses occurred, if the defendant and the victim are all the same. Regarding this provision as set forth in former Penal Code section 784.7, the Supreme Court has stated:

> The Legislature's power to designate the place for trial of a criminal offense is limited by the requirement that there be a reasonable relationship or nexus between the place designated for trial and the commission of the offense. Repeated abuse of the same child or spouse in more than one county creates that nexus. The venue authorized by Penal Code section 784.7 is not arbitrary. It is reasonable for the Legislature to conclude that this pattern of conduct is akin to a continuing offense and to conclude that the victim and other witnesses should not be burdened with having to testify in multiple trials in different counties.

(*People v. Price*, *supra*, 25 Cal.4th. at p. 1075.)

AB 1065 (Jones-Sawyer), Chapter 803, Statutes of 2018, among other things, expanded jurisdictional provisions for specified theft offenses, but had a sunset clause of January 1, 2021. The expanded jurisdiction was allowed to sunset, largely due to concerns about "forum shopping." The concept of "forum shopping" is the process by which a party to a lawsuit selects a given jurisdiction to file suit not because it is the most appropriate venue for the case, but rather because the selected forum offers some kind of strategic or legal advantage. Forum shopping is more common in civil cases than criminal cases, and it is often discouraged by the courts. (See e.g. *Stewart Org., Inc. v. Ricoh Corp.*, (1988) 487 U.S. 22, 39-40.) Currently, only the Attorney General has the authority to aggregate theft offenses in various jurisdictions in one case and to charge all associated offenses.

This bill would reinstate this expanded jurisdiction, similar to the ones codified for domestic violence offenses and human trafficking offenses, for specified theft offenses that may be consolidated in a single trial in any county. The bill would allow prosecution of not only the theft offenses, but also to associated offenses connected together in their commission to the underlying theft offenses. This bill would make joinder of offenses from different counties contingent on agreement by all district attorneys in counties with jurisdiction over the offenses. This bill would require that charges from jurisdictions on which there is no agreement by the district attorney to be returned to that jurisdiction. Because agreement by the prosecutors is needed to join offenses from other counties, this bill avoids concerns about "forum shopping."

It should be noted however, that this bill differs from other similar statutes expanding criminal jurisdiction in one respect—it lacks the requirement that evidence of agreement be presented at a joinder/consolidation hearing pursuant to Penal Code section 954. (Compare Pen. Code, § 784.7 [requiring hearing to join sex, domestic violence, and human trafficking

offenses].) A hearing under section 954, by granting a court the discretion to sever offenses in the interests of justice and for good cause shown, has been held to be critical to the constitutional validity of this statute, which no longer requires offenses to have been committed against a single victim. A court assessing the propriety of joinder under section 784.7 must consider the prejudicial effects of such joinder upon a good showing made by a party resisting it. (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1113.) To avoid constitutional concerns, this bill should also be amended to include this procedural requirement.

3) **Argument in Support**: According to the *Ventura County District Attorney*, the sponsor of this bill, "I am pleased to sponsor your measure, AB 1779, as amended on March 11, 2024, which enhances our ability to combat organized retail theft by amending Penal Code section 786.5 to provide county district attorneys with legal authority to join related theft offenses from multiple counties. To address concerns about potential conflicts between neighboring counties, your bill has been amended to require a prosecutor to present written authorization that all district attorneys in counties with jurisdiction agree to the venue.

"As we have discussed, organized retail theft is a significant and escalating problem for business owners in our community and across the state. It is especially concerning to witness the evolving use of violence and the flagrant criminality of the ongoing trend of smash-and-grab and grab-and-go thefts. These crimes wield not only financial losses, but threaten physical harm to business owners, workers, and customers. They also greatly contribute to the perception of lawlessness in California.

"Many organized retail theft crews operate across county lines, a strategy that makes successful prosecution of the perpetrators more difficult and thus renders the crimes more profitable. These thieves understand they are unlikely to face the full consequences of their crimes and they become emboldened to commit more and more thefts. In one example, two such thieves organized to steal baby formula at a time when this essential item was extremely scarce. During one of the thefts in Ventura County, the defendants threatened to harm the loss prevention officer when confronted. Although neither defendant had children, collectively they stole over $7,000 worth of formula in less than two weeks from ten different Target stores in Ventura and Los Angeles Counties.

"In a second example, an individual took advantage of Home Depot's 'Will Call' service, which allows customers to purchase items for later pick up. This defendant would order merchandise and provide a credit card number, then pick up the merchandise with his Will Call receipt. Once the defendant had driven the merchandise away, he would cancel his Will Call order causing Home Depot to refund the amount charged. The defendant did not, however, return the merchandise to Home Depot. This scheme netted the defendant more than $150,624 worth of merchandise in roughly two months from four different stores in Ventura and Los Angeles Counties.

"Under current law, my office could charge only those crimes committed in Ventura County even though we were aware of the significant conduct occurring in Los Angeles. Under AB 1779 we could have sought agreement from the Los Angeles District Attorney to consolidate the cases so that all known instances in each scheme could have been efficiently tried and sentenced together and so that truly effective restitution orders could be sought.

"Consolidated prosecutions promote judicial and fiscal efficiency by avoiding the unnecessary expenditures of resources and funds that come with piecemeal and repetitious litigation. Consolidation also saves the accused from potentially having to defend themselves repeatedly in multiple counties.

"Your bill will once again permit prosecutors to join related theft offenses from multiple counties into a single consolidated criminal prosecution and help us more effectively protect our merchants from organized retail theft."

4) **Argument in Opposition**: According to *Initiate Justice*, "AB 1779 would allow prosecutors to prosecute retail theft and 'all associated offenses' across an unlimited number of county lines, if they allege that even one shoplifting case that occurred in their jurisdiction was connected to a case or cases in other jurisdictions. Through this bill, prosecutors would be able to leverage plea deals by aggregating the value of alleged petty theft cases and charging 'all associated offenses' that they allege to have occurred in other county jurisdictions, as well as their own. Currently, only the State Attorney General has the authority to aggregate petty theft cases in various jurisdictions into one organized retail theft case with felony penalties and to charge all associated offenses.

"Under existing law, a prosecutor has jurisdiction over any offense allegedly occurring in their county. (See, e.g., Pen. Code § 786.) AB 1779 proposes to allow prosecutors in counties where offenses did not occur to bring charges for offenses allegedly committed in other counties. It would do so even if the prosecutor in the county in which the offense allegedly occurred has already determined that charges are not appropriate, are not in the interest of justice or where the change of venue would harm the interests of victims, witnesses, and defendants. Giving local prosecutors the final say over charging decisions makes sense, both because a local prosecutor can consistently determine what charges (if any) are appropriate, and because forcing victims, witnesses, and defendants to travel out of county can threaten their employment and ability to care for their families."

5) **Related Legislation**: AB 329 (Ta) of the 2023-2024 Legislative Session, would have expanded the territorial jurisdiction in which the Attorney General can prosecute specified theft offenses and associated offenses connected together in their commission to include cargo theft. AB 329 failed passage in this Committee.

6) **Prior Legislation**:

   a) AB 1613 (Irwin), Chapter 949, Statutes of 2022, expands the territorial jurisdiction in which the Attorney General can prosecute specified theft offenses and associated offenses connected together in their commission to the underlying theft offenses.

   b) SB 94 (Committee on Budget), Chapter 25, Statutes of 2019, extended the expanded jurisdictional provision relating to theft offenses until July 1, 2021.

   c) AB 1065 (Jones-Sawyer), Chapter 803, Statutes of 2018, created the crime of organized retail theft, and created the expanded jurisdictional provisions for specified theft offenses, with a sunset clause of January 1, 2021.

REGISTERED SUPPORT / OPPOSITION:

Support

California Correctional Supervisors Organization, INC.
California District Attorneys Association
California State Sheriffs' Association
Chief Probation Officers' of California (CPOC)
City of Santa Clarita
League of California Cities
Peace Officers Research Association of California (PORAC)
San Diego County District Attorney's Office
Valley Industry and Commerce Association (VICA)
Ventura County Office of The District Attorney

Oppose

Communities United for Restorative Youth Justice (CURYJ)
Ella Baker Center for Human Rights
Initiate Justice
Initiate Justice Action
LA Defensa

Analysis Prepared by: Sandy Uribe / PUB. S. / (916) 319-3744

Date of Hearing: April 9, 2024
Chief Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 1794 (McCarty) – As Amended April 1, 2024

As Proposed to be Amended in Committee

SUMMARY: Clarifies the standard for aggregating multiple thefts to charge grand theft, and establishes CAL-Fast Pass Program, authorizing district attorney's offices to operate a program allowing retailers to submit details of alleged retail theft directly to the district attorney through an online portal to determine whether to further investigate and file charges. Specifically, **this bill:**

1) Clarifies that offenses which may be aggregated to establish grand that include takings from multiple places or multiple victims.

2) Specifies that circumstantial evidence may be used to determine if multiple takings are committed pursuant to intent, impulse or plan, including, but not limited to:

   a) Whether the defendant took particular items of property;

   b) Whether the defendant took property within a short time span;

   c) Whether the defendant took property from a similar location; or,

   d) Whether the defendant employed a single method to take the property.

3) Establishes the CAL-Fast Pass Program, which authorizes district attorneys to operate a program allowing retailers to submit investigative reports to the district attorney's office so that the office may determine whether to file charges involving retail theft.

4) Provides that the program shall allow a retailer to submit details of an alleged shoplifting to the district attorney's office through an online portal on the district attorney's website.

5) Requires each participating district attorney's office to establish criteria on the types of cases they may investigate for prosecution.

6) Provides that cases to be investigated shall include but not be limited to, any of the following criteria:

   a) A $500 minimum value of stolen property;

   b) A defendant acting in concert with others, or committing repeated thefts;

c) The case involves threats of violence;

d) There is video evidence of the theft; or,

e) There is a positive identification of the suspect.

7) Requires a district attorney's office that establishes a pilot program to conduct an annual evaluation of the program, which includes the impact on retail theft county-wide, if any, and it's effectiveness with respect to thefts investigated by the office.

8) Allows the district attorney's office to contract with an independent entity to conduct the evaluation and prepare a report.

9) Requires submission of the report to the Assembly and Senate Public Safety Committees and the Board of State and Community Corrections (BSCC) starting on December 31, 2026, and yearly on that date thereafter. The report must include:

a) The number of thefts reported from retailers to the county district attorney's office;

b) The number of thefts reports investigated by the county district attorney's office;

c) The number of criminal charges filed by the county district attorney's office in response to the theft reports;

d) The conviction rates and jail or prison time imposed; and,

e) The evaluation on the program's impact on overall retail theft, if any, and its effectiveness.

10) Allows district attorneys' offices that establish a CAL-Fast Pass program to apply for funding under the Organized Retail Theft Prevention Grant Program and the Organized Retail Theft Vertical Prosecution Grant Program administered by the BSCC to fund the program.

EXISTING LAW:

1) Divides theft into two degrees, petty theft and grand theft. (Pen. Code, § 486.)

2) Defines grand theft as theft of money, labor, real or personal property of a value exceeding $950. Grand theft is a wobbler, punishable by imprisonment in a county jail not exceeding one year, or as a felony by imprisonment in the county jail for 16 months, two years, or three years (Pen. Code, § 487, 489.)

3) Punishes petty theft as a misdemeanor, punishable by fine not exceeding $1,000, or by imprisonment in the county jail not exceeding six months, or both. (Pen. Code, §490.)

4) Defines "shoplifting" as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed $950. Any other entry into a

commercial establishment with the intent to commit larceny is burglary. Shoplifting is punishable as a misdemeanor, except as specified. (Pen. Code, § 459.5.)

5) States that any act of shoplifting must be charged as such, and that a person charged with shoplifting cannot also be charged with burglary or theft of the same property. (Pen. Code, § 459.5, subd. (b).)

6) Provides that the value of the money, labor, real property, or personal property taken exceeds $950 over the course of distinct but related acts, the value of the money, labor, real property, or personal property taken may properly be aggregated to charge a count of grand theft, if the acts are motivated by one intention, one general impulse, and one plan. (Pen. Code, § 487, subd. (e).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Retail theft poses a significant threat to California's economy and the vitality of its small businesses, resulting in a staggering loss of $1.319 billion for the state. AB 1794 is a crucial step towards protecting businesses, ensuring consumer safety, and bolstering the economy. By consolidating theft crimes across different locations and victims, as well as establishing the CAL Fast Pass program, this bill will streamline efforts to combat retail theft, fostering greater expediency and transparency to both business owners and shoppers."

2) **Aggregation**: Repeated acts of theft can be aggregated and prosecuted as one felony if they are conducted pursuant to one intention, one general impulse, and one plan. (Pen. Code, § 487, subd. (e); see also, *People v. Bailey* (1961) 55 Cal.2d 514, 518-519.) Aggregation is an important concept in theft offenses because if charges of theft are aggregated then the value of the contents stolen can also be aggregated. Aggregation can make the difference between a defendant being charged with multiple misdemeanor offenses (where the value of each item stolen is less than $950) and a felony charge, when the value of the items stolen can be added together to breach the $950 threshold.

   The defendant in *Bailey* made a single fraudulent misrepresentation about her household income that caused her to receive a stream of welfare payments. (*Id.* at pp. 515–516.) While each individual payment fell below the felony threshold, the aggregated total constituted grand theft. *(Id.* at p. 518.) The Supreme Court concluded that the payments could be aggregated because "the evidence established that there was only one intention, one general impulse, and one plan." (*Id.* at p. 519; see also CALCRIM No. 1802 [Theft: As Part of Overall Plan].)

   The California Supreme Court addressed the *Bailey* rule in *People v. Whitmer* (2014) 59 Cal.4th 733. In *Whitmer*, the defendant arranged for the fraudulent sale of 20 motorcycles, motorized dirt bikes, all-terrain vehicles, and similar recreational vehicles. The defendant was convicted of multiple thefts. (*Id.* at pp. 735-736.) The defendant appealed, arguing that under *Bailey* he should have been convicted of a single theft. The Supreme Court distinguished the facts in *Whitmer* from what occurred in *Bailey,* and found that multiple theft convictions were appropriate because each count of theft was based on a separate and

distinct fraudulent act. (*Whitmer, supra.* at p. 740.) The court in *Whitmer* pointed out that *Bailey* concerned a single fraudulent act followed by a series of payments. In a concurring opinion, Justice Liu distinguished acts committed with a common scheme from acts committed as part of a single impulse. (*Whitmer, supra,* at p. 748, concur. opn. J. Liu.) Justice Liu went on to state that ". . ., separate and distinct takings do not fall under *Bailey*'s aggregation rule simply because, as here, they were all done the same way. But neither does the mere fact that multiple takings are separate and distinct entail a finding of multiple thefts in every case. If the takings were committed pursuant to a single intention, impulse, and plan, then under *Bailey* they amount to only one theft."

Where multiple victims are involved, courts disagree about applying the *Bailey* rule and cumulating the charges even if a single plan or intent is demonstrated. In *People v. Columbia Research Corp.* (1980) 103 Cal.App.3d Supp. 33, the court applied *Bailey* and approved aggregation where the defendant was charged with grand theft based on a series of petty thefts that occurred over a 10-month period, pursuant to a single plan and intent, and involved different victims. (*Id.* at p. 40.) In *People v. Garcia* (1990) 224 Cal.App.3d 297, the defendant filed fraudulent bonds at different times involving different victims. The court found multiple convictions proper. (*Id.* at pp. 308-309.)

This bill would clarify that distinct but related acts of theft can be aggregated, even if the acts are committed against multiple victims or committed in multiple places. This bill also would clarify what type of evidence is relevant to determine whether a defendant acted with one intention, one general impulse, and one plan for purposes of establishing aggregation.

3) **CAL-Fast Pass**: Last fall, Yolo County District Attorney Jeff Reisig established the Yolo County "FastPass to Prosecution" Program. The program is intended to speed up shoplifting investigations by allowing retailers to communicate directly with the district attorney's office. It is known as "Fast Pass", because the program eliminates a report of shoplifting to police, who would then submit investigative reports to the district attorney's office to determine whether to file charges. Instead, retailers submit the details of an alleged shoplifting directly to the district attorney's office online to determine if further investigation is necessary and what criminal charges to file.

According to a press release issued by the Yolo County District Attorney's Office:

> FastPass was designed to provide retailers another option to report non-emergency crimes that have been investigated and documented internally, directly to the DA, who possesses the exclusive authority to file formal criminal complaints. FastPass is not designed to deter retailers from calling 911 in an emergency or reporting crimes to police and sheriffs, and nothing prevents law enforcement from responding, but because of factors outside the control of police and sheriffs, including high priority call volume and limited staffing, some police responses can be delayed or impractical....
>
> Since the launch of FastPass last fall, the DA's office has filed criminal cases against 49 suspects, including dozens of felony cases (60%), with total losses exceeding $100,000. These 49 individuals combined have over 134 previous theft convictions, and 93% of all the offenders have previous arrests including theft, burglary, robbery, violent assaults, and family violence. First time offenders are

not generally part of the FastPass program.

(https://yoloda.org/yolo-da-announces-the-launch-of-fastpass-to-prosecution-combatting-retail-theft-through-retailer-initiated-reporting-and-rapid-prosecution/ [as of April 4, 2024].)

This bill would establish the CAL Fast Pass program, authorizing the district attorney's office in any county to replicate the program. The bill would incentivize participation by making the offices eligible for specified organized retail theft grants administered by the BSCC. In order to determine the efficacy of the program, the bill would mandate specified reporting requirements.

4) **Argument in Support**: According to the *California Police Chiefs Association* (CPCA), "The annual total value of stolen goods, as reported by the Department of Justice, has nearly doubled since the 2014. As such, there is a clear need to address the dramatic increase in the number of theft offenses through statutory solutions. AB 1794 proposes several of these solutions that we believe will have an overall positive impact in ultimately reducing the total value of stolen goods.

"While CPCA believes it will take a comprehensive approach to meaningfully reduce the number of theft offenses occurring throughout the state, we feel AB 1794 is a step in the right direction."

5) **Argument in Opposition**: According to the *Pacific Juvenile Defender Center*, "AB 1794 would allow for DAs to press felony charges by aggregating separate instances of retail theft that occurred on different occasions and by broadly expanding the types of circumstantial evidence that can be considered in aggregating separate instances.

"AB 1794 also takes the unusual approach of allowing retailers to seek criminal prosecutions by filing requests for retail theft prosecutions directly with DAs. This would give special treatment to retailers that no one else in the criminal legal system—including victims of serious violence and sexual harm—receives. In bypassing law enforcement investigation and processing, DAs would receive retail theft allegations without the checks and balances that other allegations—even those involving physical harm—receive, and may result in DAs prioritizing retail theft claims before other issues because of the special attention these unvetted claims will require. A DA's office has finite resources and must prioritize and triage prosecutorial resources in order to safeguard public safety, justice, and accountability. This bill will inevitably draw DA resources away from cases that have greater impact on public safety."

6) **Related Legislation**:

   a) AB 1845 (Alanis), would establish a grant program for identifying, apprehending, and prosecuting resale of stolen property. AB 1845 is being heard in this committee today.

   b) AB 2943 (Zbur), among other things, clarifies the law on aggregating theft offenses and creates the new offense of "criminal deprivation of a retail business opportunity," relating to receipt of stolen property. AB 2943 is being heard in this committee today.

7) **Prior Legislation:**

a) AB 2356 (Rodriguez), Chapter 22, Statues of 2022, specifies that if the value of property taken, or intended to be taken, exceeds $950 over the course of distinct but related acts, the value of the property taken, or intended to be taken, may properly be aggregated to charge a count of grand theft, if the acts are motivated by one intention, one general impulse, and one plan.

b) AB 1772 (Chau), of the 2019-2020 Legislative Session, would have specified that if the value of the property taken or intended to be taken exceeds $950 over the course of distinct but related acts, whether committed against one or more victims, the value of the property taken or intended to be taken may properly be aggregated to charge a count of grand theft, if the acts are motivated by one intention, one general impulse, and one plan. AB 1772 failed passage in this Committee.

c) AB 3011 (Chau), of the 2017-2018 Legislative Session, would have specified that if the value of the stolen property exceeds $950, then it may be aggregated to a charge of grand theft. AB 3011 failed passage in this Committee.

d) AB 2444 (Portantino), of the 2011-2012 Legislative Session, would have provided that grand theft occurs where money, labor, or real or personal property in an aggregate amount of $950 is taken as a result of an agreement or prior arrangement to take and the taking is made in concert with one or more other individuals. After referral to this Committee, the hearing was canceled at the author's request.

e) AB 2372 (Ammiano), Chapter 693, Statutes of 2010, increased the threshold amount that constitutes grand theft from $400 to $950.

REGISTERED SUPPORT / OPPOSITION:

Support

Arcadia Police Officers' Association
Burbank Police Officers' Association
California Coalition of School Safety Professionals
California Narcotic Officers' Association
California Police Chiefs Association
California Reserve Peace Officers Association
California Retailers Association
Chief Probation Officers' of California (CPOC)
Claremont Police Officers Association
Corona Police Officers Association
Culver City Police Officers' Association
Deputy Sheriffs' Association of Monterey County
Fullerton Police Officers' Association
League of California Cities
Los Angeles School Police Management Association
Los Angeles School Police Officers Association
Murrieta Police Officers' Association

Newport Beach Police Association
Novato Police Officers Association
Palos Verdes Police Officers Association
Placer County Deputy Sheriffs' Association
Pomona Police Officers' Association
Riverside Police Officers Association
Riverside Sheriffs' Association
Santa Ana Police Officers Association
Upland Police Officers Association

Opposition

California Public Defenders Association
Pacific Juvenile Defender Center
Vera Institute of Justice

Analysis Prepared by: Sandy Uribe / PUB. S. / (916) 319-3744

Amended Mock-up for 2023-2024 AB-1794 (McCarty (A) , Friedman (A))

Mock-up based on Version Number 98 - Amended Assembly 4/1/24
Submitted by: Sandy Uribe, Assembly Public Safety Committee

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 487 of the Penal Code is amended to read:

487. Grand theft is theft committed in any of the following cases:

(a) When the money, labor, real property, or personal property taken is of a value exceeding nine hundred fifty dollars ($950), except as provided in subdivision (b).

(b) Notwithstanding subdivision (a), grand theft is committed in any of the following cases:

(1) (A) When domestic fowls, avocados, olives, citrus or deciduous fruits, other fruits, vegetables, nuts, artichokes, or other farm crops are taken of a value exceeding two hundred fifty dollars ($250).

(B) For the purposes of establishing that the value of domestic fowls, avocados, olives, citrus or deciduous fruits, other fruits, vegetables, nuts, artichokes, or other farm crops under this paragraph exceeds two hundred fifty dollars ($250), that value may be shown by the presentation of credible evidence which establishes that on the day of the theft domestic fowls, avocados, olives, citrus or deciduous fruits, other fruits, vegetables, nuts, artichokes, or other farm crops of the same variety and weight exceeded two hundred fifty dollars ($250) in wholesale value.

(2) When fish, shellfish, mollusks, crustaceans, kelp, algae, or other aquacultural products are taken from a commercial or research operation which is producing that product, of a value exceeding two hundred fifty dollars ($250).

(3) Where the money, labor, real property, or personal property is taken by a servant, agent, or employee from their principal or employer and aggregates nine hundred fifty dollars ($950) or more in any 12 consecutive month period.

(c) When the property is taken from the person of another.

(d) When the property taken is any of the following:

(1) An automobile.

(2) A firearm.

(e) (1) If the value of the money, labor, real property, or personal property taken exceeds nine hundred fifty dollars ($950) over the course of distinct but related acts, including takings from multiple places or multiple victims, the value of the money, labor, real property, or personal property taken may properly be aggregated to charge a count of grand theft, if the acts are motivated by one intention, one general impulse, and one plan.

(2) Circumstantial evidence may be used to determine whether multiple takings are committed pursuant to one intention, general impulse, and plan. The following types of evidence are relevant, but not exclusive, in determining whether a defendant acted with a single intent, impulse, and plan in committing a series of thefts:

(A) Whether the defendant took particular items of property.

(B) Whether the defendant took the property within a short time span or similar location.

(C) Whether the defendant employed a single method to take the property.

SEC. 2. Section 746 is added to the Penal Code, to read:

746. (a) **The CAL-Fast Pass Program is hereby created.**

(b) Counties may operate a program to allow retail stores to submit investigative reports to prosecutors for the prosecutors to determine whether to file charges for retail theft. The program shall allow retailers to submit details of alleged shoplifting**, organized retail theft, or grand theft** directly to the county district attorney through an online portal on the district attorney's internet website. The district attorney may use these submissions to determine whether further investigation is necessary and whether to file charges.

(c) District attorneys' offices that establish a CAL-Fast Pass program may apply for funding under the Organized Retail Theft Prevention Grant Program and the Organized Retail Theft Vertical Prosecution Grant Program administered by the Board of State and Community Corrections to fund the program.

~~(b)~~ **(d)** Each county that operates a program pursuant to this section shall establish criteria on the types of cases they may investigate. The cases the program may investigate shall include, but not be limited to, cases that meet any of the following criteria:

(1) A five-hundred-dollar ($500) minimum value of stolen property. ~~, or the defendant was acting in concert or committing repeated thefts.~~

(2) **The defendant was acting in concert or committing repeated thefts.**

~~(2)~~ **(3)** The theft was a felony offense.

~~(3)~~ **(4)** The case involves threats of violence.

~~(4)~~ **(5)** There is video evidence of the theft.

~~(5)~~ **(6)** There is a positive identification of the suspect.

~~(e)~~ **(e)** (1) A county that establishes a program pursuant to this section shall conduct an annual evaluation of the ~~pilot~~ program's impact and effectiveness in their county. The evaluation shall include, but not be limited to, evaluating the ~~pilot~~ program's impact on overall retail theft countywide, if any, and its effectiveness with respect to theft reports investigated by the county district attorney's office.

(2) Counties may contract with an independent entity, including, but not limited to, the Regents of the University of California, for the purposes of conducting the evaluation and preparing the report pursuant to this subdivision.

(3) Counties establishing a program pursuant to this section shall submit an annual report to the ~~Department of Justice~~ **Assembly and Senate Public Safety Committees and the Board of State and Community Corrections** on December 31 each year, starting on December 31, 2026. The report shall include, but not be limited to, all of the following:

(A) The number of theft reports from retailers to the county district attorney's office.

(B) The number of theft reports investigated by the county district attorney's office.

(C) The number of criminal charges filed by the county district attorney's office in response to the theft reports.

(D) The conviction rates and jail or prison time sentenced by the judge or jury in response to the theft reports.

(E) The report based on the evaluation conducted pursuant to paragraph (1).

~~(d) This chapter shall remain in effect only until January 1, 2031, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 2030, deletes or extends that date.~~

Date of Hearing: April 9, 2024
Consultant: Elizabeth Potter

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 1802 (Jones-Sawyer) – As Amended April 1, 2024

SUMMARY: Eliminates the sunset date for the crime of organized retail theft and for the existence of a taskforce established by the California Highway Patrol to analyze organized retail theft and vehicle burglary and to assist local law enforcement in counties identified as having elevated property crime.

EXISTING LAW:

1) Establishes that a person who commits any of the following acts is guilty of organized retail theft:

   a) Acts in concert with one or more persons to steal merchandise from one or more merchant's premises or online marketplace with the intent to sell, exchange, or return the merchandise for value.

   b) Acts in concert with two or more persons to receive, purchase, or possess merchandise as described, knowing or believing it to have been stolen.

   c) Acts as an agent of another individual or group of individuals to steal merchandise from one or more merchant's premises or online marketplaces as part of an organized plan to commit theft.

   d) Recruits, coordinates, organizes, supervises, directs, manages, or finances another to undertake any of the acts described, or any other statute defining theft of merchandise. (Pen. Code, § 490.4, subd. (a)(1)-(4).)

2) Provides that organized retail theft is punishable as follows:

   a) If a person acts in concert or as an agent and commits violations on two or more separate occasions within a 12-month period, and if the aggregated value of the merchandise stolen, received, purchased, or possessed within that 12-month period exceeds nine hundred fifty dollars ($950), the offense is punishable by imprisonment in a county jail not exceeding one year or pursuant to subdivision (h) of Penal Code section 1170.

   b) Any other violation when a person acts in concert or as an agent that is not described in paragraph (1) of this subdivision is punishable by imprisonment in a county jail not exceeding one year.

   c) A violation of organized retail theft by act of recruiting, coordinating, organizing, supervising, directing, managing, or financing another to commit acts of organized retail

theft is punishable by imprisonment in a county jail not exceeding one year, or as a felony pursuant to subdivision (h) of Penal Code section 1170. (Pen. Code, § 490.4, subd. (b)(1)-(3).)

3) States that, for the purpose of determining whether the defendant acted in concert with another person or persons in any proceeding, the trier of fact may consider any competent evidence, including, but not limited to, all of the following:

   a) The defendant has previously acted in concert with another person or persons in committing acts constituting theft, or any related offense, including any conduct that occurred in counties other than the county of the current offense, if relevant to demonstrate a fact other than the defendant's disposition to commit the act;

   b) That the defendant used or possessed an artifice, instrument, container, device, or other article capable of facilitating the removal of merchandise from a retail establishment without paying the purchase price and use of the artifice, instrument, container, or device or other article is part of an organized plan to commit theft; or,

   c) The property involved in the offense is of a type or quantity that would not normally be purchased for personal use or consumption and the property is intended for resale. (Pen. Code, § 490.4, subd. (c).)

4) States that, in a prosecution for the crime of organized retail theft, the prosecutor shall not be required to charge any other co-participant of the organized retail theft. (Pen. Code, § 490.4, subd. (d).)

5) Provides that, upon conviction for organized retail theft, the court shall consider ordering, as a condition of probation, that the defendant stay away from retail establishments with a reasonable nexus to the crime committed. (Pen. Code, § 490.4, subd. (e).)

6) Repeals this crime on January 1, 2026.

7) Requires the Department of the California Highway Patrol (CHP) to, in coordination with the Department of Justice, convene a regional property crimes task force to assist local law enforcement in counties identified by the CHP as having elevated levels of property crime, including, but not limited to, organized retail theft and vehicle burglary. The task force shall provide local law enforcement in the identified region with logistical support and other law enforcement resources, including, but not limited to, personnel and equipment, as determined to be appropriate by the Commissioner of the California Highway Patrol in consultation with task force members. (Pen. Code, § 13899.)

8) Repeals the property crimes task force on January 1, 2026. (Pen. Code, § 13899.1.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Retail theft has been growing concern in California and is an increasingly frequent topic of discussion in the Legislature. Last year, the

Public Policy Institute of California reported a 5.8% increase in commercial burglary and a 9.1% increase in commercial robbery compared to the year prior. AB 1802 will maintain the ability of law enforcement to adequately respond to retail crime by reenacting the crime of organized retail theft and the operation of the CHP property crimes task force until January 1, 2031. In doing so, it will ensure law enforcement and businesses have continued access to a vital tool needed to address this ongoing issue."

2) **Retail Theft in California:** A report by the Public Policy Institute of California (PPIC), (see <Retail Theft and Robbery Rates Have Risen across California - Public Policy Institute of California (ppic.org)> [as of April 3, 2024]) took a look at the problem or retail theft and robbery across the state by examining changes and differences across 15 large counties. The report states in part, "the 2022 data shows that while California's shoplifting rate jumped notably in 2022, it remains lower than it was at any point in the decade before the pandemic. The commercial burglary rate, however, reached its highest level since 2008, and the commercial robbery rate rose to roughly where it was in 2017. The challenges of retail theft and robbery appear to be widespread, but they vary across the state.

"Organized retail theft is frequently cited as a driver of recent trends across the country, but particularly in California. Like many other states, California has launched efforts to curb organized retail theft. AB 331 (2021) toughens penalties and includes funding for a California Highway Patrol task force to identify trouble spots and assist local law enforcement. In June 2023, Attorney General Bonta, announced an information-sharing partnership with a number of large retailers.

"The impact of these efforts will depend partly on the extent to which organized retail theft is actually driving recent trends. It will be important to continue monitoring retail theft and robbery rates and examining other possible contributing factors."

This bill would eliminate the sunset date of the organized retail theft code.

3) **Argument in Support**: According to the Los Angeles County District Attorney, the sponsor of this bill, "One of the most important tools we have to combat the problem of retail theft is California's Organized Retail Theft statute, Penal Code Section 490.4. California's Organized Retail Theft statute makes it a wobbler for an organized group of two or more persons to steal goods from a merchant with the intent to sell, exchange or return the goods for value.

"Last year our Office filed over 500 cases using California's Organized Retail Theft statue in both the criminal and juvenile courts. The majority of these cases involved multiple defendants. In addition to prosecuting these cases, our Office has also worked with the Los Angeles County regional organized task force to recover millions of dollars in stolen goods which have been returned to retailers by law enforcement. For example, $188,000 in merchandise has been returned to Saks Fifth Avenue in Beverly Hills, $250,000 in recovered goods has been givenback to Kevin Jewelers, and hundreds of thousands of dollars has been returned to Target and CVS.

"The number of criminal prosecutions for organized retail theft have increased significantly since 2020. In 2020, our Office filed 95 criminal cases charging a violation of Penal Code Section 490.4 (78 felony filings and 17 misdemeanor filings). Last year the number of Penal

Code Section 490.4 filings increased to 541 (434 felony filings and 107 misdemeanor filings).

"Retail theft is a significant public policy problem as it not only negatively impacts California merchants but also for everyday Californians who feel less safe shopping in our communities but who are also harmed and inconvenienced by retail store closures in their local neighborhoods."

4) **Argument in Opposition**: *The California Attorneys for Criminal Justice* argues, "The crime of organized retail theft is of recent vintage: it first became law effective July 21, 2021. Existing laws relating to conspiracy already apply to the criminal conduct covered by AB 331. So this new crime was, when enacted, entirely unneeded. Prosecutors seeking to bring more serious charges against organized groups engaged in retail thefts have always been able to do so, without the necessity of AB 331. This is precisely why a sunset provision was originally included—to wait and see whether AB 331 was anything other than a duplicative. California law should not have both of these as options.

"Nor is there any data suggesting that AB 331 has done anything to impact retail theft one way or another. As Assemblymember Bonta, who sits on the recently formed special committee to address retail theft recently told the Los Angeles Times, "inconsistent information" on the extent of retail thefts since the passage of AB 331 "makes it difficult to assess the issue." (Anabel Sosa, California lawmakers want to curb retail theft, but says it's not as easy as it sounds, L.A. Times, (Dec. 30, 2023). As noted in this article, when proponents of this bill claiming that there is a rising problem with retail theft were asked to provide data at a legislative hearing, they "came up emptyhanded." (Id.) The National Retail Federation was, in fact, forced to retract the statistics it had earlier provided in support of the claim that organized retail theft was the central force behind shoplifting losses among retail businesses. (Mark Faithfull, National Retail Federation Retracts Stats Amid Theft War of Words, Forbes (Dec. 8, 2023).) And, as other media organizations have reported, retailers may be using claims of organized theft to cover up internal flaws causing their profits to drop. (See Gabrielle Funrouge, Retailers say organized theft is biting into profits, but internal issues may really be to blame, CNBC, August 10, 2023).

"Most importantly, there is no pressing need to extend the sunset provision of AB 331 in this legislative session, as AB 331 does not expire until 2026. Rushing to extend the sunset on a controversial and unnecessary expansion of the Penal Code in an election year is purely political gamesmanship and is not the wisest course to actually confront retail theft crimes. For this reason, CACJ opposes this bill."

5) **Related Legislation**:

a) AB 1772 (Ramos) would require the DOJ to submit a report to the Legislature regarding the number of retail theft convictions during the COVID-19 State of Emergency, as specified. AB 1772 is pending in this Committee.

b) AB 1779 (Irwin) would allow, a prosecutor to bring a case in any county where theft offenses occurred for offenses that occur in multiple jurisdictions, as specified. AB 1779 is pending in this Committee.

c) AB 1787 (Villapudua) would among other things, repeal the sunset provision in the organized retail theft statute, thereby extending the crime indefinitely. AB 1787 is pending in this Committee.

d) AB 1794 (McCarty) states the intent of the Legislature to enact legislation relating to theft. AB 1794 is pending in this Committee.

e) AB 1845 (Alanis), would establish the Identifying, Apprehending, and Prosecuting of Resale of Stolen Property Grant Program (IAPRSP Grant Program). AB 1845 is pending hearing in this committee.

f) AB 1972 (Alanis) would include the railroad police and cargo theft in CHP's regional property crimes task force. AB 1972 is pending in this Committee.

g) AB 1960 (Soria) would reenact sentence enhancement for theft offenses when the loss exceeds specified dollar amounts. AB 1960 is pending in this Committee.

h) AB 1990 (W. Carrillo) would authorize peace officers to make a warrantless arrest for misdemeanor shoplifting, as specified. AB 1990 is pending in this Committee.

i) AB 2406 (Davies) would make it a felony, punishable by imprisonment in state prison, to use two or more minors to engage in theft related offenses. AB 2406 is pending in this Committee.

j) AB 2438 (Petrie-Norris) would make any person who acts in concert with two or more persons to take, attempt to take, damage, or destroy any property in the commission or attempted commission of a felony punishable by an additional and consecutive term of imprisonment of one, two or three years. AB 2438 is pending in this Committee.

k) AB 2790 (Pacheco) would define organized retail theft to include acting in concert with one or more persons to steal specified types of merchandise, including infant formula, baby food, over-the-counter medications, and blood glucose testing strips, with the intent to sell those items. AB 2790 is pending in this Committee.

l) AB 2943 (Zbur) would, among other things, extend the organized retail theft statute until January 2031, and make it a crime for any person to possess property unlawfully that was acquired through one or more acts of shoplifting, theft, or burglary from a retail business, if the property is not possessed for personal use and the person has intent to sell, exchange, or return the merchandise for value, or the intent to act in concert with one or more persons to sell, exchange, or return the merchandise for value, and the value of the possessed property exceeds $950. AB 2943 is pending in this committee.

m) SB 923 (Archuleta) would revise the definition of shoplifting to require an intent to steal retail property or merchandise and would require a person convicted of petty theft or shoplifting, if the person has two or more prior convictions for specified theft-related offenses, to be punished by imprisonment in the county jail for up to one year, or for 16 months, or two or three years. SB 923 is pending in Senate Public Safety Committee.

n) SB 928 (Niello) would remove the sunset date for organized retail theft. SB 928 is pending in Senate Public Safety Committee.

o) SB 982 (Wahab) would remove the sunset date for organized retail theft. SB 982 is pending in Senate Appropriations Committee.

p) SB 1416 (Newman) would create sentencing enhancements for selling, exchanging, or returning for value, or attempting to sell, exchange, or return for value, any property acquired through one or more acts of shoplifting, theft, or burglary from a retail business, if the property value exceeds specified amounts and would make these enhancements apply to any person acting in concert with another person to commit these offenses. SB 1416 is pending in Senate Public Safety Committee.

6) **Prior Legislation**:

a) AB 23 (Muratsuchi), of the 2023-2024 Legislative Session, would have decreased the threshold amount for grand theft from $950 to $400. The hearing on AB 23 was canceled the request of the author.

b) AB 75 (Hoover), of the 2023-2024 Legislative Session, would have reinstated the offense of petty theft with a prior as it existed before it was eliminated by Prop. 47 and makes it applicable to the offense of shoplifting created by Prop.47, subject to approval by the voters. AB 75 failed passage in this committee.

c) AB 329 (Ta), of the 2023-2024 Legislative Session, would have expanded the territorial jurisdiction in which the Attorney General can prosecute specified theft offenses and associated offenses connected together in their commission to include cargo theft. AB 329 failed passage in this Committee.

d) AB 335 (Alanis), of the 2023-2024 Legislative Session, would have required the Little Hoover Commission to submit a report to the Legislature describing the reported retail thefts, as specified. AB 335 was held under submission in Assembly Appropriations Committee.

e) AB 2294 (Jones-Sawyer), Chapter 856, Statutes of 2022, authorized the misdemeanor arrest of a person that has a prior arrest, citation or conviction for theft, as specified, and authorized a city or county prosecuting authority or county probation department to create a diversion or deferred entry of judgment program for persons who commit a theft offense or repeat theft offenses.

f) AB 2356 (Rodriguez), Chapter 22, Statues of 2022, expanded the definition of "grand theft" where the aggregate amount taken by all participants exceeds $950.

g) SB 101 (Senate Committee on Budget), Chapter 12, Statutes of 2023, allocated 85,000,000 million dollars for a grant program to combat organized retail theft that law enforcement agencies could apply and compete for; and 10,000,000 million dollars for a grant program for organized retail theft vertical prosecution that district attorneys could apply and compete for; and for both grant programs to be administered by BSCCC. This budget bill also included other programs and budget allocations relating to Budget Act of

2023.

h) SB 316 (Niello), of the 2023-2024 Legislative Session, would have reinstated the offense of "petty theft with a prior" as it existed prior to the passage Proposition 47 and includes shoplifting in the list of eligible prior crimes.

i) AB 331 (Jones-Sawyer), Chapter 113, Statutes of 2021, extended the sunset date for organized retail theft through January 1, 2026.

j) AB 1597 (Waldron), of the 2021-2022 Legislative Session, would have amended Proposition 47 by reinstating the offense of petty theft with a prior. AB 1597 failed passage in this Committee.

k) AB 1599 (Kiley), of the 2021-2022 Legislative Session, would have repealed the changes made by Proposition 47, except those related to reducing the penalty for possession of concentrated cannabis, subject to approval of the voters. AB 1599 failed passage in this Committee.

l) AB 1603 (Salas), of the 2021-2022 Legislative Session, would have amended Proposition 47 by reducing the threshold amount for petty theft and shoplifting to be punished as a misdemeanor from $950 to $400. AB 1603 failed passage in this Committee.

m) AB 2390 (Muratsuchi), of the 2021-2022 Legislative Session, would have amended Proposition 47 by authorizing the aggregation of the value of property from one or more acts of theft or shoplifting, as specified. AB 2390 failed passage in this Committee.

n) SB 1108 (Bates), of the 2021-2022 Legislative Session, would have amended Proposition 47 by reinstating the offense of petty theft with a prior. SB 1108 failed passage in Senate Public Safety Committee.

o) AB 3234 (Ting), Chapter 334, Statutes of 2020, created a court-initiated misdemeanor diversion program.

p) AB 1810 (Budget Committee), Chapter 34, Statutes of 2018, allows trial courts to divert mentally ill defendants into pre-existing treatment programs, where the proposed program is consistent with the needs of the defendant and the safety of the community.

q) AB 1065 (Jones-Sawyer), Chapter 803, Statutes of 2018, created the crime of organized retail theft and expanded jurisdiction to prosecute cases of theft or receipt of stolen merchandise.

r) AB 2369 (Patterson), of the 2015-2016 Legislative Session, would have amended Proposition 47 by making persons convicted of crimes reduced to misdemeanors eligible for felony prosecution and sentencing if convicted of specified offenses two times within a three-year period. AB 2369 failed passage in this Committee.

s) SB 1227 (Hancock), Chapter 658, Statutes of 2013, created a diversion program for veterans who commit misdemeanors or county jail-eligible felonies and who are suffering

from service-related trauma or substance abuse.

t) AB 994 (Lowenthal), of the 2013-2014 Legislative Session, would have required each county to establish and maintain a pretrial diversion program, to be administered by the district attorney of that county, and authorizes either the district attorney or the superior court to offer diversion to a defendant. AB 994 was vetoed.

u) AB 1844 (Fletcher), Chapter 219, Statutes of 2010, amended petty theft with a prior to require three prior theft-related convictions.

REGISTERED SUPPORT / OPPOSITION:

Support

Los Angeles County District Attorney's Office (Sponsor)
Arcadia Police Officers' Association
Boma California
Burbank Police Officers' Association
California Business Properties Association
California Chamber of Commerce
California Narcotic Officers' Association
California Reserve Peace Officers Association
Chief Probation Officers' of California (CPOC)
City of Carlsbad
City of Santa Clarita
Corona Police Officers Association
Culver City Police Officers' Association
Deputy Sheriffs' Association of Monterey County
Fullerton Police Officers' Association
League of California Cities
Los Angeles County Business Federation (BIZ-FED)
Murrieta Police Officers' Association
Naiop of California
Newport Beach Police Association
Novato Police Officers Association
Orange County Business Council
Orange County Taxpayers Association
Palos Verdes Police Officers Association
Peace Officers Research Association of California (PORAC)
Placer County Deputy Sheriffs' Association
Pomona Police Officers' Association
Riverside Police Officers Association
Riverside Sheriffs' Association
Santa Ana Police Officers Association
Santa Clarita; City of
Southern California Leadership Council
Technet-technology Network
United Chamber Advocacy Network

Upland Police Officers Association
Valley Industry and Commerce Association (VICA)

Oppose

California Attorneys for Criminal Justice

Analysis Prepared by: Elizabeth Potter / PUB. S. / (916) 319-3744

Date of Hearing: April 9, 2024
Counsel: Kimberly Horiuchi

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 1831 (Berman) – As Amended March 21, 2024

SUMMARY: Adds to the definition of "obscene matter" and "matter," any "matter generated through AI" as it pertains to images of persons under the age of 18 engaged in sexual conduct, as specified. Specifically, **this bill**:

1) Creates a new crime, punishable by a felony, for any person that possesses or controls any matter generated through the use of artificial intelligence (AI), which depicts any person under the 18 engaging in or simulating sexual conduct, as specified.

2) Expands the crime of knowingly bringing into the state or possessing or publishing in the state with the intent to distribute or exhibit images of a person under the age of 18 engaged in sexual conduct to include any matter generated through the use of AI.

3) Expands the crime of intent to distribute images of a person under of 18 engaged in sexual conduct to include any matter generated through the use of AI.

4) Provides that any person who knowingly sends or causes to be sent for sale or distribution for commercial consideration any matter that depicts a person under the age of 18 engaged in sexual conduct also includes any matter generated through AI or any instance where a person knows the matter depicts what appears to be a person under the age of 18 engaging in or simulating sexual conduct, and lacks serious literary, artistic, political or scientific value.

5) States it is not necessary to prove the matter depicts a real person under the age of 18 is obscene or lacks serious literary, artistic, political, or scientific value.

6) Includes any matter generated through the use of AI in existing law criminalizing possession or use for distribution of images depicting sexual conduct by a person under the age of 18.

7) Expands the crime of commercial sexual exploitation to include any person who knowingly develops or duplicates images of a person under the age of 18 engaged in sexual conduct to include any matter generated through the use of AI.

8) Includes in the definition of employing a child under the age of 18 for purposes of production, distribution, or exhibition of a person under the age of 18 engaged in sexual conduct to include any matter generated through the use of AI.

9) Provides that any person who uses, persuades, or induces a minor or any parent of a minor to engage in or assist in posing or modeling for the purposes of preparing any representation of information data involving matter generated through the use of AI.

10) Expands the crime of possession of child pornography to include any matter generated through the use of AI.

11) Adds a new felony, punishable by up to one year in county jail or three years in state prison, a fine of not more than $2,500, or by both imprisonment and fine for knowingly possessing any image, as specified, of a person under the age of 18 engaged in sexual conduct, generated through the use of AI knowing that the matter is obscene and depicts what appears to be a person under the 18 years of age.

12) Defines "matter generated through the use of artificial intelligence" as means an image that has been generated or modified by a machine-based system that can, for a given set of human-defined objectives, create visual content that is, or would falsely appear to a reasonable person to be, or to incorporate, actual photographs or recordings of a real human being actually engaging in the actions depicted.

13) Makes findings and declarations sufficient to support a "compelling government interest" in support of additional restrictions on what constitutes obscene matter, including:

    a) The possession of CSAM normalizes and validates the sexual exploitation of children and contributes to new victimization. Some offenders use CSAM to groom children into believing that sex with adults is appropriate. Moreover, for some higher risk offenders, viewing CSAM leads to escalating behavior, including physical sexual assault of children. Moreover, exchange of CSAM over internet communities allows offenders to promote CSAM and validate the sexual abuse of children.

    b) The harms identified above exist regardless of how CSAM is produced, and it is imperative that we protect our children from that harm regardless of how the images are produced.

EXISTING LAW:

1) Provides that a person is guilty of sexual exploitation of a child if they knowingly develop, duplicates, print, or exchange any representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip that depicts a person under the age of 18 years engaged in an act of sexual conduct. (Pen. Code, § 311.3, subd. (a).)

2) Defines "sexual conduct" as:

    a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals.

    b) Penetration of the vagina or rectum by any object.

    c) Masturbation for the purpose of sexual stimulation of the viewer.

    d) Sadomasochistic abuse for the purpose of sexual stimulation of the viewer.

e) Exhibition of the genitals or the pubic or rectal area of any person for the purpose of sexual stimulation of the viewer.

f) Defecation or urination for the purpose of sexual stimulation of the viewer. (Pen. Code, § 311.3, subd. (b)(1-6); Pen. Code, § 311.4, subd. (d).)

3) States any person who knowingly depicts a person under the age of 18 engaged in any sexual conduct, may be punished by up to one year in county jail, a fine of not more than $2000, or both imprisonment and fine. Any person who has a previous conviction for depicting a person under the age of 18 engaged in any sexual conduct shall be sentenced to state prison. (Pen. Code, § 311.3, subd. (d).)

4) Defines "matter" as any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, or any other computer-related equipment or computer-generated image that contains or incorporates in any manner, any film, filmstrip, photograph, negative, slide, photocopy, videotape, or video laser disc. (Pen. Code, § 311.4, subd. (d)(2).)

5) States any person who, with knowledge that a person is a minor, or who, while in possession of any facts on the basis of which they should reasonably know that the person is a minor, hires, employs, or uses the minor to do or assist in doing any obscene material, as specified, shall be punished by punished by up to one year in county jail, a fine of not more than $2000, or by both imprisonment and fine. If the person has previously been convicted of using a minor in obscene material, the court may, in impose a fine not exceeding fifty thousand dollars ($50,000). (Pen. Code, § 311.4, subd. (a).)

6) States any person who, with knowledge that a person is a minor under the age of 18 years, or who, while in possession of any facts on the basis of which he or she should reasonably know that the person is a minor under the age of 18 years, knowingly promotes, employs, uses, persuades, induces, or coerces a minor under the age of 18 years, as specified to engage in or assist others to engage in either posing or modeling alone or with others for purposes of preparing any representation of information, data, or image, as defined, involving sexual conduct by a minor under the age of 18 years alone or with other persons or animals, for commercial purposes, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years. (Pen. Code, § 311.4, subd. (b).)

7) Provides that any person who uses a minor for obscene material or advertises obscene matter depicting a person under the age of 18 is punishable by fine of not more than $1,000 plus $5 for each additional unit of obscene material involved in the offense, not to exceed $10,000, or by imprisonment in the county jail for not more than six months plus one day for each additional unit of obscene material not to exceed a total of 360 days in the county jail, or by both that fine and imprisonment. If that person has previously been convicted of any child pornography offense, is a felony, punishable by up to three years in county jail. (Pen. Code, § 311.9, subd. (a).)

8) States any person who knowingly possesses or controls any matter, representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any

manner, any film or filmstrip, the production of which involves the use of a person under 18 years of age, knowing that the matter depicts a person under 18 years of age personally engaging in or simulating sexual conduct, is guilty of a felony and shall be punished by imprisonment in the state prison, or a county jail for up to one year, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both the fine and imprisonment. (Pen. Code, § 311.11, subd. (a).)

FISCAL EFFECT: Unknown

COMMENTS: >

1) **Author's Statement:** According to the author: "AB 1831, the Preventing AI-Enabled Child Exploitation Act, will modernize our laws to ensure AI-generated sexually explicit images of children are illegal to possess, distribute, and create. With the rapid advancement of AI, this technology is being used to create highly realistic images of child sexual abuse, which can be virtually indistinguishable from a real child. The process of creating AI-generated sexually explicit images of minors victimizes thousands of children because an AI program must first learn what these images look like by using existing real images of children. Law enforcement officers in California have already encountered instances of people in possession of AI-generated child sexual abuse material (CSAM) that could not be prosecuted due to the deficiency in current law. Therefore, it is critical that our laws keep up with evolving AI technology to ensure predators are being prosecuted and children are being protected."

2) **CSAM and AI:** According to information provided by the author, there is much more evidence in support of the harms caused by CSAM such that it may create a clear compelling government interest in restricting AI-generated CSAM. The remaining issue is whether the proposed amendments are overbroad and prohibits otherwise protected speech. The author states in detail:

> "Currently prosecution of the possession of child sexual abuse material (CSAM) and related crimes, requires proof that the material in question depicts a real child. However, advances in AI and computer technology have made it possible, cheap, and easy to create highly realistic deepfake content, including CSAM. For example, websites available to the general public offer services that modify images of real people, including children, to make them appear nude. Other websites will generate artificial images of children in any position or situation the user demands. The images are often so realistic that the human eye cannot tell they are fake.
> Numerous free applications utilize generative AI technology to produce images and videos of humans that appear real. There are many sites that provide free "text-to-image" services that allow a user to generate an image (or series of images) based upon text input. Some of these services include Dall-E, Midjourney, and Kasper Art. With minimal input, a user can produce images of humans that appear to be real. This includes material that could involve children.
> These results demonstrate the simplicity of the process for producing lifelike images of hypothetically "fictional" persons in

realistic settings using a mobile device with no programming skills. Countless AI-image generating services not only allow the generation of nude, not-safe-for-work, or underage imagery, but actually market themselves for that ability.

Many of these services have basic free plans, but also paid plans that allow for more censor-free content generation. These services are not on the dark web, but within the open internet for anyone – including children – to find. The wide availability and use of technology in this way is deeply troubling for a number of reasons. For example, as CSAM becomes more readily available, and simultaneously more difficult to prosecute, CSAM consumers will be able to view more volume and more explicit content than before. Viewers of CSAM can then become desensitized, they will seek more harmful materials and eventually are likely to escalate their conduct to physical child sexual abuse.

Before an artificially intelligent program is utilized to create something, it needs to be taught what it is going to produce and how it is going to produce it. AI can learn to recognize and understand images through a process known as image recognition or computer vision. Image recognition occurs by analyzing data and identifying patterns or rules that it needs to follow. For example, by showing a computer dozens of images of cats and dogs, over time it will develop a generalized idea of what a cat and what a dog should look like. When shown an image, the computer should then have information to make an intelligent assumption of what kind of animal is shown. If the amount of training data provided to the AI program is increased, the accuracy of what the AI program produces should also increase.

For example, in 2023, a police agency in Los Angeles arrested a subject for possession of CSAM. During an interview with the suspect, he admitted to producing AI CSAM for approximately 2 years on his phone and computer "because you cannot tell someone what you are naturally attracted to since it is a crime." The suspect enjoyed the idea of flooding "the market" with AI CSAM because "it will visually give [the consumer] what [they] want." The suspect also believed that very soon it would be too difficult to tell the difference between real and AI-generated CSAM.

In 2020 Investigators in Ventura County investigating the possession and transfer of CSAM amongst three individuals determined that one of the suspects was using his computer to create CSAM images. He confessed to creating and distributing these made to order sexually explicit images of children for financial gain. However, despite the obscene nature of the images

and the fact that they appeared to depict young children, he could not be prosecuted.

3) **Child Pornography:** Possession or distribution of child pornography is punishable as either a misdemeanor or felony, and in some cases, may be a state prison felony. For the most part, these laws have not been amended in nearly 20 years and require felony defendants to serve their sentence in state prison – rather than county jail.

Penal Code section 311.2, subdivision (a) criminalizes distribution or exhibition of obscene material, including child pornography, and requires a maximum sentence of one year in state prison. Additionally, Penal Code section 311.2 may be charged per image and, in some case, aggregated to increase the total sentence. (*People v. Haraszewski* (2012) 203 Cal.App.4th 924.) Penal Code section 311.2, subdivision (b) punishes exhibition or distribution of child pornography for commercial consideration as a felony subject to a maximum of six years in state prison. (Pen. Code, § 290, subd. (c).)

Penal Code section 311.2, subdivision (c) punishes exhibition or distribution of obscene matter to another person 18 and over knowing the material depicts a minor engaged in sexual conduct, may be sentenced to a maximum of 1 year in state prison. Penal Code section 311.2 subdivision (d) punishes distribution of obscene matter, including child pornography, to a person under the age of 18, by up to one year in county jail, or three years in state prison.

Penal Code section 311.3 criminalizes "sexual exploitation of a child" meaning knowingly developing or printing child pornography, as specified, and may be punished by up to one year in the county jail. (Pen. Code, § 311.3, subd. (d).) Penal Code section 311.4, subdivision (a) punishes knowingly employing a minor to distribute obscenity or pornography, as specified, and is subject to a punishment of up to one year in state prison.[1] Penal Code section 311.11, subdivision (a) criminalizes possession of child pornography which is mostly punishable as a felony.

4) **First Amendment:** The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." (U.S. Const, Amend. I, Section 1.) The California Constitution also protects free speech. "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const. Art. I, § 2.) "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (*Ashcroft v. American Civil Liberties Union* (2002) 535 U.S. 564, 573.) Legislation that regulates the content of protected speech is subject to strict scrutiny, sometimes referred to by the courts as "exacting scrutiny" in this context. (*Reed v. Town of Gilbert, Ariz.* (2015) 135 S.Ct. 2218, 2226.) To survive strict scrutiny, state action must be narrowly tailored to address a compelling government interest. (*Ibid.*)

---

[1] Penal Code section 311.1 through 311.11 are mostly not subject to the 2011 Realignment Act and many require registration as a sex offender. This means these defendants are sentenced to state prison on a felony – not county jail. Additionally, when required to register as a sex offender, a defendant is not eligible for realignment moving forward. (See Pen. Code, § 1170, subd. (h)(5).)

However, certain speech is not eligible for First Amendment protections. As a general principal, the First Amendment bars the government from dictating what we see or read or speak or hear. The First Amendment does not protect defamation, incitement, ***obscenity, and pornography produced with real children.*** (See *Simon & Schuster, Inc. v. New York State Crime Victims Bd.* (1991) 502 U.S. 105, 127.) *Miller v. California* (1973) 413 U.S. 15, 24 held "obscene material is unprotected by the First Amendment."

> "There are inherent dangers in undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. As a result, the permissible scope of such regulation is confined to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be ***limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific valu***e. (Emphasis added.)

New York v. Ferber (1982) 458 U.S. 747, 759-761 further defined the limits of child pornography when it held, "Generally, pornography can be banned only if it is obscene under *Miller v. California* [citation omitted], but pornography depicting actual children can be proscribed whether or not the images are obscene because of the State's interest in protecting the children exploited by the production process, and in prosecuting those who promote such sexual exploitation."

In this case, the author's office presented evidence in support of a link between child abuse and AI-generated child pornography in a 2023 report issued by the Internet Watch Foundation entitled "*How AI is being used to create child sexual abuse imagery*:

> Most AI child sexual abuse material (CSAM) found is now realistic enough to be treated as 'real' CSAM. The most convincing AI CSAM is visually indistinguishable from real CSAM, even for trained IWF analysts. Text-to-image technology will only get better and pose more challenges for the IWF and law enforcement agencies. There is now reasonable evidence that AI CSAM has increased the potential for the re-victimization of known child sexual abuse victims, as well as for the victimization of famous children and children known to perpetrators. The IWF has found many examples of AI-generated images featuring known victims and famous children."[2]

In this instance, it is not clear this bill would run afoul of First Amendment standards. First, even if the image is not viewed as "child pornography" – which is unclear given the rapid

---

[2] Located at https://www.iwf.org.uk/about-us/why-we-exist/our-research/how-ai-is-being-abused-to-create-child-sexual-abuse-imagery/, last visited April 1, 2024.

rise of AI-generated CSAM - it seems unlikely, barring an overbreadth argument, that a court would not view it as obscene under *Miller*.
According to the *ACLU California Action*, however, there is a bit of concern around the language of Penal Code section 311.2:

> We are concerned that some provisions of AB 1831 fall outside these exceptions. In particular, proposed Penal Code section 311.2 would impermissibly prohibit a person from distributing, intending to distribute, exhibiting, or exchanging:
>
> Non-obscene material generated by artificial intelligence that neither depicts a real child nor that was generated using images of real children, and
>
> Non-obscene material that depicts what "appears to be a person under 18 years of age" but is, in fact, a person over the age of 18.
> "The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 244. The U.S. Supreme Court has found statutes unconstitutional on their face when they prohibit "a substantial amount of protected expression." *Id.*
>
> AB 1831 suffers from such overbreadth: The speech prohibited by AB 1831 includes matter that does not depict real children, as required to fall within the exception to First Amendment protection addressed in *Ashcroft v. Free Speech Coalition,* and that does not "appeal to the prurient interest in sex," or "portray sexual conduct in a patently offensive way," as required to fall within the exception to First Amendment protection addressed by *Miller v. California.*

The author may wish to consider whether this nuance should be clarified as the bill moves through the Assembly.

5) **Overbreadth**: If a statute is so broadly written that it deters or "chills" free expression, it may be invalided by the court as a violation of the First Amendment. If an ordinary speaker is be able to determine what is prohibited and what is not, a statute may be struck down on its face because of its chilling effect—even if it also prohibits acts that may legitimately be forbidden.

Numerous state and federal courts have ruled that child pornography is not entitled to First Amendment protections when the statute is aimed at the underlying conduct. (See *Roth v. United States* (1957) 354 U.S. 476, 489; *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 251 (hereinafter "*Ashcroft*").) "The free speech guarantee of the First Amendment gives significant protection from overbroad laws that chill speech within the First's Amendment's sphere. Under this principle, a law is unconstitutional on its face if the law prohibits or chills a substantial amount of protected expression." (*Ibid.*) The primary issue when considering overbreadth is whether the prohibited conduct includes otherwise lawful speech.

In order to avoid overbreadth, the statute must be narrowly drawn and represent a considered

legislative judgment that a particular mode of expression has to give way to other compelling needs of society. (*Broadrick v. Oklahoma* (1973) 413 U.S. 601, 611–612.) As explained below, case law on point stands for the proposition that the 1996 Child Pornography Prevention Act (specifically, 18 U.S.C. § 2256, subd. (8)(D)) was overbroad in the manner in which it attempted to regulate child pornography because it prohibited images that were not obscene and not child pornography.

According to information provided by the author's office in response to expressed concerns about constitutionality:

> The First Amendment does not protect obscenity, *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), or the possession of child pornography produced using children. *Osborne v. Ohio,* 495 U.S. 103, 110, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990)
>
> In *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 245–246, the Supreme Court struck an earlier provision of federal law that prohibited possession and other activities related to non-obscene artificially generated CSAM materials. Subsequent amendments however have addressed the *Aschroft* holding. Thus 18 U.S.C. § 1466A(a)(1) now prohibits images of actual minors engaging in sexually explicit conduct and "a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting," that "depicts a minor engaging in sexually explicit conduct" and is obscene. When the material is obscene, there is no requirement that the minor depicted actually exist. (18 U.S.C. § 1466A(c).) These provisions were upheld in *United States v. Whorley* (4th Cir. 2008) 550 F.3d 326, 336, against an individual charged with possessing obscene cartoons depicting minors engaged in sexually explicit conduct.
>
> After the decision in *Free Speech Coalition,* Congress enacted the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, 117 Stat. 650. (PROTECT Act.) The PROTECT Act's pandering and solicitation provision was tested in *United States v. Williams* (2008) 553 U.S. 285, and, despite the fact that the PROTECT Act proscribed pandering or soliciting regarding AI generated obscene CSPAN, it was upheld against First Amendment challenge.
>
> Importantly, in *Williams*, the Supreme Court noted that the PROTECT Act "criminalizes only offers to provide or requests to obtain contraband—child obscenity and child pornography involving actual children, both of which are proscribed, see 18 U.S.C. § 1466A(a), § 2252A(a)(5)(B) (2000 ed., Supp. V), and the proscription of which is constitutional. . . ." (*Williams*, *supra*, 553 U.S. at p. 297.)

> This bill is drafted so that images generated by artificial intelligence which do not depict a real child are prohibited only if they are also obscene. In this way the proposed amendments to current law will not run afoul of the First Amendment."

As noted above, the First Amendment does not protect child pornography or obscenity. Unfortunately, most state and federal jurists are not familiar with AI-generated content and may struggle to understand its complexities and reliance on AI content as a form of CSAM. As this technology advances at a breakneck speed, the law should keep pace with technological developments while adhering to constitutional standards.

6) **Argument in Support:** According to the *Ventura County District Attorney:* AB 1831 will help prevent the sexual exploitation of children by ensuring that obscene CSAM created using artificial intelligence is unlawful to produce, to possess, and to distribute to the same extent CSAM is currently illegal under current law. AB 1831 sends a clear message that our society will not tolerate the malicious use of AI to produce harmful sexual content involving minors. CSAM is a visual depiction of the sexual abuse of children. Its creation, possession, and distribution have long been illegal. Currently, prosecution for possession of CSAM and related crimes requires proof that the material in question depicts a real child. However, advances in AI have made it possible, cheap, and easy to create highly realistic deepfake content, including CSAM.

"For example, websites available to the general public offer services that modify images of real people, including children, to make them appear nude. Other websites will generate artificial images of children in any position or situation the user demands. The images are often so realistic that the human eye cannot tell they are fake. Under existing law however, these images are not as clearly unlawful as they should be to facilitate prosecution. There are two kinds of representations of CSAM addressed by AB 1831. The first are AI-generated obscene representations depicting fictitious children in matter that would be illegal under current law if it depicted a real child. Notably, to be "obscene" under AB 1831, the AI generated representations of fictitious children engaged in sex would have to satisfy the longstanding definition of obscenity already found in Penal Code section 311. This definition requires proof that the matter "taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value." AB 1831 will clarify that there is no legal difference between obscene matter generated by AI and obscene matter generated by a person.

"A second type of AI CSAM involves using the face or body of a real child to generate a new AI image. This matter invokes longstanding concerns about child sexual exploitation through the creation, possession, and distribution of images of that exploitation. When CSAM depicts an identifiable child, it has no protection under the law. (New York v. Ferber (1982) 458 U.S. 747; Osborne v. Ohio (1990) 495 U.S. 103, 110.) Thus, current law already prohibits CSAM when the matter depicts an identifiable child. AB 1831 will clarify that morphed CSAM is unlawful even if created using AI. Moreover, AB 1831 will ensure that the worst of these morphed images are unlawful even if the child cannot be identified.

...

"AB 1831 is modeled in part after newer federal statutes, such as 18 U.S.C. 2552A and 18 U.S.C. § 1466A, both of which have been upheld against First Amendment claims in numerous decisions. (See United States v. Williams (2008) 553 U.S. 285, 299 [18 U.S.C. 2552A(a)(3), prohibiting advertising, distributing, etc. of virtual child obscenity satisfied First Amendment test]; United States v. Arthur (5th Cir. 2022) 51 F.4th 560, 569, cert. denied (2023) 143 S.Ct. 846 [upholding 18 U.S.C. 1466A(a); obscene image need not depict real minors]; *United States v. Schales* (9th Cir. 2008) 546 F.3d 965, 972 [ban on production, distribution, possession with intent to distribute artificial child obscenity was facially constitutional] United States v. Dean (11th Cir. 2011) 635 F.3d 1200, 1208 [18 U.S.C. 1466A(a)(2) is not unconstitutionally overbroad].) Congress enacted laws to proscribe virtual child obscenity because they recognized that the artificial nature of such images does not render them safe. CSAM has been demonstrated to have unique properties and consequences. Research has shown a correlation between the consumption of CSAM and an increased risk of individuals actually engaging in hands-on sexual offenses against minors. (United States Sentencing Commission Report to Congress: Federal Child Pornography Offenses (Dec. 2012) Chapter 4 at 77, 94-104, 312.) (Citation omitted). …"

7) **Argument in Opposition**: According to *ACLU California Action*: As currently drafted, AB 1831 would expand various child pornography statutes to include matter generated by artificial intelligence and matter that "appears to depict a person under the age of 18" engaging in sexual conduct. While we appreciate the potential harms caused by many forms of new technology, we fear that the current version of AB 1831improperly restricts lawful speech and runs afoul of the First Amendment.

   The U.S. Supreme Court has said that freedom of expression, including freedom of speech, is "the matrix, the indispensable condition of nearly every other form of freedom." *Palko v. State of Connecticut* (1937) 302 U.S. 319, 327. As such, the First Amendment protects nearly all speech, with only a handful of notable exceptions. One of those exceptions is "obscene" works, defined as those works that "appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Miller v. California* (1973) 413 U.S. 15, 24. A second exception is child pornography. *New York v. Ferber* (1982) 458 U.S. 747. Importantly, however, courts have limited the child pornography exception to pornography that depicts real children. (*Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234.)"

8) **Related Legislation:**

   a) AB 1872 (Sanchez) expands the definition of "fear" in the extortion statute to include any threat to post, distribute, or create AI-generated images or videos of another. AB 1872 is being heard in this committee today.

   b) AB 1873 (Sanchez) creates a new crime for knowingly developing, duplicating, printing, or exchanging any representation of information, data, or images generated using artificial intelligence (AI), that depicts a person under the age of 18 years engaged in any sexual conduct, as specified.

9) **Prior Legislation:** SB 1128 (Alquist), Chapter 337, Statutes of 2006, stated, among other numerous changes to the distribution of obscene material, that any person who knowingly

promotes, employs or uses a minor who the person knows or reasonably should have known is under the age of 18 or engages in or assists others to engage in either posing or modeling involving sexual conduct for commercial purposes shall punished as a felony punishable by a term of three, six or eight years in state prison.

SUPPORT
Calchamber
California Association of Highway Patrolmen
California District Attorneys Association
California Federation of Teachers AFL-CIO
California State Sheriffs' Association
Center for Public Interest Law/children's Advocacy Institute/university of San Diego
Common Sense Media
Crime Victims United of California
Jewish Family and Children's Services of San Francisco, the Peninsula, Marin and Sonoma Counties
Los Angeles City Attorney's Office
Organization for Social Media Safety
Peace Officers Research Association of California (PORAC)
SAF AFTRA
Simi Valley Police Department
Technet
The Child Abuse Prevention Council
Ventura County District Attorney

OPPOSITION

ACLU California Action

Analysis Prepared by: Kimberly Horiuchi / PUB. S. / (916) 319-3744

Date of Hearing: April 9, 2024
Consultant: Elizabeth Potter

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 1845 (Alanis) – As Amended February 21, 2024

SUMMARY: Establishes the Identifying, Apprehending, and Prosecuting of Resale of Stolen Property Grant Program (IAPRSP Grant Program). Specifically, **this bill**:

1) Establishes the Identifying, Apprehending, and Prosecuting of Resale of Stolen Property Grant Program and requires the program to be administered by the Board of State and Community Corrections (the board).

2) Requires the board to award grants, on a competitive basis, to county district attorneys' offices and law enforcement agencies and to establish minimum standards, funding schedules, and procedures for awarding grants.

3) Requires the application for a grant to include all of the following criteria:

   a) A joint application by a county district attorney's office and one or more law enforcement agencies located within that county; or Multicounty applications may be submitted by two or more county district attorneys' offices and two or more law enforcement agencies located within those counties;

   b) The district attorney or district attorneys must use grant funds to prosecute stolen goods crimes and criminal profiteering. District attorneys awarded grant funds must do all of the following:

      i) Employ vertical prosecution methodology for receiving stolen goods crimes;

      ii) Dedicate at least one-half of the time of one deputy district attorney and one-half of the time of one district attorney investigator solely to the investigation and prosecution of receiving stolen goods crimes;

      iii) Provide the board with annual data on the number of receiving stolen goods cases filed by that county, the number of receiving stolen goods convictions obtained, and the sentences imposed for those convicted of receiving stolen goods crimes in that county. For multicounty grants, data for each county awarded funds shall be provided; and,

      iv) Use the funding received pursuant to this program to supplement, and not supplant, existing financial resources.

4) Requires a law enforcement agency or agencies to use grant funds to identify and arrest offenders guilty of receiving stolen goods crimes.

5) Allows grant funds to be used for officer salaries and overtime for training equipment appropriate for the investigation of stolen property crimes.

6) Requires each law enforcement agency receiving funds to do both of the following:

   a) Provide the board with annual data on the number of receiving stolen goods crimes investigated by that agency, the number of receiving stolen goods crimes investigations, and the number of arrests made. For multicounty grants, data for each county awarded funds shall be provided; and

   b) Funding received by law enforcement agencies must use those funds to supplement, and not supplant, existing financial resources.

7) Provides that applications must include a proposed allocation of funding between the applicant county's or counties' district attorneys' offices and the applicant law enforcement agencies either by dollar allocation or percentage distribution.

8) Allows a law enforcement agency that received funding pursuant to the Organized Retail Theft Prevention Grant Program and a district attorney that received funding under the Organized Retail Theft Vertical Prosecution Grant program to receive additional funding provided by the IAPRSP Grant Program.

9) Provides that the board cannot require applicants to have received funds from the Organized Retail Theft Prevention Grant Program or the Organized Retail Theft Vertical Prosecution Grant program to be eligible for the IAPRSP Grant Program.

10) Provides that a law enforcement agency receiving funding pursuant to the IAPRSP Grant Program, must share relevant intelligence data obtained in the course of investigations pursuant to this program with agencies receiving funds under the Organized Retail Theft Prevention Grant Program and with the California Highway Patrol (CHP).

11) Requires all grantees receiving grant funding to consult with other grant recipients to discuss and exchange best practices for the investigation, arrest, and prosecution of receiving stolen property crimes.

12) Requires all entities receiving grant funding to comply with all applicable privacy laws and regulations.

13) Provides that an applicant must submit a proposal, in a form prescribed by the board, that includes, but not limited to, all of the following:

   a) Data demonstrating the nature and scale of the specific crime problem that the applicant proposes to address using grant funds;

   b) Clearly defined and measurable objectives for the grant;

   c) A description of how the applicant proposes to use the grant funds to achieve the stated objectives, including any plans to coordinate or collaborate with other entities, such as public agencies, community organizations, retailers, or representatives of crime victims

organizations;

d) A discussion of how the applicant plans to sustain the proposed activities once grant funds expire or an explanation of why the proposed activities are limited term in nature;

e) A description of existing or proposed policies to limit racial bias in utilizing these funds;

f) If proposing an investment in surveillance technologies, a description of existing or proposed policies to govern the use of those technologies, including how the applicant will comply with applicable privacy laws and secure any data stored; and,

g) How the funding will be used to facilitate collaboration with online marketplaces and retailers to address the increase in property crimes in the applicant's jurisdiction or jurisdictions.

14) Requires the board, when awarding grants, to do each of the following:

a) Give preference to applicants whose grant proposals to demonstrate the greatest need for additional resources and likelihood of success in identifying, arresting, and convicting offenders who commit receiving stolen property crimes and in addition, give preference to joint applications from two or more county district attorney's offices and law enforcement agencies in two or more applicant counties; and,

b) Ensure that grants, to the extent feasible, are allocated to a range of applicants that represent diversity of communities across the state, including rural, urban, and suburban counties, and equitably distributed to counties located in northern and southern California.

15) Requires each grantee to report to the board, in a form and at intervals prescribed by the board, their progress in receiving grant objectives.

16) Requires the board, no later than 90 days following the close of each grant cycle, to prepare and submit a report to the Legislature, as specified, regarding the impact of the initiatives of the grant. The report, at a minimum, must include all of the following:

a) The grant recipients and the amount awarded to each;

b) How the funding was used; and,

c) What outcomes and objectives were achieved.

17) Allows the board to establish a deadline by which district attorney's offices and law enforcement agencies that receive grants pursuant to this program must submit the data collected and maintained in order for the board to comply with the report to the Legislature.

18) Provides that this program is only operative when funding is provided in the annual Budget Act or another statute.

19) Requires that no more than 5 percent of funds appropriated for this program to be retained by the board for administrative cost, including technical assistance, training and the cost of producing the report to the Legislature.

20) Makes the grant program operative upon appropriation by the Legislature.

21) Sunsets the provisions of this program on January 1, 2030.

22) Contains Legislative findings and declarations.

EXISTING LAW:Requires the CHP to, in coordination with the Department of Justice, to convene a regional property crimes task force to assist local law enforcement in counties identified by the CHP as having elevated levels of property crime, including, but not limited to organized retail theft and vehicle burglary. (Pen. Code, § 13899.)

2) Instructs the regional property crimes task force to provide local law enforcement in the identified region with logistical support and other law enforcement resources, including, but not limited to, personnel and equipment, as determined to be appropriate by the Commissioner of the CHP in consultation with task force members. (Pen. Code, § 13899.)

3) Repeals the property crimes task force on January 1, 2026. (Pen. Code, § 13899.1.)

4) Divides theft into two degrees, petty theft and grand theft. (Pen. Code, § 486.)

5) Defines grand theft as when the money, labor, or real or personal property taken is of a value exceeding $950 dollars or when the property is taken from a person, or when the property stolen is an automobile or firearm. (Pen. Code, § 487)

6) Defines petty theft as obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed $950. (Pen. Code, § 490.2, subd. (a).)

7) Provides that any person who drives or takes a vehicle not their own, without the owner's consent, and with intent either to permanently or temporarily deprive the owner thereof of title to or possession of the vehicle, whether with or without intent to steal it, is guilty of a public offense. (Veh. Code, § 10851, subd. (a).)

8) Establishes that a person who commits any of the following acts is guilty of organized retail theft:

   a) Acts in concert with one or more persons to steal merchandise from one or more merchant's premises or online marketplace with the intent to sell, exchange, or return the merchandise for value.

   b) Acts in concert with two or more persons to receive, purchase, or possess merchandise as described, knowing or believing it to have been stolen.

   c) Acts as an agent of another individual or group of individuals to steal merchandise from one or more merchant's premises or online marketplaces as part of an organized plan to

commit theft.

d) Recruits, coordinates, organizes, supervises, directs, manages, or finances another to undertake any of the acts described, or any other statute defining theft of merchandise. (Pen. Code, § 490.4, subd. (a)(1)-(4).)

9) Provides that organized retail theft is punishable as follows:

a) If a person acts in concert or as an agent and commits violations on two or more separate occasions within a 12-month period, and if the aggregated value of the merchandise stolen, received, purchased, or possessed within that 12-month period exceeds nine hundred fifty dollars ($950), the offense is punishable by imprisonment in a county jail not exceeding one year or pursuant to subdivision (h) of Penal Code section 1170.

b) Any other violation when a person acts in concert or as an agent that is not described in paragraph (1) of this subdivision is punishable by imprisonment in a county jail not exceeding one year.

c) A violation of organized retail theft by act of recruiting, coordinating, organizing, supervising, directing, managing, or financing another to commit acts of organized retail theft is punishable by imprisonment in a county jail not exceeding one year, or as a felony pursuant to subdivision (h) of Penal Code section 1170. (Pen. Code, § 490.4, subd. (b)(1)-(3).)

10) States that, for the purpose of determining whether the defendant acted in concert with another person or persons in any proceeding, the trier of fact may consider any competent evidence, including, but not limited to, all of the following:

a) The defendant has previously acted in concert with another person or persons in committing acts constituting theft, or any related offense, including any conduct that occurred in counties other than the county of the current offense, if relevant to demonstrate a fact other than the defendant's disposition to commit the act;

b) That the defendant used or possessed an artifice, instrument, container, device, or other article capable of facilitating the removal of merchandise from a retail establishment without paying the purchase price and use of the artifice, instrument, container, or device or other article is part of an organized plan to commit theft; or,

c) The property involved in the offense is of a type or quantity that would not normally be purchased for personal use or consumption and the property is intended for resale. (Pen. Code, § 490.4, subd. (c).)

11) States that, in a prosecution under this section, the prosecutor shall not be required to charge any other coparticipant of the organized retail theft. (Pen. Code, § 490.4, subd. (d).)

12) Provides that, upon conviction of an offense under this section, the court shall consider ordering, as a condition of probation, that the defendant stay away from retail establishments with a reasonable nexus to the crime committed. (Pen. Code, § 490.4, subd. (e).)

FISCAL EFFECT: Unknown

COMMENTS:**Author's Statement**: According to the author, "While California has devoted significant resources to combat theft, a shift towards focusing on upstream criminals—those purchasing stolen goods for resale—holds the potential to decrease property crimes, enhance the retail business environment, and improve residents' quality of life. The creation of the Identifying, Apprehending, and Prosecuting Resale of Stolen Property Grant Program by this bill aims to allocate funds to local prosecutors and law enforcement agencies. The goal is to enhance efforts in investigating and prosecuting criminal networks that drive the market for theft, focusing on receiving stolen goods crimes and criminal profiteering."

2) **Organized Retail Theft:** For the last few years, organized retail theft has been reported on by the media with images of smash and grabs and people walking out with grocery carts full of hundreds of dollars worth of goods.

   A report by the Public Policy Institute of California (PPIC), (see <Retail Theft and Robbery Rates Have Risen across California - Public Policy Institute of California (ppic.org)> [as of April 3, 2024]) took a look at the problem or retail theft and robbery across the state by examining changes and differences across 15 large counties. The report states in part, "the 2022 data shows that while California's shoplifting rate jumped notably in 2022, it remains lower than it was at any point in the decade before the pandemic. The commercial burglary rate, however, reached its highest level since 2008, and the commercial robbery rate rose to roughly where it was in 2017. The challenges of retail theft and robbery appear to be widespread, but they vary across the state.

   "Organized retail theft is frequently cited as a driver of recent trends across the country, but particularly in California. Like many other states, California has launched efforts to curb organized retail theft. AB 331 (2021) toughens penalties and includes funding for a California Highway Patrol task force to identify trouble spots and assist local law enforcement. In June 2023, Attorney General Bonta, announced an information-sharing partnership with a number of large retailers.

   "The impact of these efforts will depend partly on the extent to which organized retail theft is actually driving recent trends. It will be important to continue monitoring retail theft and robbery rates and examining other possible contributing factors."

3) **Efforts to Combat Retail Theft:** On December 19, 2023, Governor Newsom announced, as part of Governor Newsom's Real Public Safety Plan, "in the first 11 months of the year alone, the California Highway Patrol (CHP) — through its Organized Retail Crime Task Force (ORCTF) — increased proactive organized retail crime operations by over 310%, made more than 1,000 arrests (a 109% year-over-year increase) and recovered 187,515 items stolen from retailers (38,600 more items than last year). (<Combating Organized Retail Crime: California Highway Patrol Increases Operations by Over 310% | California Governor> [as of Apr. 3, 2024].)

   The Governor's Public Safety Plan was originally unveiled on December 17, 2021, and included in three major goals, which included bolstering local law enforcement response to stop and apprehend criminals and more prosecutors to hold perpetrators accountable.

The Public Safety Plan breaks down these goals as follows:

"Bolstering Local Law Enforcement Response to Stop and Apprehend Criminals by:

- **Increased Local Law Enforcement to Combat Retail Theft**: The Real Public Safety Plan includes $255 million in grants for local law enforcement over the next three years to increase presence at retail locations and combat organized, retail crime so Californians and small businesses across the state can feel safe.

- **Smash and Grab Enforcement Unit:** Governor Newsom's Plan includes a permanent Smash and Grab Enforcement Unit. Operated by the California Highway Patrol, the unit will consist of enforcement fleets that will work with local law enforcement to crack down on organized retail, auto and rail theft in the Bay Area, Sacramento, San Joaquin Valley, Los Angeles and San Diego regions.

- **Keeping Our Roads Safe:** With the Real Public Safety Plan, CHP will now be able to strategically deploy more patrols based on real-time data to help keep our roads safe. Governor Newsom will also work with the Legislature to upgrade highway camera technology to gather information to help solve crimes.

- **Support for Small Businesses Victimized by Retail Theft**: Governor Newsom's Plan will create a new grant program to help small businesses that have been the victims of smash-and-grabs to get back on their feet quickly.

"More Prosecutors to Hold Perpetrators Accountable by:

- **Dedicated Retail Theft Prosecutors**: The plan will ensure District Attorneys are effectively and efficiently prosecuting retail, auto and rail theft-related crime by providing an additional $30 million in grants for local prosecutors over three years.

- **Fighting Crime Statewide**: The Real Public Safety Plan will allow the Attorney General to continue leading anti-crime task forces around the state, including High Impact Investigation Teams, LA interagency efforts and task forces to combat human trafficking and gangs.

- **Statewide Organized Theft Team**: Governor Newsom's plan includes $18 million over three years for the creation of a dedicated state team of special investigators and prosecutors in the Attorney General's office to go after perpetrators of organized theft crime rings that cross jurisdictional lines." (<Governor Newsom Unveils Public Safety Plan to Aggressively Fight and Prevent Crime in California | California Governor> [as of April 3, 2024].)

Generally, retail theft crimes fall under petty theft (thefts under $950) or grand theft (thefts over $950). Currently, law enforcement officers have the power and authority to arrest for either petty or grand theft. This bill would allocate and distribute additional grants to law enforcement to combat retail theft.

4) **Vertical Prosecution:** Prosecutors generally prosecute offenses in two ways, horizontally or vertically. (Lori Mullins. *Prosecuting Cases Vertically: A More Victim-focused Approach.* (May 2015) <https://ggulawreview.com/wp-content/uploads/2015/04/mullins_digital_symposium.pdf> [as of Feb. 14, 2024] at p. 2.) Horizontal prosecution generally refers to a method in which a different prosecutor is in charge of a case depending on what stage of the legal process it is in. (*Ibid.*) For example, one prosecutor may charge a case, another may handle the case at arraignment, then pass it on to another prosecutor for a preliminary hearing, who may then pass it on to another prosecutor for the trial. (*Ibid.*) Vertical prosecution generally refers to a method where there is a designated prosecutor who handles a case from charging all the way through to sentencing or dismisal. (*Ibid.*)

Many large jurisdictions combine horizontal and vertical prosecution. (Cassia Spohn. "Specialized Units and Vertical Prosecution Approaches." *The Oxford Handbook of Prosecutors and Prosecution.* (May 26, 2021) <https://books.google.com/books?hl=en&lr=&id=uzoqEAAAQBAJ&oi=fnd&pg=PA259&dq=vertical+prosecution+&ots=PDMTnhbBqE&sig=TTjXqo96scfci3IlXdz6YKi6N80#v=onepage&q=vertical%20prosecution&f=false> [as of Feb. 14, 2024] at p. 259.) They usually will prosecute routine misdemeanor and felony cases horizontally, and will select more severe or complex cases such as homicides, sex offenses, high-level drug trafficking offenses, or gang offenses, for vertical prosecution by specialized units. (*Ibid.*)

Advocates of vertical prosecution contend that cases involving sexual assault or gang violence have reluctant or fearful victims and face potentially complex and difficult evidentiary issues. (*Id.* at 260.) Furthermore, advocates contend that as a result of continuous contact with a case, the prosecutor will be more informed of the evidentiary issues, will have greater time to develop a comprehensive legal strategy, and will be able to develop familiarity with victims and witnesses leading to securing testimony needed for a conviction. (*Ibid.*) For example, a prosecutor in a specialized vertical unit may develop the enhanced skill needed to confront the fact that a sexual assault victim may not have reported the crime immediately or may have engaged in supposed "risky behavior" before an incident; the fact that a domestic violence victim may not show up to a court appearance, or, if they do, minimize the defendant's behavior; and the fact that a victim or witness of gang violence may fear retaliation for testifying. (*Ibid.*) That said, these assumptions that drive the use of vertical prosecution and specialized units are largely untested as there is no research comparing the efficacy of vertical and horizontal prosecution and limited research examining specialized units. (*Id.* at 267.)

According to the BSCC, there is currently a vertical prosecution grant program for organized retail theft. The BSCC states:

> The Organized Retail Theft (ORT) Vertical Prosecution Grant Program was established in Assembly Bill 178 and was awarded to district attorneys to address increased levels of

retail theft property crimes by using a vertical prosecution model. Vertical prosecution means a prosecutor is assigned to an organized retail theft case from beginning to end (e.g., initial hearing/arrangement to sentencing). Under this model, the victim(s), witness(es), and impacted law enforcement official(s) have a single point of contact throughout the process.

The ORT Prevention Grant (established in the Budget Act of 2022, Senate Bill 154) was designated as a competitive grant for city police departments, county sheriffs' departments, and probation departments to support local law enforcement agencies in preventing and responding to organized retail theft, motor vehicle or motor vehicle accessory theft, or cargo theft.

Initiated by the Governor and strongly supported by the Legislature in 2022, ORT grants are crucial components of the state's commitment to enhancing public safety and addressing the escalating issue of organized retail theft. (<https://www.bscc.ca.gov/organized-retail-theft-vertical-prosecution-grant-program/> [as of Apr. 4, 2024])

The law currently allows petty theft to be prosecuted as a misdemeanor and grand thefts to be prosecuted as felonies as well. This bill seeks to provide district attorneys with additional grants to prosecute organized retail theft crimes using vertical prosecution methods.

5) **Argument in Support**: "According to the *California State Sheriff's Association*, "Organized retail thieves purposefully and strategically steal property so that it can be resold later for economic gain. The uptick in organized retail theft over the past few years has made more common the reselling of stolen goods, and thus requires acute law enforcement response to a very savvy network of criminal enterprises.

"This proposal will enhance current efforts and partnerships in investigating and prosecuting criminal networks by ensuring that law enforcement has the resources to hold accountable those who engage in systematic property theft."

6) **Argument in Opposition**: According to *The San Francisco Public Defender's Office,* "California is facing an extreme budget shortfall. California should not funnel more funding into law enforcement because such agencies receive significant funding at the city, county, and state level. Rather, law enforcement and District Attorneys should use their existing resources.

"I. District Attorney offices and law enforcement agencies already receive significant funding from cities, counties, and the state.

"California's 482 cities and 58 counties spent more than $20 billion from all revenue sources on city police and county sheriff's departments. Cities spend nearly three times more on police than on housing and community development. Counties spend more of their general revenue on sheriff's departments than on social services by a substantial margin. Altogether, The state of California and its cities and counties spend roughly $50 billion annually on local law enforcement, the criminal legal system, and incarceration in state prisons and county jails. In comparison, this spending is about three times what California spends from its General Fund on higher education (community colleges, CSU, and UC) and

is roughly equivalent to state General Fund support for K-12 education.

"In 2023, Governor Newsom has already created an unprecedented ("the largest investment ever to combat organized retail crime") $267 million retail theft slush fund for state grants to local law enforcement to fight 'organized retail crime.'

"II. District Attorney Offices Receive Significantly More Funding Than Public Defender Offices

"The Sixth Amendment to the United States Constitution—ratified in 1791—grants defendants in federal courts the right to counsel. In 1963, the Supreme Court extended this right to state courts. Today, approximately 9 in 10 criminal defendants in the US cannot afford to hire a lawyer. California is one of a minority of states that makes the counties responsible for providing indigent defense—and the counties spend more on prosecutors than on public defenders. The Legislative Analyst's Office found that public defender offices receive 82% less funding than district attorneys. This leaves them outmatched in overall budget, spending per arrest, and attorney-to-staff ratios. In Alameda County, The Public Defender's Office budget is approximately $54.1 million per year, while the District Attorney's Office gets $96 million per year.

In early 2024, Governor Newsom and Attorney General Bonta announced deployment of state attorneys to boost criminal prosecutions in Oakland and the East Bay.

"III. Despite record high investments in law enforcement, law enforcement agencies' effectiveness have sharply declined.

"State spending on law enforcement has risen sharply, even after adjustments for inflation and population growth. However, despite record spending on California law enforcement agencies in recent years, one of the core measures of law enforcement effectiveness— crime clearance rates — has fallen to historically low levels. Over the past three decades, these clearance rates fell by 41%, from a 22.3% clearance rate in 1990 to 13.2% in 2022, which equates to fewer than one in seven crimes solved." (citations omitted)

7) **Related Legislation**:

a) AB 1772 (Ramos) would require the DOJ to submit a report to the Legislature regarding the number of retail theft convictions during the COVID-19 State of Emergency, as specified. AB 1772 is pending in this Committee.

b) AB 1779 (Irwin) would allow, a prosecutor to bring a case in any county where theft offenses occurred for offenses that occur in multiple jurisdictions, as specified. AB 1779 is pending in this Committee.

c) AB 1787 (Villapudua) would among other things, repeal the sunset provision in the organized retail theft statute, thereby extending the crime indefinitely. AB 1787 is pending in this Committee.

d) AB 1794 (McCarty) states the intent of the Legislature to enact legislation relating to theft. AB 1794 is pending in this Committee.

e) AB 1802 (Jones-Sawyer), would eliminate the sunset date for the organized retail theft code. AB 1802 is pending hearing in this committee.

f) AB 1972 (Alanis) would include the railroad police and cargo theft in CHP's regional property crimes task force. AB 1972 is pending in this Committee.

g) AB 1960 (Soria) would reenact sentence enhancement for theft offenses when the loss exceeds specified dollar amounts. AB 1960 is pending in this Committee.

h) AB 1990 (W. Carrillo) would authorize peace officers to make a warrantless arrest for misdemeanor shoplifting, as specified. AB 1990 is pending in this Committee.

i) AB 2406 (Davies) would make it a felony, punishable by imprisonment in state prison, to use two or more minors to engage in theft related offenses. AB 2406 is pending in this Committee.

j) AB 2438 (Petrie-Norris) would make any person who acts in concert with two or more persons to take, attempt to take, damage, or destroy any property in the commission or attempted commission of a felony punishable by an additional and consecutive term of imprisonment of one, two or three years. AB 2438 is pending in this Committee.

k) AB 2790 (Pacheco) would define organized retail theft to include acting in concert with one or more persons to steal specified types of merchandise, including infant formula, baby food, over-the-counter medications, and blood glucose testing strips, with the intent to sell those items. AB 2790 is pending in this Committee.

l) AB 2943 (Zbur) would, among other things, extend the organized retail theft statute until January 2031, and make it a crime for any person to possess property unlawfully that was acquired through one or more acts of shoplifting, theft, or burglary from a retail business, if the property is not possessed for personal use and the person has intent to sell, exchange, or return the merchandise for value, or the intent to act in concert with one or more persons to sell, exchange, or return the merchandise for value, and the value of the possessed property exceeds $950. AB 2943 is pending in this committee.

m) SB 923 (Archuleta) would revise the definition of shoplifting to require an intent to steal retail property or merchandise and would require a person convicted of petty theft or shoplifting, if the person has two or more prior convictions for specified theft-related offenses, to be punished by imprisonment in the county jail for up to one year, or for 16 months, or two or three years. SB 923 is pending in Senate Public Safety Committee.

n) SB 928 (Niello) would remove the sunset date for organized retail theft. SB 928 is pending in Senate Public Safety Committee.

o) SB 982 (Wahab) would remove the sunset date for organized retail theft. SB 982 is pending in Senate Appropriations Committee.

p) SB 1416 (Newman) would create sentencing enhancements for selling, exchanging, or returning for value, or attempting to sell, exchange, or return for value, any property acquired through one or more acts of shoplifting, theft, or burglary from a retail business, if the property value exceeds specified amounts and would make these enhancements apply to any person acting in concert with another person to commit these offenses. SB 1416 is pending in Senate Public Safety Committee.

8) **Prior Legislation**:

a) AB 23 (Muratsuchi), of the 2023-2024 Legislative Session, would have decreased the threshold amount for grand theft from $950 to $400. The hearing on AB 23 was canceled the request of the author.

b) AB 75 (Hoover), of the 2023-2024 Legislative Session, would have reinstated the offense of petty theft with a prior as it existed before it was eliminated by Prop. 47 and makes it applicable to the offense of shoplifting created by Prop.47, subject to approval by the voters. AB 75 failed passage in this committee.

c) AB 329 (Ta), of the 2023-2024 Legislative Session, would have expanded the territorial jurisdiction in which the Attorney General can prosecute specified theft offenses and associated offenses connected together in their commission to include cargo theft. AB 329 failed passage in this Committee.

d) AB 335 (Alanis), of the 2023-2024 Legislative Session, would have required the Little Hoover Commission to submit a report to the Legislature describing the reported retail thefts, as specified. AB 335 was held under submission in Assembly Appropriations Committee.

e) AB 2294 (Jones-Sawyer), Chapter 856, Statutes of 2022, authorized the misdemeanor arrest of a person that has a prior arrest, citation or conviction for theft, as specified, and authorized a city or county prosecuting authority or county probation department to create a diversion or deferred entry of judgment program for persons who commit a theft offense or repeat theft offenses.

f) AB 2356 (Rodriguez), Chapter 22, Statues of 2022, expanded the definition of "grand theft" where the aggregate amount taken by all participants exceeds $950.

g) SB 101 (Senate Committee on Budget), Chapter 12, Statutes of 2023, allocated 85,000,000 million dollars for a grant program to combat organized retail theft that law enforcement agencies could apply and compete for; and 10,000,000 million dollars for a grant program for organized retail theft vertical prosecution that district attorneys could apply and compete for; and for both grant programs to be administered by BSCCC. This budget bill also included other programs and budget allocations relating to Budget Act of 2023.

h) SB 316 (Niello), of the 2023-2024 Legislative Session, would have reinstated the offense of "petty theft with a prior" as it existed prior to the passage Proposition 47 and includes shoplifting in the list of eligible prior crimes.

i) AB 331 (Jones-Sawyer), Chapter 113, Statutes of 2021, extended the sunset date for organized retail theft through January 1, 2026.

j) AB 1597 (Waldron), of the 2021-2022 Legislative Session, would have amended Proposition 47 by reinstating the offense of petty theft with a prior. AB 1597 failed passage in this Committee.

k) AB 1599 (Kiley), of the 2021-2022 Legislative Session, would have repealed the changes made by Proposition 47, except those related to reducing the penalty for possession of concentrated cannabis, subject to approval of the voters. AB 1599 failed passage in this Committee.

l) AB 1603 (Salas), of the 2021-2022 Legislative Session, would have amended Proposition 47 by reducing the threshold amount for petty theft and shoplifting to be punished as a misdemeanor from $950 to $400. AB 1603 failed passage in this Committee.

m) AB 2390 (Muratsuchi), of the 2021-2022 Legislative Session, would have amended Proposition 47 by authorizing the aggregation of the value of property from one or more acts of theft or shoplifting, as specified. AB 2390 failed passage in this Committee.

n) SB 1108 (Bates), of the 2021-2022 Legislative Session, would have amended Proposition 47 by reinstating the offense of petty theft with a prior. SB 1108 failed passage in Senate Public Safety Committee.

o) AB 3234 (Ting), Chapter 334, Statutes of 2020, created a court-initiated misdemeanor diversion program.

p) AB 1810 (Budget Committee), Chapter 34, Statutes of 2018, allows trial courts to divert mentally ill defendants into pre-existing treatment programs, where the proposed program is consistent with the needs of the defendant and the safety of the community.

q) AB 1065 (Jones-Sawyer), Chapter 803, Statutes of 2018, created the crime of organized retail theft and expanded jurisdiction to prosecute cases of theft or receipt of stolen merchandise.

r) AB 2369 (Patterson), of the 2015-2016 Legislative Session, would have amended Proposition 47 by making persons convicted of crimes reduced to misdemeanors eligible for felony prosecution and sentencing if convicted of specified offenses two times within a three-year period. AB 2369 failed passage in this Committee.

s) SB 1227 (Hancock), Chapter 658, Statutes of 2013, created a diversion program for veterans who commit misdemeanors or county jail-eligible felonies and who are suffering from service-related trauma or substance abuse.

t) AB 994 (Lowenthal), of the 2013-2014 Legislative Session, would have required each county to establish and maintain a pretrial diversion program, to be administered by the district attorney of that county, and authorizes either the district attorney or the superior court to offer diversion to a defendant. AB 994 was vetoed.

u) AB 1844 (Fletcher), Chapter 219, Statutes of 2010, amended petty theft with a prior to require three prior theft-related convictions.

REGISTERED SUPPORT / OPPOSITION:Support

California District Attorneys Association
California State Sheriffs' Association
Elected Officials to Protect America - Code Blue
League of California Cities
Peace Officers Research Association of California (PORAC)

Oppose

San Francisco Public Defender

Analysis Prepared by: Elizabeth Potter / PUB. S. / (916) 319-3744

Date of Hearing: April 9, 2024
Counsel: Kimberly Horiuchi

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 1872 (Sanchez) – As Introduced January 22, 2024

SUMMARY: Expands the definition of "fear" in the extortion statute to include any threat to post, distribute, or create AI-generated images or videos of another.

EXISTING LAW:

1) States fear, such as will constitute extortion, may be induced by a threat of any of the following:

   a) To do an unlawful injury to the person or property of the individual threatened or of a third person.

   b) To accuse the individual threatened, or a relative of his or her, or a member of his or her family, of a crime.

   c) To expose, or to impute to him, her, or them a deformity, disgrace, or crime.

   d) To expose a secret affecting him, her, or them.

   e) To report his, her, or their immigration status or suspected immigration status. (Pen. Code, § 519, subd. (1-5).)

2) Provides that every person who extorts property or other consideration from another, under circumstances not amounting to robbery or carjacking, by means of force or threat, as specified, shall be punished by imprisonment in county jail for a term of two, three, or four years. (Pen. Code, § 520.)

3) Defines extortion as the obtaining of property or other consideration from another, with their consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right. (Pen. Code, § 518, subd. (a).)

4) Defines consideration as anything of value, including sexual exploitation of a child, or an image of an intimate body part, as specified. (Pen. Code, § 518, subd. (b).)

5) States it is not extortion if a person under 18 years of age obtains consideration for an image of sexual conduct or an image of an intimate body part. (Pen. Code, § 518, subd. (c).)

6) Provides that every person who commits any extortion under color of official right, in cases for which a different punishment is not prescribed in the Penal Code, is guilty of a misdemeanor. (Pen. Code § 521.)

7) States that except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars ($1,000), or by both. (Pen. Code, § 19.)

8) States that every person who attempts, by means of any threat, such as is specified in existing provisions of law relating to threats sufficient to constitute extortion, to extort money or other property from another is punishable by imprisonment in the county jail not longer than one year or in the state prison or by fine not exceeding ten thousand dollars ($10,000), or by both such fine and imprisonment. (Pen. Code, § 524.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement:** According to the author: "The development of artificial intelligence is moving at a record pace and so are the dangers it poses to our most vulnerable populations. To help equip our prosecutors with the tools they need to crack down on criminals targeting these people, I introduced AB 1872, which will clarify that extortion by means of threat to post, distribute, or create AI-generated images or videos is considered a criminal act."

   "Currently, California law defines extortion as the obtaining of property from another, even with consent, through the wrongful use of force, fear, or certain threats. Of particular concern for vulnerable populations, especially minors, are "sextortion" cases involving AI-generated images. "Sextortion" involves coercing victims into providing sexually explicit photos or videos of themselves, then threatening to share them publicly or with the victim's family and friends. The key motivators for this are typically a desire for more illicit content, financial gain, or to bully and harass others. For example malicious actors have used manipulated photos or videos with the purpose of extorting victims for ransom or to gain compliance for sending actual nude photos.

   "As of January 2024, the FBI has publicly identified the uptick in sextortion cases as a "growing threat targeting minors." Based on recent victim reporting, the malicious actors typically demanded:

   1. Payment through with threats to share the images or videos with family members or social media friends if funds were not received.
   2. The victim send real sexually-themed images or videos.

   "These crimes can result in victims harming themselves or even committing suicide. From October 2021 to March 2023, the FBI and Homeland Security Investigations received over 13,000 reports of online financial sextortion of minors. The sextortion involved at least 12,600 victims—primarily boys—and led to at least 20 suicides.

"In 2023, the FBI issued an alert to warn the public of the growing use of AI by malicious actors to create manipulative images and videos for the purpose of ensnaring victims in sextortion schemes. While California law does prohibit sextortion generally, it does not specifically prohibit extortion with AI-generated material. This loophole makes it harder for prosecutors and law enforcement to successfully convict criminals and address this growing issue."

2) **AI Defined:** AI is the simulation of human intelligence processes by machines, especially computer systems. Specific applications of AI include expert systems, natural language processing, speech recognition, and machine vision. According to TechTarget, an aggregate site for AI in enterprise:

> "As the hype around AI has accelerated, vendors have been scrambling to promote how their products and services use it. Often, what they refer to as AI is simply a component of the technology, such as machine learning. AI requires a foundation of specialized hardware and software for writing and training machine learning algorithms. No single programming language is synonymous with AI, but Python, R, Java, C++ and Julia have features popular with AI developers. In general, AI systems work by ingesting large amounts of labeled training data, analyzing the data for correlations and patterns, and using these patterns to make predictions about future states. In this way, a chatbot that is fed examples of text can learn to generate lifelike exchanges with people, or an image recognition tool can learn to identify and describe objects in images by reviewing millions of examples. New, rapidly improving generative AI techniques can create realistic text, images, music and other media."
>
> Learning: This aspect of AI programming focuses on acquiring data and creating rules for how to turn it into actionable information. The rules, which are called algorithms, provide computing devices with step-by-step instructions for how to complete a specific task.
>
> Reasoning. This aspect of AI programming focuses on choosing the right algorithm to reach a desired outcome.
>
> Self-correction. This aspect of AI programming is designed to continually fine-tune algorithms and ensure they provide the most accurate results possible.
>
> Creativity. This aspect of AI uses neural networks, rules-based systems, statistical methods and other AI techniques to generate new images, new text, new music and new ideas.
>
> AI, machine learning and deep learning are common terms in enterprise IT and sometimes used interchangeably, especially by companies in their marketing materials. But there are distinctions.

> The term AI, coined in the 1950s, refers to the simulation of human intelligence by machines. It covers an ever-changing set of capabilities as new technologies are developed. Technologies that come under the umbrella of AI include machine learning and deep learning. Machine learning enables software applications to become more accurate at predicting outcomes without being explicitly programmed to do so. Machine learning algorithms use historical data as input to predict new output values. This approach became vastly more effective with the rise of large data sets to train on. Deep learning, a subset of machine learning, is based on our understanding of how the brain is structured. Deep learning's use of artificial neural network structure is the underpinning of recent advances in AI, including self-driving cars and ChatGPT." (TechTarget, "A Guide to Artificial Intelligence in the Enterprise.")[1]

3) **Extortion:** The crime of extortion requires a showing that a person obtained something of value from another with consent but induced by a wrongful use of force or fear. (Pen. Code, § 518; CACI No. 1830 [use of fear or force requires proving a defendant threatened to unlawfully injure or use force against another person or a third person or the property of another.) Fear, as defined by the crime of extortion, means to induce by a threat of exposing the person to "a deformity, disgrace, or crime" or by threat of exposing a secret affecting another. (*People v. Goodman* (1958) 159 Cal.App.2d 54, 61 [force or fear must be the controlling cause.].)

   Threatening to expose a secret or in any way threatening to harm a person's reputation in order to receive something of value from the other person is extortion. For instance, threats to expose photos or images of another engaged in sexually explicit conduct in exchange for something of value is also extortion. The secret must affect the threatened person in some way so unfavorable to their reputation or other interest that they would probably pay out money or property to avoid threatened exposure. (*People v. Peniston* (1966) 242 Cal.App.2d 719, 722.) In the *Peniston* case, the defendant possessed partially nude studio photographs of the complaining witness, and told her that unless she gave him money he would take them to her family. The court upheld an extortion conviction. (*Id.* at pp. 722-723.)

   Recently, in *People v. Bollaert* (2016) 248 Cal.App.4th 699, 725-726, the Court of Appeal upheld an extortion conviction based on the defendant's conduct of obtaining and displaying nude photographs and private information on a website, while taking payments from victims on another website to remove the contents. The court reasoned that the defendant committed extortion based on threatening to expose a secret because the photographs were secret to anyone who had not viewed defendant's website. (*Id.*)

---

[1]Located at https://www.techtarget.com/searchenterpriseai/definition/AI-Artificial-Intelligence [last visited April 4, 2024.]

The U.S. Attorney's Office for the Central District of California defines "sextortion" as "a type of extortion or blackmail of a victim who is usually asked for a nude image. The perpetrator typically threatens to publicly release a nude image unless a victim performs a sexual act or complies with other demands."

For example, in *U.S. v Abrahams* (C.D. Cal 2014) No. SA 13-422M, the defendant took control of victims' email accounts, social media accounts, and their computers – which allowed him to remotely turn on web cameras and take pictures of them naked. The defendant used the nude photos to threaten the women to publicly post the compromising photos to the victims' social media accounts – unless they either sent more nude photos or videos, or engaged in a Skype session with him and complied with his demands. Based on this conduct, the defendant was convicted of one count of computer hacking and three counts of extortion and was sentenced to five years in federal prison. (See Press Release, "*Glendale man who admitted hacking into hundreds of computers in 'sextortion' case sentenced to five years in federal prison,"* U.S. District Attorney's Office for the Central District (December 9, 2013).)[2]

This bill expands the definition of "fear" in the extortion statute to specify AI generated content may also be sufficient to induce fear such that the elements of extortion may be proven. Given that the existing definition of "fear" in Penal Code section 519 is very broad, it already criminalizes threats of exposure or the imputation of reputational harm in exchange for something of value. That likely includes AI-generated content.

4) **Arguments in Support:** According to the *Orange County Sheriff's Department*: "In January 2024, the Federal Bureau of Investigation (FBI) issued a warning on the growing threat of sextortion. The FBI reports that in the six month period from October 2022 to March 2023, there was a 20% increase in reporting of financially motivated sextortion incidents involving minor victims compared to the same period the previous year. It is not surprising that this uptick includes sextortion using fake images or videos.

"The availability of AI tools and AI-generated images to create this type of material has been well documented in recent studies. The Stanford Internet Observatory found more than 3,200 images of suspected child sexual abuse in the giant AI database LAION. Users on a single dark-web forum shared nearly 3,000 AI-generated images of child sexual abuse in just one month, according to a recent report from the UK-based Internet Watch Foundation. A recent example of this phenomena occurred in February 2024. Students at a Beverly Hills middle school used AI to generate nude images of classmates and shared them with others. This demonstrates both the ease and likelihood that images can be created for purposes of extortion. AB 1872 is a necessary response to the increased prevalence of sextortion combined with access to AI technology. As technology develops and programs to make AI-generated images become more accessible, it is important that the law recognize the impact a

---

[2] Located at (https://www.justice.gov/usao-cdca/pr/glendale-man-who-admitted-hacking-hundreds-computers-sextortion-case-sentenced-five) [last visited April 4, 2024.]

fake explicit image can have on victims and ensure violators face a consequences."

5) **Argument in Opposition:** According to the *California Public Defenders Association:* "AB 1872 proposes to amend Penal Code section 519 to include in the definition of fear the threat "to post, distribute, or create AI-generated images or videos of another." The development revolutionary technology always comes specter of its abuse in unforeseeable ways. Such is the case with artificial intelligence, and its ability to develop realistic images and videos to falsely depict individuals in embarrassing, compromising or degrading ways. CPDA understands the concern over the abuse of AI to harass and intimidate individuals. However, AB1827 is a misguided effort to address this problem. The current iteration of Penal Code 519 includes clearly defined conduct that would be threatening or harassing on its face. Conversely, AB1827 would amend the statue to include vaguely defined conduct, including the mere creation of an AI image. The failure to narrowly tailor the amendment to clearly harassing or threatening behavior could result in the application of the statute to innocent or unintentional conduct.

   "Additionally, AI is novel technology not fully understood by the average member of the public. Accordingly, the failure to specifically define the term "AI- generated images or videos of another" renders the amendment vague on its face. Prosecutors, juries, and judges would struggle to charge, interpret, and apply the statue in consistent ways. As the amendment fails to properly define and give notice the prohibited conduct, it undermines fundamental principles of due process. Lastly, the ostensible goals of AB1872, to prohibit the use degrading or embarrassing AI generated imagery for purposes of extortion, is arguably already covered under the current definition of extortion in Penal Code section 518. AB 1872 is a vaguely drafted amendment that undermines the due process rights of the accused. It is also unnecessary in that the conduct it seeks to prohibit is already addressed by current criminal statutes."

6) **Prior Legislation:** SB 500 (Leyva), Chapter 518, Statutes of 2019 expands the crime of extortion to include not only the obtaining of property, but also the obtaining of other consideration, including sexual conduct or images of intimate body parts.

REGISTERED SUPPORT / OPPOSITION:

Support

Orange County Sheriff's Department (Sponsor)
Calchamber
California Association of Highway Patrolmen
California District Attorneys Association
California State Sheriffs' Association
Peace Officers Research Association of California (PORAC)
Technet

Opposition

California Public Defenders Association

Analysis Prepared by: Kimberly Horiuchi / PUB. S. / (916) 319-3744

Date of Hearing: April 9, 2024
Counsel: Kimberly Horiuchi

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 1873 (Sanchez) – As Introduced January 22, 2024

PULLED BY THE AUTHOR.

Analysis Prepared by: Kimberly Horiuchi / PUB. S. / (916) 319-3744

Date of Hearing: April 9, 2024
Chief Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 1960 (Soria) – As Introduced January 29, 2024

SUMMARY: Re-enacts a sentence enhancement for felony offenses for a person who intentionally takes, damages, or destroys property, when the loss exceeds specified dollar amounts, but lowers the amounts to below 2017 levels when the enhancement sunset. Specifically, **this bill**:

1) Provides that if a person takes, damages or destroys any property in the commission or attempted commission of a felony, or if a person commits receiving stolen property charged as a felony, the court shall impose an additional term of imprisonment as follows:

   a) If the loss or property value exceeds $50,000, the court shall impose an additional term of one year.

   b) If the loss or property value exceeds $200,000, the court shall impose an additional term of two years.

   c) If the loss or property value exceeds $1,000,000, the court shall impose an additional term of three years.

   d) If the loss or property value exceeds $3,000,000, the court shall impose an additional term of four years.

   e) For each additional loss or property value of $3,000,000, the court shall impose a term of one year in addition to the term of four years imposed for the loss of the first $3,000,000.

2) Allows imposition of this enhancement if the aggregate losses to the victims, or the aggregate property values from all felonies exceed the specified triggering amounts.

3) Prohibits imposition of the enhancement unless the facts are charged in the accusatory pleading and admitted by the defendant or found to be true by the trier of fact.

4) States that, notwithstanding any other law, the court may impose this enhancement and an enhancement pursuant to another Penal Code section on a single count.

EXISTING LAW:

1) Defines grand theft as any theft where the money, labor, or real or personal property taken is of a value exceeding $950. (Pen. Code, § 487, subd. (a).)

2) Defines embezzlement as the fraudulent appropriation of property by a person to whom it has been intrusted. (Pen. Code, § 503.)

3) States that every person guilty of embezzlement is punishable in the manner prescribed for theft of property of the value or kind embezzled. (Pen. Code, § 514.)

4) Specifies that if the embezzlement is of the public funds of the United States, or of this state, the offense is a felony punishable in the state prison, and the person convicted is prohibited from holding any office of honor, trust, or profit in this state. (Pen. Code, § 514.)

5) Provides for a "white collar crime" enhancement which specifies that any person who commits two or more related felonies which involve a pattern of related felony conduct, and the pattern of related felony conduct involves fraud or embezzlement, shall receive an additional term of imprisonment in the state prison as specified, depending on the value of the property taken or the loss resulting from that conduct. (Pen. Code, § 186.11.)

PRIOR LAW: Provided that when any person takes, damages or destroys any property in the commission or attempted commission of a felony, with the intent to cause that taking, damage, or destruction, the court shall impose an additional term as follows:

1) If the loss exceeds $65,000, the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of one year;

2) If the loss exceeds $200,000, the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of two years;

3) If the loss exceeds $1.3 million, the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of three years; and,

4) If the loss exceeds $3.2 million, the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of four years. (Former Pen. Code, § 12022.6 [Repealed as of January 1, 2018].)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "AB 1960 provides prosecutors the tools to hold criminals accountable by imposing a stronger sentence for retail theft. The bill reinstates a tiered penalties enhancement system, if the value of the stolen or damaged property is exceptionally high. Specifically, it would provide a sentence enhancement up to five years when the property loss is more than $50,000. Our communities are hurting. Crime, especially retail theft, is not only a problem in my district. This is an issue plaguing the entire state. We must address it with urgency and action. This bill will do that and our

communities will be safer as a result."

2) **Great Takings Enhancement**: Until January 1, 2018, state law required the court to impose an additional term of imprisonment, as specified, when any person takes, damages, or destroys any property in the commission or attempted commission of a felony, as specified.

This enhancement, known as the "great takings" enhancement, in former Penal Code section 12022.6 became effective in 1977. It appears that a sunset provision became effective in 1990. The sunset clause was re-written through legislation in 1992. The sunset was then extended from 1998 to 2008 by AB 293 (Cunneen), Chapter 551, Statutes of 1997. The sunset provision stated that the purpose of the provision is to allow the Legislature to consider the effects of inflation on the enhancement thresholds in the law.

AB 1705 (Niello), Chapter 420, Statutes of 2007, raised the dollar limits and contained a sunset date of January 1, 2018. Again, accompanying the sunset date was a statement of legislative intent which indicated that the provisions would be reviewed within 10 years to consider the effects of inflation on the additional terms imposed. For that reason section 12022.6 remained in effect only until January 1, 2018. AB 1511 (Low) of the 2017-2018 legislative session would have raised the amounts to trigger the enhancement to reflect the 2017 levels of inflation, but would have removed the sunset date. AB 1511 was vetoed. Therefore, by virtue of the sunset date in the prior legislation, this sentence enhancement was repealed.

This bill would enact a statutory framework providing enhanced punishment when an individual is convicted of crimes which result in the loss of specified dollar amounts of property, similar to the previous great taking enhancement but with several significant differences.

First, not only does this bill NOT adjust the values to account for inflation, some of the proposed values are actually LOWER than the threshold amounts in statute when the law sunset as described below:

Length of Enhancement	2017 Value	Proposed Value
One year	$65,000	$50,000
Two years	$200,000	$200,000
Three years	$1,300,000	$1,000,000
Four years	$3,200,000	$3,000,000

Taking into account the levels of inflation today, the proposed values relate to lower amounts of purchasing power than in 2017.[1] For example, as shown in the table below, stealing $50,000 of goods today would be like stealing approximately $40,000 of goods in 2017, which is lower than the value that was intended:

[1] These figures were calculated using the Bureau of Labor Statistics inflation calculator: https://www.bls.gov/data/inflation_calculator.htm

Proposed Value	2017 Buying Power
$50,000	$40,000
$200,000	$159,000
$1,000,000	$794,000
$3,000,000	$2,383,000

In fact, if we were to follow the legislate intent, the legislature should adjust the nominal values up to match the same levels of real purchasing power in 2017 to account for inflation as follows:

Length of Enhancement	2017 Value	2024 Value
One year	$65,000	$82,000
Two years	$200,000	$250,000
Three years	$1,300,000	$1,600,000
Four years	$3,200,000	$4,000,000

In addition to lower threshold values, this bill has an additional provision allowing for enhanced punishment of one year over and above the maximum four year term in the former statute for every additional $3,000,000 in losses.

This bill also differs from the 2017 statutory framework in that it does not have an intent requirement. The former law provided for increased punishment when a person took damaged or destroyed property in the commission or attempted commission of a felony, "with the intent to cause that taking, damage or destruction." (See former Pen. Code, § 12022.6, subd. (a).) Because this bill lacks an intent requirement, it's application is significantly broader. So for example, while the former statute could have been applicable to damages caused by the commission of an arson, which requires intent, it could not have been applied to the offense of unlawfully causing, which only requires recklessness. (See Pen. Code, §§ 451.5 and 452.) In contrast, the sentence enhancement proposed by this bill a can be applied to any felony, regardless of mens rea.

Finally, this bill differs from the former statutory scheme in that it does not have a sunset date, thereby deleting the triggering mechanism for the Legislature to consider an adjustment to the value thresholds in statute based on inflation.

3) **Governor's Veto Message**: As noted above, in 2018, the Legislature passed AB 1511 (Low) which was similar to this bill; however, the measure was vetoed by former Governor Brown. In his veto message, the Governor said:

"This bill re-enacts and re-casts a previous enhancement for excessive takings which was allowed to sunset on January 1, 2018.

"Penal Code Section 12022.6 was enacted in 1977, and in 1990, AB 3087 added a sunset provision, repealing the statute as of July 1, 1992. That sunset date has been extended several times since then, first in 1992 (AB 939) extending the date to 1998, then in 1997 (AB 293) extending the date by 10 years, to 2008. In 2007, via AB 1705, the Legislature again extended the sunset 10 more years to 2018. The statute was not further extended at that time, and Penal Code Section 12022.6 was therefore repealed on January 1, 2018.

"AB 1511 now seeks to re-enact this repealed enhancement, but omits any sunset provision similar to those that have been included with this statute since 1990. I see no reason to now permanently re-enact a repealed sentencing enhancement without corresponding evidence that it was effective in deterring crime. As I have said before, California has over 5,000 criminal provisions covering almost every conceivable form of human misbehavior. We can effectively manage our criminal justice system without 5,001."

As noted above, this bill also does not contain a sunset provision, thereby permanently re-enacting the law without triggering legislative review to consider its effectiveness or the effects of inflation.

4) **Research on the Deterrent Effect and Impact on State Prisons:** According the U.S. Department of Justice, "Laws and policies designed to deter crime by focusing mainly on increasing the severity of punishment are ineffective partly because criminals know little about the sanctions for specific crimes. More severe punishments do not 'chasten' individuals convicted of crimes, and prisons may exacerbate recidivism." (National Institute of Justice, U.S. Department of Justice, Five Things About Deterrence (June 5, 2016) <https://nij.ojp.gov/topics/articles/five-things-about-deterrence>)

In a 2014 report, the Little Hoover Commission also addressed the disconnect between science and sentencing – that is, putting away offenders for increasingly longer periods of time, with no evidence that lengthy incarceration, for many, brings any additional public safety benefit. (Little Hoover Commission, *Sensible Sentencing for a Safer California* (2014) at p. 4 https://lhc.ca.gov/sites/lhc.ca.gov/files/Reports/219/Report219.pdf.) Additionally, the Commission also explained how California's sentencing structure and enhancements contributed to a 20-year state prison building boom: "California policymakers enacted hundreds of laws increasing sentence length, adding sentence enhancements and creating new sentencing laws. The end result was that every new prison the state built was quickly filled to capacity." (*Id.* at p. 9.)

CDCR has informed this committee that in the three years preceding the repeal of this enhancement, the following number of admissions had one or more great taking enhancements applied to their case:

Year[2]	Number of Unique Offenders	Number of Unique Cases Per Offender	Number of PC 12022.6(a)(2) Enhancements	Number of PC 12022.6(a)(3) Enhancements	Number of PC 12022.6(a)(4) Enhancements	Aggregate Number of Enhancements
2015	43	43	192	45	4	241
2016	49	49	159	38	4	201
2017	53	54	130	7	35	172

It should be noted, however, that some of these enhancements were stayed by the court and

---

[2] Year is based on the case's sentence pronounced date. For cases that were resentenced, the information is based on the original sentencing and excludes information post-resentencing.

therefore did not affect the actual term of incarceration.

5) **Argument in Support**: According to the *California District Attorneys Association*, "CDAA supports AB 1960, your bill to restore enhancements for felony excessive takings and destruction of property. Similar enhancements, on the books for decades in California, expired in 2018. It was the stated intent of the Legislature in 2018 (according to former Penal Code section 12022.6, subdivision (f)) to consider the effects of inflation on the additional terms imposed, but instead the Legislature let the law expire without doing so.

"We agree with your goal of directing that the punishment should fit the crime, a core principle of any enlightened system of criminal justice. Excessive takings and destruction of property should not be treated the same as those that are not. Under current law, a felony taking or destruction of property of over $3 million carries the same consequence as one involving $1,000. Your bill restores logic, deterrence, and accountability to this area of our criminal law."

6) **Argument in Opposition**: According to the California Public Defenders Association, "AB 1960 would do nothing to assist victims but would serve to increase the time that a person would be incarcerated for a property offense. The enhancement thresholds were established many years ago, and have not been updated to keep pace with inflation, so they are would be broader in their application today than was the intent of the law that was allowed to sunset in 2018.

"Sentencing enhancements are a major expensive policy failure. They do not or address violence in any demonstrable way. Enhancements are, however, one of the drivers of mass incarceration, a systematic means of economically and politically disenfranchising Black, Latinx and Indigenous families and communities. Mass incarceration is a human rights and economic disaster for all California families depriving communities of health care, substance abuse treatment, housing and education."

7) **Prior Legislation**:

a) AB 484 (Gabriel), of the 2023-2024 Legislative Session, would have re-enacted a sentence enhancement for specified property-related offenses for a person who intentionally takes, damages, or destroys property, when the loss exceeds specified dollar amounts, but would have authorized, rather than required, the court to impose the enhancement. AB 484 was held in the Assembly Appropriations Committee.

b) AB 1511 (Low), of the 2017-2018 Legislative Session, would have re-enacted the enhancement for taking or destroying property during commission of a felony and raised the dollar amounts, based on inflation, required to trigger the enhancement. AB 1511 was vetoed by the Governor.

c) AB 1705 (Niello), Chapter 420, Statutes of 2007, raised the dollar limits required to impose specified enhancements for taking, damaging, or destroying property and set a sunset date of January 1, 2018.

d) AB 293 (Cunneen), Chapter 551, Statutes of 1997, extended the sunset date of the excessive takings enhancement for 10 years, from 1998 to 2008.

REGISTERED SUPPORT / OPPOSITION:

Support

Association for Los Angeles Deputy Sheriffs
California District Attorneys Association
California Police Chiefs Association
California State Sheriffs' Association
League of California Cities
Merced District Attorney
Orange County District Attorney

Opposition

California Public Defenders Association
Californians United for A Responsible Budget
Communities United for Restorative Youth Justice
Ella Baker Center for Human Rights
Initiate Justice
Initiate Justice Action
San Francisco Public Defender
Uncommon Law
Vera Institute of Justice
Young Women's Freedom Center

Analysis Prepared by: Sandy Uribe / PUB. S. / (916) 319-3744

Date of Hearing: April 9, 2024
Counsel: Kimberly Horiuchi

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 1962 (Berman) – As Amended March 11, 2024

SUMMARY: Expands the crime of posting an intimate image of another identifiable person without their consent with the intent cause serious emotional distress (referred to as "revenge porn") to include the distribution of images recorded, captured, or otherwise obtained without the authorization of the person depicted or by exceeding authorized access from property, accounts, messages, files, or resources of the person depicted.

EXISTING LAW:

1) Provides that every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press. (Cal. Const., art. I, § 2.)

2) Makes it a misdemeanor to look through a hole or opening, into, or otherwise view, by means of any instrumentality, including, but not limited to, a camera, motion picture camera, camcorder, mobile phone, electronic device, or unmanned aircraft system, the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside. (Pen. Code, § 647, subd. (j)(1).)

3) Makes it a misdemeanor to use a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another identifiable person under or through the clothing being worn by that other person, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person and invade the privacy of that other person, under circumstances in which the other person has a reasonable expectation of privacy. (Pen. Code, § 647, subd. (j)(2).)

4) Makes it a misdemeanor to use a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another identifiable person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person. (Pen. Code, § 647, subd. (j)(3).)

5) Makes it a misdemeanor to intentionally distribute an image of another identifiable person's intimate body parts or depicting the person engaged in one of several specified sex acts, under circumstances in which the persons agree or understand that the image shall remain private, when the person distributing the image knows, or should know, that its distribution will cause serious emotional distress, and where the person depicted suffers that distress. (Pen. Code, § 647, subd. (j)(4)(A).)

6) Provides that a person intentionally distributes an image when that person distributes the image or arranges, specifically requests, or intentionally causes another person to distribute that image. (Pen. Code, § 647, subd. (j)(4)(B).)

7) Defines "intimate body part" as any portion of the genitals, the anus, and in the case of a female, also includes any portion of the breasts below the top of the areola that is either uncovered or clearly visible through clothing. (Pen. Code, § 647, subd. (j)(4)(C).)

8) Makes distribution of the image exempt from prosecution if:

   a) It is made in the course of reporting an unlawful activity;

   b) It is made in compliance with a subpoena or other court order for use in a legal proceeding;

   c) It is made in the course of a lawful public proceeding; or,

   d) It is related to a matter of public concern or public interest. (Pen. Code, § 647, subd. (j)(4)(D)(i)-(iv).)

9) Specifies a second or subsequent violation of the misdemeanors described above, also known as invasion of privacy, is punishable by imprisonment in the county jail not exceeding one year, and/or a fine not exceeding $2,000. (Pen. Code, § 647, subd. (k)(1).)

10) Specifies that if the victim of the invasion of privacy, as described above, was a minor at the time of the offense, the violation is punishable in a county jail not exceeding one year, and/or a fine not exceeding $2,000. (Pen. Code, § 647, subd. (k)(2).)

11) States that the invasion of privacy provisions do not preclude punishment under any section of law providing for greater punishment. (Pen. Code, § 647, subd. (j)(5).)

12) Provides that every person who, with intent to place another person in reasonable fear for their safety, or the safety of the other person's immediate family, by means of an electronic communication device, and without consent of the other person, and for the purpose of causing that other person unwanted physical contact, injury, or harassment, by a third party, electronically distributes, publishes, e-mails, hyperlinks, or makes available for downloading, personal identifying information, including, but not limited to, a digital image of another person, or an electronic message of a harassing nature about another person, is guilty of a misdemeanor punishable by up to one year in the county jail and/or a fine not exceeding $1,000. (Pen. Code, § 653.2, subd. (a).)

13) Provides that every person who sends, brings, possesses, prepares, publishes, produces, develops, duplicates or prints any obscene matter depicting a person under the age of 18 years engaging in or simulating sexual conduct, as defined, with the intent to distribute, exhibit, or exchange such material, is guilty of either a misdemeanor punishable by imprisonment in the county jail for up to one year, and/or a fine not to exceed $1,000, or guilty of a felony punishable by imprisonment in the state prison, and/or a fine not exceeding $10,000. (Pen. Code, § 311.1, subd. (a).)

14) Specifies that every person who sends, brings, possesses, prepares, publishes, produces, duplicates or prints any obscene matter depicting a person under the age of 18 years engaging in or simulating sexual conduct, as defined, for commercial purposes is guilty of a felony, punishable by imprisonment in the state prison for two, three, or six years and a fine up to $100,000. (Pen. Code, § 311.2, subd. (b).) A person convicted of this offense is subject to sex offender registration for 10 years. (Pen. Code, § 290 subds. (c) & (d)(1).)

15) Provides that any person who hires or uses a minor to assist in the preparation or distribution of obscene matter is guilty of a misdemeanor, unless the person has a prior conviction, in which case the crime is a felony. (Pen. Code, §§ 311.4, subd. (a), 311.9, subd. (b).)

16) Provides that any person who hires or uses a minor to assist in the possession, preparation or distribution of obscene matter for commercial purposes is guilty of a felony, punishable by imprisonment in the state prison for three, six, or eight years. (Pen. Code, § 311.4, subd. (b).)

17) Makes it a misdemeanor for a person to advertise or promote the sale, distribution, or exhibition of matter represented or held out by him or her to be obscene. (Pen. Code, § 311.5.)

18) Defines "obscene matter" as "matter, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value." (Pen. Code, § 311, subd. (a).)

19) Establishes a private cause of action against a person who intentionally distributes by any means a photograph, film, videotape, recording, or any other reproduction of another, without the other's consent when all of the following conditions are satisfied:

    a) The person knew that the other person had a reasonable expectation that the material would remain private;

    b) The distributed material exposes an intimate body part of the other person, or shows the other person engaging in an act of intercourse, oral copulation, sodomy, or other act of sexual penetration. Defines "intimate body part" to mean any portion of the genitals, and in the case of a female, any portion of the breasts below the top of the areola, that is either uncovered or visible through less than fully opaque clothing; and,

    c) The other person suffers general or special damages, as defined. (Civ. Code, § 1708.85, subds. (a) & (b).)

20) Provides that a depicted individual has a cause of action against a person who does either of the following:

   a) Creates and intentionally discloses sexually explicit material and the person knows or reasonably should have known the depicted individual in that material did not consent to its creation or disclosure; or,

   b) Intentionally discloses sexually explicit material that the person did not create, and the person knows the depicted individual in that material did not consent to the creation of the sexually explicit material. (Civ. Code, § 1708.86, subd. (b).)

21) Defines "depicted individual" as "an individual who appears, as a result of digitization, to be giving a performance they did not actually perform or to be performing in an altered depiction." (Civ. Code, § 1708.86, subd. (a)(4).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement:** According to the author: "AB 1962 will close loopholes and strengthen California's law against revenge porn. Under current revenge porn law, a jury must find that there was an agreement between the two parties that the image or video would remain private. However, there are circumstances where there is no such agreement because the image or video was taken surreptitiously. If a sexually explicit image or video is secretly taken and then distributed, this circumstance should fall under California's revenge porn laws.

   "To ensure that victims of revenge porn are adequately protected, AB 1962 will ensure that a person cannot distribute secretly recorded or captured images or videos without the authorization of the person depicted. Additionally, it would ensure that a person cannot distribute images or videos that are stolen from the depicted person. Too often perpetrators of revenge porn leverage legal loopholes to get away with this heinous crime, leaving victims traumatized, humiliated, and without justice. AB 1962 will ensure that if you record and distribute another person's sexually explicit images without their consent there will be legal consequences."

2) **Other States:** According to the author, numerous other states have enacted similar language pertaining to sexually explicit images taken of a person without their knowledge.

   > "There has been other states with similar legislation that explicitly prohibit the distribution of pornographic videos and images taken without the depicted person's knowledge and/or consent. North Carolina's revenge porn statute reads, "... (5) The obtained image without consent of the depicted person or under circumstances such that the person knew or should have known that the depicted person expected the images to remain private." (N.C.G.S.A. § 14-190.5A, https://codes.findlaw.com/nc/chapter-14-criminal-law/nc-gen-st-sect-14-190-5a.html).

Washington's revenge porn statute reads, "...(a) obtained under circumstances in which a reasonable person would know or understand that the image was to remain private; or (b) knowingly obtained by that person without authorization or by exceeding authorized access from the other person's property, accounts, messages, files, or resources." (Wash. Rev. Code Ann. § 4.24.795; https://codes.findlaw.com/wa/title-4-civil-procedure/wa-rev-code-4-24-795.html). Presently, there has been no litigation over the legality of Washington's revenge porn statute. [AB 1962 is mirrored off the Washington Statute (Wash. Rev. Code Ann. § 4.24.795). This statute has not been challenged in Washington's state courts.]

"Comparatively, several other states have less explicit language prohibiting the distribution of pornographic videos taken without the depicted person's knowledge and consent. More specifically, several other states do not require "an agreement or understanding" that the video/image remain private but rather consider whether the videos/images were obtained and/or created under circumstances in which the actor knew or reasonably should have known the depicted person had a reasonable expectation of privacy.

For example, Minnesota's revenge porn statute reads, "... (3) the image was obtained or created under circumstances in which the actor knew or reasonably should have known the person depicted had a reasonable expectation of privacy..." (M.S.A. § 617.261). Minnesota's revenge porn statute was upheld by the Minnesota Supreme Court ruling that the statute serves a compelling interest and is narrowly tailored to serving that interest. (*State v. Casillas* (2020) 952 N.W.2d 629.)

Illinois's revenge porn statute which requires the person to "obtain the image under circumstances in which a reasonable person would know or understand that the image was to remain private" was also recently upheld by the Illinois Supreme Court. (See Illinois v. Austin (2019) 155 N.E.3d 439.) Texas's revenge porn statute was also recently upheld by a Texas appellate court in *Ex Parte Jones*, 2021 Tex. Crim. App. Unpub. LEXIS 464 (May, 26, 2021).

Meanwhile, other states only require that the video be distributed without the depicted person's consent regardless of whether the video was made with an "agreement or understanding" that it would remain private or whether a person has a "reasonable expectation of privacy." For example, Vermont's revenge porn statute reads in its entirety, "(b)(1) a person violates this section if he or she knowingly discloses a visual image of an identifiable person who is nude or who is engaged in sexual conduct, without his or her consent, with the intent to harm, harass, intimidate, threaten, or coerce the person depicted, and the disclosure would

cause a reasonable person to suffer harm." (VT ST T. 13 § 2606). This statute was recently upheld by the Supreme Court of Vermont. (See *State v. Van Buren* (2018) 210 Vt. 293.)

3) **Existing Penalties Related to Surreptitious Recordings of Sexual Conduct:** The intent of this bill is to criminalize a situation where a person may be secretly recorded and the material distributed without their consent or even knowledge that the image was taken. Penal Code section 647 subdivision (j) generally prohibits secretly filming, photographing, or recording another person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in any area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person. (Pen. Code, § 647, subd. (j)(3).)

   The act of secretly taking a picture or filming a person, with the intent to invade the privacy of that person, whether or not the image is subsequently distributed, is already criminal offense. For example, in *In re M.H.* (2016) 1 Cal.App.5th 699, evidence was sufficient to find that a minor invaded the privacy of a fellow high school student when he used his smart phone to surreptitiously record another student in a school bathroom stall while he was either masturbating or jokingly pretending to do so, and had the video disseminated on social media. Similarly, in *People v. Johnson* (2015) 234 Cal.App.4th 1432, the defendant was guilty of the offense for secretly photographing individuals under their skirts while shopping at Target.

   In addition, Penal Code section 502 makes unauthorized access to a computer network, which includes a phone or social media profile, a crime. Under Section 502, there is protection for traditional hacking, but the statute also protects individual users from unauthorized access, and the offence is chargeable as a misdemeanor or felony. (Pen. Code, § 502.) In 2015, the Attorney General prosecuted a cyber-hacker who hacked into email accounts and stole victims' private intimate images. The defendant pled guilty to computer intrusion. (Office of the Attorney General, Attorney General Kamala D. Harris Announces Guilty Plea of Hacker Involved in Cyber Exploitation Scheme (June 17, 2015).[1]

4) **Torts for Infliction of Emotional Distress:** Code of Civil Procedure section 1708.85 allows a person to file a private right of action (i.e., lawsuit) against any person who intentionally distributes sexually explicit photographs or other images or recordings of another person, without the consent of that person. Under California law, intentional infliction of emotional distress requires "extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress." (See *Hughes v. Pair* (2009) 46 Cal. 4th 1035, 1050.) "A defendant's conduct is 'outrageous' when it is so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Id.* at pp. 1050–51.)

   A person may also sue a former spouse, domestic partner, or person with whom the plaintiff cohabites for infliction of emotional distress pursuant to Civil Code section 1714.01. A

---

[1] <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harrisannounces-guilty-plea-hacker-involved-cyber> [last visited April 3, 2024].)

person may recover up to $250,000 for non-economic injuries like pain or suffering. A plaintiff is also entitled to receive attorneys' fees (which are often significantly more than the actual damages) and economic damages, including medical (i.e., mental health) bills, costs of removing the images from the internet, lost wages, etc. This bill, as it pertains to images that may have been taken surreptitiously and disseminated without someone's consent, may be remedied at civil law pursuant to a private right of action or injunctive relief.

5) **First Amendment:** The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." (U.S. Const, Amend. I, Section 1.) The California Constitution also protects free speech. "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const. Art. I, § 2.) "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (*Ashcroft v. American Civil Liberties Union* (2002) 535 U.S. 564, 573.)

Legislation that regulates the content of protected speech is subject to strict scrutiny, sometimes referred to by the courts as "exacting scrutiny" in this context. (*Reed v. Town of Gilbert, Ariz.* (2015) 135 S.Ct. 2218, 2226.) To survive strict scrutiny, state action must be narrowly tailored to address a compelling government interest. (*Ibid.*)

Nevertheless, First Amendment protections are not absolute. Restrictions on the content of speech have long been permitted in a few limited areas including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. (*United States v. Stevens* (2010) 559 U.S. 460, 130 S.Ct. 1577, 1584 [citations omitted].) The First Amendment permits "restrictions upon the content of speech in a few limited areas which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the societal interest in order and morality.'" (*R.A.V. v. City of St. Paul* (1992) 505 U.S. 377, 382-383.)

While some lower courts have grappled with First Amendment challenges to state "revenge porn" laws generally, the California Supreme Court has yet to weigh in. (Paul, *Is Revenge Porn Protected Speech? Lawyers Weigh in, and Hope for a Supreme Court Ruling*, The Washington Post (Dec. 26, 2019).[2]

A former version of California's "revenge porn" law (Pen. Code, § 647, subd. (j)(4)(iii)) survived First Amendment scrutiny in *People v. Iniguez* (2016) 247 Cal.App.4th Supp. 1 (*Iniguez*). There, the defendant argued the statute was overbroad in violation of the First Amendment. Overbreadth means a defendant "may challenge a statute not because their own rights of free expression are violated, but because the very existence of an overbroad statute may cause others not before the court to refrain from constitutionally protected expression. [Citations.]" (*In re M.S.* (1995) 10 Cal.4th 698, 709.) To avoid being overbroad, "statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." (*Broadrick v. Oklahoma* (1973) 413

---

[2] Located at < https://www.washingtonpost.com/nation/2019/12/26/is-revenge-porn-protected-speech-supreme-court-may-soon-weigh/> [as of April 5, 2024].)

U.S. 601, 611–612 [citations omitted].)

Without deciding whether a person has a free speech right to distribute such images, the *Iniguez* court concluded former subdivision (j)(4)(iii) of Penal Code section 647.6[3] was not constitutionally overbroad because it required specific intent to distribute sexually explicit material, with the intent to cause serious emotional distress. (*People v. Iniguez*, *supra*, 247 Cal.App.4th Supp. at pp. 7-8.) Accordingly, the statute would not apply if a person acted by mistake or accident. (*Id.* at pp. 7-8.)

The *Iniguez* court also explained that "it is not just *any* images that are subject to the statute, but only those which were taken under circumstances where the parties agreed or understood the images were to remain private. The government has an important interest in protecting the substantial privacy interests of individuals from being invaded in an intolerable manner." (*People v. Iniguez*, *supra*, 247 Cal.App.4th Supp. at p. 8 [citation omitted].) The court stated, "It is evident that barring persons from intentionally causing others serious emotional distress through the distribution of photos of their intimate body parts is a compelling need of society." (*Ibid.*)

6) **Arguments in Support:** According to the *California State Sheriffs Association*: "Existing law makes unlawful the distribution of certain images of another person taken under circumstances in which the person understands that the image shall remain private and the distribution of which causes serious emotional distress. To ensure that acts of revenge porn are adequately addressed, this proposal would close loopholes in current law. AB 1962 would clarify that the existing crime of revenge porn applies when an image is knowingly obtained without the victim's knowledge or consent. The bill would also ensure that a person cannot distribute images or videos that are stolen from the depicted person."

7) **Arguments in Opposition:** None on file.

8) **Related Legislation:**

   a) AB 1380 (Berman) expands the crime of "revenge porn" to include the distribution of specified images obtained without the authorization of the person depicted or by exceeding authorized access from the property, accounts, messages, files, or resources of the person depicted. AB 1380

   b) AB 1856 (Ta) creates a new crime for intentionally distributing or causing to be distributed a deepfake of an intimate body part of an identifiable person, or a deepfake of the person engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, and the person distributing the deepfake knows or should know that the person depicted did not consent to the distribution and that distribution will cause serious emotional distress, and the person depicted suffers that distress.

9) **Prior Legislation:**

---

[3] Penal Code section 647, subdivision (j)(4)(A-D.)

a) SB 23 (Rubio), Chapter 783, Statutes of 2021, extends the statute of limitations for the crime of "revenge porn" to allow prosecution to commence within one year of the discovery of the offense, but not more than four years after the image was distributed

b) SB 1081 (Rubio), Chapter 882, Statutes of 2022, defines the terms "distribute" and "identifiable" for purposes of the existing crime of unlawful distribution of a private image, also known as "revenge porn."

REGISTERED SUPPORT / OPPOSITION:

Support

American Association of University Women - California
Asian Law Alliance
California District Attorneys Association
California Police Chiefs Association
California State Sheriffs' Association
Crime Victims Alliance
Peace Officers Research Association of California (PORAC)
Santa Clara County District Attorney's Office
Street Grace
Womensv (women of Silicon Valley)

Opposition

None

Analysis Prepared by: Kimberly Horiuchi / PUB. S. / (916) 319-3744

Date of Hearing: April 9, 2024
Counsel: Liah Burnley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 1972 (Alanis) – As Introduced January 30, 2024

As Proposed to be Amended in Committee

SUMMARY: Expands the regional property crimes tasks force within the California Highway Patrol (CHP) to include railroad police and cargo theft.

EXISTING LAW:

1) Requires CHP, in coordination with the Department of Justice (DOJ), to convene a regional property crimes task force to assist local law enforcement in counties identified as having elevated levels of property crime, including, but not limited to, organized retail theft, vehicle burglary, and theft of vehicle parts and accessories. (Pen. Code, § 13899.)

2) States that the task force shall provide local law enforcement with logistical support and other law enforcement resources, including, but not limited to, personnel and equipment. (Pen. Code, § 13899.)

3) States that every person who steals, takes, carries, leads, or drives away the personal property of another is guilty of theft. (Pen. Code, § 484, subd. (a).)

4) Defines grand theft as theft of money, labor, real or personal property of a value exceeding $950. Grand theft is a wobbler, punishable by imprisonment in a county jail not exceeding one year, or as a felony by imprisonment in the county jail for 16 months, two years, or three years (Pen. Code, § 487, 489.)

5) Provides that every person who steals, takes, or carries away cargo of another, if the cargo is taken of a value exceeding $950, is guilty of grand theft. (Pen. Code, § 487h, subd. (a).)

6) Provides that every person who enters any vessel, railroad car, locked or sealed cargo container, with attempt to commit theft or any felony is guilty of burglary, a wobbler, punishable as a misdemeanor by imprisonment in the county jail for up to a year, or as a felony by imprisonment in the county jail for 16 months, two years, or three years. (Pen. Code, §§ 459, 461.)

7) Defines "cargo" as any goods, wares, products or manufactured merchandise that has been loaded into a trailer, railcar, or cargo container, awaiting or in transit. (Pen. Code § 487h, subd. (b).)

8) Defines "cargo container" as a receptacle with strong enough for repeated use, designed to facilitate the carriage of goods, fitted for handling from one mode of transport to another, designed to be easy to fill and empty, and having a cubic displacement of 1,000 cubic feet or

more. (Pen. Code, § 458.)

9) Provides that the value of the money, labor, real property, or personal property taken exceeds $950 over the course of distinct but related acts, the value of the money, labor, real property, or personal property taken may properly be aggregated to charge a count of grand theft, if the acts are motivated by one intention, one general impulse, and one plan. (Pen. Code, § 487, subd. (e).)

10) Provides that every person who destroys any part of a railroad, including any structure or fixture attached to or connected with any railroad, is guilty of a misdemeanor punishable by imprisonment in the county jail not exceeding one year, or a felony, punishable by imprisonment in county jail for a period of 16 months, two, or three years. (Pen. Code, § 489, subd. (c)(1).)

11) Makes it a felony, punishable by imprisonment in a county jail for a term of two, three, or four years, to obstruct a railroad track. (Pen. Code, § 218.1.)

12) Makes trespass on a railroad or any transit related property a misdemeanor. (Pen. Code, § 369i.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Cargo theft crimes not only affect businesses, but can also create backlogs at ports causing major disruptions to California's supply chain. Cases like these show the increasing level of sophistication of these criminals and how far organized crimes rings will go to steal from our consumers and businesses. AB 1972 will ensure that law enforcement has the support they need to combat cargo theft statewide."

2) **CHP's Regional Property Crimes Task Force**: AB 1065 (Jones-Sawyer), Chapter 803, Statutes of 2018, among other things, operation of CHP's regional property crimes task force. AB 1065 had a sunset date of January 1, 2021. AB 331 (Jones-Sawyer), Chapter 113, Statutes of 2021, extended the sunset through January 1, 2026.

   Under Penal Code section 13899, CHP is required to, in coordination with the DOJ, convene a regional property crimes task force to assist local law enforcement in counties with elevated levels of property crime, including, but not limited to, organized retail theft, vehicle burglary, and theft of vehicle parts and accessories. The task force provides local law enforcement and in these regions with logistical support and other law enforcement resources, including, but not limited to, personnel and equipment, in consultation with task force members. In response to AB 1065, the CHP, in consultation with the DOJ, developed a task force concept to work with allied agencies to combat organized retail theft. Three regional task forces, known as Organized Retail Crime Task Forces (ORCTF), were established by the CHP in three field Divisions with the greatest need for immediate action: Golden Gate Division (encompassing the greater Bay Area), Southern Division (encompassing the greater Los Angeles region), and Border Division (encompassing Orange and San Diego counties). (CHP, *Organized Retail Theft Program*. Available at: <https://www.chp.ca.gov/notify-

chp/organized-retail-theft-program>.)

This bill would add railroad police to the task force and would require CHP and the DOJ to assist railroad police and local law enforcement agencies with cargo thefts.

3) **Railroad and Cargo Theft**: Under existing law, any person who steals, takes, or carries away cargo of another, if the cargo is taken of a value exceeding $950, is guilty of grand theft. (Pen. Code, § 487h, subd. (a).) And, any person who enters any railroad car or locked or sealed cargo container with attempt to commit theft or any felony is guilty of burglary, which is a felony, punishable by imprisonment in county jail for a period of 16 months, two or three years. (Pen. Code, §§ 459; 461, subd. (b).)

In instances where the property stolen from a cargo container is less than $950, the crime is punishable by a fine not exceeding $1,000 or by imprisonment in the county jail not exceeding 6 months, or both. (Pen. Code, § 490.) If a person trespasses on a railroad or any transit related property during the commission of the offense, they can be charged with an additional misdemeanor. (Pen. Code, § 369i.) If a person trespasses on a railroad with intent to commit robbery, they can be subject to imprisonment of a term of not more than twenty years under federal law. (18 U.S.C. § 1991.)

According to background materials provided by the author, the impetus of this bill is to give "law enforcement and prosecutors additional tools to protect rail lines and shipping routes from organized cargo theft."

The Union Pacific Police Department is the law enforcement agency of Union Pacific's (UP) railroad. (*Union Pacific Special Agents: The Badges Behind the Shield,* UP (April 2016). https://www.up.com/aboutup/community/inside_track/badges-04-11-2016.htm [as of March 8, 2023].) According to UP, the Union Pacific Police Department has primary jurisdiction over crimes committed against the railroad. The department is responsible for all UP locations across 32,000 miles of track in 23 states. (*Ibid.*) UP police have full police authority and are responsible for crimes that include trespassing on railroad rights of way, theft of railroad property, threats of terrorism and derailments, well as investigate public safety incidents which occur on railroad property. They often work with local, state, and federal law enforcement agencies on issues concerning the railroad. (*Ibid.*) Union Pacific special agents and local law enforcement officers have overlapping jurisdictions, but UP railroad property is the Union Pacific Police Department's responsibility. (*Ibid.*)

In December 20, 2021, UP sent a letter to Los Angeles County District Attorney George Gascón, regarding train thefts and security concerns. The letter states, in part:

> "Since December 2020, UP has experienced an over 160% increase in criminal rail theft in Los Angeles County. In several months during that period, the increase from the previous year surpassed 200%. In October 2021 alone, the increase was 356% over compared to October 2020. Not only do these dramatic increases represent retail product thefts – they include increased assaults and armed robberies of UP employees performing their duties moving trains. …
>
> "This increased criminal activity over the past twelve months accounts for

> approximately $5 million in claims, losses and damages to UP. And that value does not include respective losses to our impacted customers. Nor does it capture the larger operating or commercial impacts to the UP network or supply chain system in Los Angeles County.
>
> "In response to this increased, organized, and opportunistic criminal activity, UP by its own effort and cost enlisted additional and existing Special Agents across the UP system to join our local efforts with LAPD, LASD and CHP to help prevent the ongoing thefts. We have also utilized and are further exploring the use of additional technologies to help us combat these criminals through drones, specialized fencing, trespass detection systems, and other measures."

(*Letter from Union Pacific Railroad* (Dec. 20, 2021) <https://www.up.com/cs/groups/public/@uprr/@newsinfo/documents/up_pdf_nativedocs/pdf_up_la_district_atty_211221.pdf>.) Notably, UP's train thefts started right around the time it laid off thousands of workers. According to UP's annual reports to the federal Surface Transportation Board, the company ended 2019 with 23,096 employees. In 2020, that number fell to 20,334. And that number fell again to 18,408 in the third quarter of 2021. (*Quarterly Wage A&B Data*, Surface Transportation Board. <https://www.stb.gov/reports-data/economic-data/quarterly-wage-ab-data/>.) According to the Los Angeles Times, former UP employees and police say budgetary issues have slashed the ranks of the company's force, leaving as few as half a dozen in the region. (*'Like A Third World Country': Gov. Newsom Decries Rail Thefts amid Push to Beef up Enforcement,* Los Angeles Times (Jan. 20, 2022) <https://www.latimes.com/california/story/2022-01-20/los-angeles-rail-theft-supply-chain-crunch-limited-security>.) "Union Pacific from Yuma, Ariz., to L.A. has six people patrolling…" and "thefts started about seven months ago as the police presence ebbed." (*Ibid.*) UP's employment numbers remain low, despite record profits for the rail operator. UP reported a net income of $6.5 billion for 2021. (*Union Pacific Reports Fourth Quarter and Full Year 2021 Results,* UP (Jan. 2022) <https://www.up.com/media/releases/4q21-earnings-nr210120.htm>.)

By adding railroad police to CHP's task force, this bill would allow CHP to provide resources and assistance to railroad police agencies such as UP.

4) **Argument in Support**: No longer applicable.

5) **Argument in Opposition**: No longer applicable.

6) **Related Legislation:**

   a) AB 1802 (Jones-Sawyer) would extend the operation of CHP's regional property crimes task force until January 1, 2031. AB 1802 is pending in this Committee.

   b) AB 1960 (Soria) would reenact sentence enhancement for theft offenses when the loss exceeds specified dollar amounts. AB 1960 is pending in this Committee.

c) AB 1990 (W. Carrillo) would authorize peace officers to make a warrantless arrest for misdemeanor shoplifting, as specified. AB 1990 is pending in this Committee.

d) AB 1779 (Irwin) would allow, a prosecutor to bring a case in any county where theft offenses occurred for offenses that occur in multiple jurisdictions, as specified. AB 1779 is pending in this Committee.

e) AB 1787 (Villapudua) would among other things, repeal the sunset provision in the organized retail theft statute, thereby extending the crime indefinitely. AB 1787 is pending in this Committee.

f) AB 1794 (McCarty) would clarify aggregation requirements for grand theft, among other things. AB 1794 is pending in this Committee.

g) AB 2406 (Davies) would make it a felony to use two or more minors to engage in theft related offenses. AB 2406 is pending in this Committee.

h) AB 2438 (Petrie-Norris) would make any person who acts in concert to take, damage, or destroy any property in the commission of a felony punishable by an additional and consecutive term of imprisonment. AB 2438 is pending in this Committee.

i) AB 2790 (Pacheco) would define organized retail theft to include acting in concert with one or more persons to steal specified types of merchandise, including infant formula, baby food, over-the-counter medications, and blood glucose testing strips, with the intent to sell those items. AB 2790 is pending in this Committee.

j) AB 2943 (Zbur) would, among other things, extend the organized retail theft statute until January 2031, and make it a crime for any person to possess property unlawfully that was acquired through one or more acts of shoplifting, theft, or burglary from a retail business, if the property is not possessed for personal use. AB 2943 is pending in this committee.

k) SB 923 (Archuleta) would revise the definition of shoplifting to require an intent to steal retail property or merchandise and would require a person convicted of petty theft or shoplifting, if the person has two or more prior convictions for specified theft-related offenses, to be punished by imprisonment in the county jail for up to one year, or for 16 months, or two or three years. SB 923 is pending in Senate Public Safety Committee.

l) SB 928 (Niello) would remove the sunset date for organized retail theft. SB 928 is pending in Senate Public Safety Committee.

m) SB 982 (Wahab) would remove the sunset date for organized retail theft. SB 982 is pending in Senate Appropriations Committee.

n) SB 1416 (Newman) would create sentencing enhancements for selling, exchanging, or returning for value, or attempting to sell, exchange, or return for value, any property acquired through one or more acts of shoplifting, theft, or burglary from a retail business, if the property value exceeds specified amounts and would make these enhancements apply to any person acting in concert with another person to commit these offenses. SB 1416 is pending in Senate Public Safety Committee.

7) **Prior Legislation**:

a) AB 523 (V. Fong), of the 2023-2024 Legislative Session, would have included "cargo theft" in the organized retail theft statute. AB 523 was not heard in this Committee at the request of the author.

b) AB 329 (Ta), of the 2023-2024 Legislative Session, would have expanded the territorial jurisdiction in which the Attorney General can prosecute specified theft offenses and associated offenses connected together in their commission to include cargo theft. AB 329 failed passage in this Committee.

c) AB 335 (Alanis), of the 2023-2024 Legislative Session, would have required the Little Hoover Commission to submit a report to the Legislature describing the reported retail thefts, as specified. AB 335 was held under submission in Assembly Appropriations Committee.

d) AB 2543 (Fong), of the 2021-2022 Legislative Session, would have made burglary with regard to a railroad car or a cargo container punishable by imprisonment in a county jail for two, four, or six years. AB 2543 was not heard in this committee at the request of the author.

e) AB 2769 (O'Donnell), of the 2021-2022 Legislative Session, would have made burglary of a cargo container, railroad car, or cargo, where the property stolen or damaged is valued over $950, a felony offense. AB 2769 was not heard in this committee at the request of the author.

f) AB 331 (Jones-Sawyer), Chapter 113, Statutes of 2021, extended the sunset date for the CHP regional property crimes task force through January 1, 2026.

g) AB 1065 (Jones-Sawyer), Chapter 803, Statutes of 2018, created the CHP regional property crimes task force.

h) AB 2805 (Olsen), of the 2015-2016 Legislative Session, would have created a cargo theft prevention working group coordinated by the California Highway Patrol. AB 2805 was vetoed.

i) SB 24 (Oropeza), Chapter 607, Statutes of 2009, eliminated the sunset date on cargo theft, and clarified that the elements of cargo theft are the same as other forms of grand theft.

j) AB 1814 (Oropeza), Chapter 515, Statutes of 2004, created a specific statute providing that the theft of cargo of a value in excess of $400 is grand theft and contained a sunset date of January 1, 2010.

REGISTERED SUPPORT / OPPOSITION:

Support

No longer applicable.

Opposition

No longer applicable.

Analysis Prepared by: Liah Burnley / PUB. S. / (916) 319-3744

Amended Mock-up for 2023-2024 AB-1972 (Alanis (A))

Mock-up based on Version Number 99 - Introduced 1/30/24
Submitted by: Liah Burnley, Assembly Public Safety Committee

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1389 of the Penal Code is amended to read:

13899. The Department of the California Highway Patrol shall, in coordination with the Department of Justice, convene a regional property crimes task force to assist local law enforcement **and railroad police, as described in Section 8226 of the Public Utilities Code**, in counties identified by the Department of the California Highway Patrol as having elevated levels of property crime, including, but not limited to, organized retail theft, **cargo theft,** vehicle burglary, and theft of vehicle parts and accessories. The task force shall provide local law enforcement **and railroad police** in the identified region with logistical support and other law enforcement resources, including, but not limited to, personnel and equipment, as determined to be appropriate by the Commissioner of the California Highway Patrol in consultation with task force members.

~~**SECTION 1.** Section 490.4 of the Penal Code is amended to read:~~

~~**490.4.** (a) A person who commits any of the following acts is guilty of organized retail theft, and shall be punished pursuant to subdivision (b):~~

~~(1) Acts in concert with one or more persons to steal merchandise from one or more merchant's premises, cargo, or online marketplace with the intent to sell, exchange, or return the merchandise for value.~~

~~(2) Acts in concert with two or more persons to receive, purchase, or possess merchandise described in paragraph (1), knowing or believing it to have been stolen.~~

~~(3) Acts as an agent of another individual or group of individuals to steal merchandise from one or more merchant's premises or online marketplaces as part of an organized plan to commit theft.~~

~~(4) Recruits, coordinates, organizes, supervises, directs, manages, or finances another to undertake any of the acts described in paragraph (1) or (2) or any other statute defining theft of merchandise.~~

~~(b) Organized retail theft is punishable as follows:~~

~~(1) If violations of paragraph (1), (2), or (3) of subdivision (a) are committed on two or more separate occasions within a 12-month period, and if the aggregated value of the merchandise stolen, received, purchased, or possessed within that 12-month period exceeds nine hundred fifty dollars ($950), the offense is punishable by imprisonment in a county jail not exceeding one year or pursuant to subdivision (h) of Section 1170.~~

~~(2) Any other violation of paragraph (1), (2), or (3) of subdivision (a) that is not described in paragraph (1) of this subdivision is punishable by imprisonment in a county jail not exceeding one year.~~

~~(3) A violation of paragraph (4) of subdivision (a) is punishable by imprisonment in a county jail not exceeding one year or pursuant to subdivision (h) of Section 1170.~~

~~(c) For the purpose of determining whether the defendant acted in concert with another person or persons in any proceeding, the trier of fact may consider any competent evidence, including, but not limited to, all of the following:~~

~~(1) The defendant has previously acted in concert with another person or persons in committing acts constituting theft, or any related offense, including any conduct that occurred in counties other than the county of the current offense, if relevant to demonstrate a fact other than the defendant's disposition to commit the act.~~

~~(2) That the defendant used or possessed an artifice, instrument, container, device, or other article capable of facilitating the removal of merchandise from a retail establishment without paying the purchase price and use of the artifice, instrument, container, or device or other article is part of an organized plan to commit theft.~~

~~(3) The property involved in the offense is of a type or quantity that would not normally be purchased for personal use or consumption and the property is intended for resale.~~

~~(d) In a prosecution under this section, the prosecutor shall not be required to charge any other coparticipant of the organized retail theft.~~

~~(e) Upon conviction of an offense under this section, the court shall consider ordering, as a condition of probation, that the defendant stay away from retail establishments with a reasonable nexus to the crime committed.~~

~~(f) This section shall remain in effect only until January 1, 2026, and as of that date is repealed.~~

~~**SEC. 2.** No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.~~

Date of Hearing: April 9, 2024
Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 1990 (Wendy Carrillo) – As Amended March 18, 2024

SUMMARY: Authorizes a warrantless arrest for shoplifting not committed in the presence a police officer. Specifically, **this bill**:

1) Authorizes a peace officer to make a warrantless arrest for shoplifting not committed in their presence if the officer has reasonable cause to believe that person has shoplifted.

2) Provides that, unlike other for other misdemeanors, a peace office does not have to release a person for which there is probable cause to believe that the person arrested is guilty of shoplifting.

EXISTING FEDERAL LAW: Provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (U.S. Const., Amend. IV.)

EXISTING LAW:

1) Provides that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized. (Cal. Const., art. I, § 13.)

2) Authorizes a peace officer to arrest a person without a warrant if the officer has probable cause to believe that the person to be arrested has committed a public offense in the officer's presence. (Pen. Code, § 836, subd. (a)(1).)

3) Authorizes a peace officer to arrest a person for committing specified crimes not committed in the officer's presence, including domestic violence, violations of a domestic violence protective or restraining order, or for carrying a concealed firearm within an airport. (Pen. Code, § 836, subds. (c)-(e).)

4) Requires a person arrested for a misdemeanor to be released unless the person demands to be taken before a magistrate or there exists a specified reason for nonrelease, although nothing prevents an officer from first booking an arrestee, as specified. (Pen. Code, § 853.6, subd. (a)(1); Pen. Code, § 853.6, subd. (i)(12).)

5) Requires the officer or the officer's superior, if the person arrested for a misdemeanor is released, to prepare in duplicate a written notice to appear in court, containing the name and

address of the person, the offense charged, and the time when, and place where, the person shall appear in court. (Pen. Code, § 853.6, subd. (a)(1).)

6) Requires the officer or the officer's superior, if the person arrested for a misdemeanor is not released prior to being booked and the officer in charge of the booking or the officer's superior determines that the person should be released, to prepare a written notice to appear in a court. (Pen. Code, § 853.6, subd. (a)(1).)

7) Provides that reasons for nonrelease of a person arrested by a peace officer for a misdemeanor include, among other things, that there were one or more outstanding arrest warrants for the person; that the person could not provide satisfactory evidence of personal identification; that there was a reasonable likelihood that the offense or offenses would continue or resume; that there is reason to believe that the person would not appear at the time and place specified in the notice; that the person has been cited, arrested, or convicted for misdemeanor or felony theft from a store in the previous six months; or that there is probable cause to believe that the person arrested is guilty of committing organized retail theft. (Pen. Code, § 853.6, subd. (i).)

8) Provides that the officer may book the arrested person at the scene or at the arresting agency prior to release or indicate on the citation that the arrested person shall appear at the arresting agency to be booked or indicate on the citation that the arrested person shall appear at the arresting agency to be fingerprinted prior to the date the arrested person appears in court. (Pen. Code, § 853.6, subd. (g).)

9) Provides that any person who willfully violates his or her written promise to appear or a lawfully granted continuance of his or her promise to appear in court is guilty of a misdemeanor, regardless of the disposition of the charge upon which he or she was originally arrested. (Pen. Code, § 853.7.)

10) Provides that when a person signs a written promise to appear at the time and place specified in the written promise to appear and has not posted bail, as specified, the magistrate shall issue and have delivered for execution a warrant for his or her arrest within 20 days after his or her failure to appear as promised or within 20 days after his or her failure to appear after a lawfully granted continuance of his or her promise to appear. (Pen. Code, § 853.8.)

11) Authorizes a private person to arrest another for a public offense committed or attempted in his presence. (Pen. Code, § 837.)

12) Requires a private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him or her to a peace officer. (Pen. Code, § 847, subd. (a).)

13) Defines "shoplifting" as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed $950. (Pen. Code, § 459.5, subd. (a).)

14) Makes shoplifting shall a misdemeanor punishable by up to six months in county jail, by a $1,000 fine, or both a fine and imprisonment; except that a person with one or more prior

convictions for a serious or violent felony, or for an offense require registration as a sex offender, may be punished by 16 months, 2 years, or 3 years in county jail. (Pen. Code, § 459.5, subd. (a).)

15) No person who is charged with shoplifting may also be charged with burglary or theft of the same property. (Pen. Code, § 459.5, subd. (b).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "As California grapples with an increase in retail theft, AB 1990 would authorize a peace officer to make a warrantless arrest for a misdemeanor shoplifting offense not committed in the officer's presence if the officer has probable cause to believe that person has committed shoplifting.

   "Retail theft continues to impact small and large businesses alike, our California economy, and the safety and wellbeing of our communities. Today, we stand at a pivotal moment to address a challenge that has been allowed for far too long."

2) **Effect of the Bill**: Existing law generally requires that a peace officer obtain a warrant prior to making a misdemeanor arrest for an offense that did not occur in the officer's presence. Exceptions under the statute at issue in this bill include violations of domestic violence protective or restraining order; an assault or battery of a significant other, as specified; or carry a concealed firearm within an airport. (Pen. Code, § 836, subds. (c)-(e).) Other exceptions include, among others, an assault on a firefight or paramedic (Pen. Code, § 836.1), or driving under the influence of alcohol when the person is involved in a crash. (Veh. Code, § 40300.5, subd. (a).)

   This bill would add shoplifting to the list of crimes for which a warrantless arrest may be made when the crime was not committed in the officer's presence.

   This bill would also provide that, unlike for other misdemeanors, a peace office does not have to release a person for which there is probable cause to believe that the person arrested is guilty of shoplifting. Under existing law, a person arrested by a peace office for a misdemeanor must be released, except in limited circumstances. (Pen. Code, § 853.6, subd. (i).)

   For example, existing law provides that an officer is not obligated to release a person arrested for a misdemeanor if there is reason to believe that the person would not appear at the time and place specified on the notice to appear. (Pen. Code, § 853.6, subd. (i)(9).)There is also an exception to the release requirement when there is a reasonable likelihood that the person would resume committing offenses, or where there person has outstanding warrants. (Pen. Code, § 853.6, subd. (i)(4) & (6).) Moreover, a peace officer is not required to release a person if that person has been cited, arrested, or convicted for misdemeanor or felony theft offense from a store in the previous six months. (Pen. Code, § 853.6, subd. (i)(11).) Put simply, under existing law, many people arrested for shoplifting are already not required to be released.

Indeed, this bill would authorize a peace officer to hold a person who is not a threat, has no outstanding warrants, is unlikely to continue shoplifting, has not shoplifted in the last six months, *and* is likely to show up as required for their scheduled appearance before a magistrate. Detaining such people is contrary to the Legislature's intent "that the disposition of any criminal case use the least restrictive means available." (Pen. Code, § 17.2, subd. (a).)

Further, one would perhaps be justified in raising concerns about how some in law enforcement will exercise the discretion to hold or release people arrested for shoplifting. (See Premkumar, *Police Use of Force and Misconduct in California*, PPIC (Oct. 2021) <https://www.ppic.org/publication/police-use-of-force-and-misconduct-in-california/ > [last visited Apr. 4, 2024] ["Black people are substantially overrepresented"]; Lofstrom, *Racial Disparities in Law Enforcement Stops*, PPIC (Oct. 2021) <https://www.ppic.org/publication/racial-disparities-in-law-enforcement-stops/ > [last visited Apr. 4, 2024]; Lofstrom, *Racial Disparities in California Arrests*, PPIC (Oct. 2019) <https://www.ppic.org/publication/racial-disparities-in-california-arrests/> [last visited Apr. 4, 2024]; Sewell, *Supervisors approve settlement over Antelope Valley racial profiling*, L.A. Times (Apr. 28, 2015).) The L.A. County District Attorney's Office reported "that over 47 percent of those incarcerated for misdemeanors have a mental health disability, 60 percent have substance use disorder, and 20 percent of all arrests [for misdemeanors] involve individuals who are unhoused." (Racial and Identity Profiling Advisory Board, Annual Report 2023, at p. 97 <https://oag.ca.gov/system/files/media/ripa-board-report-2024.pdf> [last visited Apr. 5, 2024].)

Incarceration for any length of time may have significant collateral consequences, including loss of a job or housing. (McCann, *How "Collateral Consequences" Keep People Trapped in the Legal System*, Vera Institute (Nov. 29, 2023) <https://www.vera.org/news/how-collateral-consequences-keep-people-trapped-in-the-legal-system> [last visited Nov. 29, 2023].)

For undocumented Californians, incarceration may result in deportation. (McCann, *supra*; L.A. District Attorney's Off., Special Directive: Misdemeanor Case Management (Dec. 2020), p. 1 <https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-07.pdf>; see San Ramon, *Orange County Sheriff's cooperation with ICE sees spike in inmate transfers*, L.A. Times (Mar. 26, 2024) <https://www.latimes.com/socal/daily-pilot/entertainment/story/2024-03-26/orange-county-sheriffs-cooperation-with-ice-sees-spike-in-inmate-transfers> [last visited Mar. 29, 2024].)

3) **This Bill Provides Fewer Guardrails Than AB 2943 (Zbur)**: This bill would authorize a peace officer to make a warrantless arrest for shoplifting not committed in their presence if the officer has reasonable cause to believe that person has shoplifted. AB 2943 (Zbur) would also allow for a warrantless arrest in that situation. However, unlike this bill, AB 2943 would require probable cause to make an arrest to include either (1) a sworn statement obtained by the officer from a person who witnessed the person to be arrested committing the alleged violation; or (2) the officer observing video footage that shows the person to be arrest committing the alleged violation. This bill contains no provisions limiting when probable cause to make a warrantless arrest exists.

Additionally, this bill provides that, unlike other for other misdemeanors, a peace officer does not have to release a person for which there is probable cause to believe that the person

arrested is guilty of shoplifting. AB 2943 contains no such provision.

4) **Proposition 47**: Proposition 47, approved by voters on November 4, 2014, reduced the penalties for certain drug and property crimes and required that the resulting state savings be directed to mental health and substance abuse treatment, truancy and dropout prevention, and victims' services. The initiative was enacted to comply with a 2011 California Supreme Court order, which upheld that California's overcrowded prisons violated incarcerated individuals' Eighth Amendment rights against cruel and unusual punishment.

   Proposition 47 contained specific language reflecting the purpose and intent of the proposition:

   "In enacting this act, it is the purpose and intent of the people of the State of California to: ". . . (3) Require misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes. . . " (http://vig.cdn.sos.ca.gov/2014/general/pdf/text-of-proposed-laws1.pdf#prop47)

   Specifically, the initiative also directed that theft crimes of $950 or less shall be considered petty theft and be punished as a misdemeanor, with limited exceptions for individuals with specified prior convictions. Proposition 47 also created the new offense of shoplifting, a misdemeanor, where the value of the property taken or intended to be taken is $950 or less (Pen. Code, § 459.5; *People v. Sherow* (2015) 239 Cal.App.4th 875, 879).)

5) **Probable Cause**: The Fourth Amendment to the U.S. Constitution protects against unreasonable searches and seizures by the government. Subject to limited exceptions, a search or seizure is reasonable if it is supported by probable cause. Probable cause to arrest an individual exists "when, under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [that individual] had committed a crime." (See *U.S. v. Garza* (9th Cir. 1992) 980 F.2d 546, 550; *U.S. v. Gonzales* (9th Cir. 1984) 749 F.2d 1329, 1337.) Whether justification for an arrest exists is based on the totality of the circumstances known to law enforcement at the time of the arrest, search, or submitting of an affidavit for a warrant. (See e.g., *Illinois v. Gates*, supra, 462 U.S. at 238; *U.S. v. Buckner* (9th Cir. 1999) 179 F.3d 834, 837.)

   This bill provides that a police officer needs "reasonable cause"—not probable cause—to believe that a person has shoplifted to make a warrantless arrest when the crime was not committed in the officer's presence. Prior to 1998, section 836 of the Penal Code used "reasonable cause" as the legal standard for judging whether a warrantless arrest was warranted. AB 1767 (Havice), Chapter 699, Statutes of 1998, replaced "reasonable cause" with "probable cause" throughout the section—at the time limited to subdivisions (a) through (d)—amendments the Floor Analysis of AB 1767 described as "a clarifying change." However, that same year, AB 247 (Scott), Chapter 224, Statutes of 1998, added subdivision (e) authorizing a warrantless arrest of person when an officer has reasonable cause to believe that the person was carrying a concealed firearm at an airport. AB 247 retained "reasonable cause" as used prior to the "clarifying change" made by AB 1767. The result is language that does not comport with contemporary legal standards—i.e. probable cause and reasonable suspicion. Confusingly, this bill employs the "reasonable cause" standard despite cross-

referencing subdivision (a), which correctly uses "probable cause."[1]

Opponents argue, "In addition to being unneeded, this bill is unconstitutional. The standard to make an arrest under the California and Federal constitutions requires *probable* cause to believe that a person has engaged in the crime for which they are being arrested. This bill would only require *reasonable* cause (a lower evidentiary standard) to arrest a person for shoplifting. This lower standard does not meet constitutional requirements."

6) **Theft Rates after Proposition 47**: Despite allegations of a recent increase, shoplifting rates in California remain comparatively low. According to PPIC, despite an increase between 2019 and 2022, "Beginning with a statewide overview of the last decade or so, shoplifting remains 8% below pre-pandemic levels[.]" (Lofstrom, Testimony: Crime Data on Retail Theft and Robberies in California, PPIC (Jan. 4, 2024) <https://www.ppic.org/blog/testimony-crime-data-on-retail-theft-and-robberies-in-california/> [last visited Apr. 5, 2024].) Indeed, the shoplifting rate is currently lower than it was every year between 2010 and 2018. (*Ibid.*)

Further, the extent of the problem has been disputed. The California Retailers' Association (CRA) estimated that San Francisco and Oakland alone suffer $3.6 billion per year in losses from organized retail crime. (Hurd, *String of Bay Area high-profile retail robberies brings calls for action*, The Mercury News (Nov. 22, 2021) <https://www.mercurynews.com/2021/11/22/string-of-bay-area-high-profile-retail-robberies-brings-calls-for-action/> [last visited Apr. 4, 2024].)

However, commenters questioned CRA's "back-of-the napkin calculation" based on a misreading of Retail Industry Leaders Association 2020 report on total retail crime, organized or otherwise. (Dean, *Retailers say thefts are at crisis level. The numbers say otherwise*, L.A. Times (Dec. 15, 2021) <https://www.latimes.com/business/story/2021-12-15/organized-retail-theft-crime-rate> [last visited Apr. 4, 2024]; see Mull, *The Great Shoplifting Freak-Out*, The Atlantic (Dec. 23, 2021) <https://www.theatlantic.com/health/archive/2021/12/shoplifting-holiday-theft-panic/621108/> [last visited Apr. 4, 2024].)

Some complaints of retail theft were overstated. For example, in 2021, Walgreens closed five stores in San Francisco purportedly due to retail theft. However, the San Francisco Police Department's data on shoplifting did not support this explanation for the closures. Recently, the chief financial officer of Walgreens acknowledged the shoplifting threat had probably been overstated. The company likely spent too much on security measures and mischaracterized the amount of theft at stores. In fact, shrinkage (the inventory that was bought but couldn't be sold primarily due to shoplifting) actually decreased to around 2.5 to 2.6 percent of sales, compared to 3.5 percent the prior year. (Holpuch, *Walgreens Executive Says Shoplifting Threat Was Overstated*, N.Y. Times (Jan. 6, 2023) <https://www.nytimes.com/2023/01/06/business/walgreens-shoplifting.html> [last visited Apr. 4, 2024]; see also, Selyukh, *Retailers howled about theft last year. Why not now?*, NPR

---

[1] Several other statutes retain the "reasonable cause" standard. For example, a peace officer may arrest a person without a warrant if "the officer has *reasonable cause* to believe that the person has been driving under the influence of an alcoholic beverage" and "the person is involved in a traffic crash." (Veh. Code, § 40300.5, subd. (a) [emphasis added].)

(Mar. 11, 2024) <https://www.npr.org/2024/03/11/1236075589/retail-theft-crime-target-stores> [last visited Apr. 4, 2024], Hiltzik, *How the retail lobby sold a $45-billion whopper about organized shoplifting*, L.A. Times (Dec. 14, 2023) <https://www.latimes.com/business/story/2023-12-14/column-retail-lobby-confesses-it-lied-about-organized-shoplifting-rings> [last visited Apr. 4, 2024].)

7) **Argument in Support**: According to the *California Business Properties Association*, "AB 1990 offers a pragmatic approach to addressing the challenges associated with misdemeanor shoplifting offenses, particularly for items totaling $950 or less. By enabling law enforcement officers to make warrantless arrests based on probable cause, even if they were not present when the crime occurred, this bill strengthens the tools available to deter and address retail theft effectively.

"CBPA is committed to ensuring the safety and security of the business environment in California. The ongoing retail theft crisis not only endangers the well-being of consumers and employees but also imposes significant financial strains on businesses."

8) **Argument in Opposition**: According to *Smart Justice*, "Existing law provides effective procedures for the detention and arrest of shoplifters. Current law provides shopkeepers and their agents the power to detain individuals for shoplifting. Current law also gives shopkeepers and their agents the power to make citizen arrests and turn the arrestee over to the police for processing and criminal prosecution. This applies equally to shoplifting crimes witnessed through video surveillance and those witnessed in person. This procedure has been used effectively for decades in shoplifting cases, and other misdemeanor offenses that do not occur in an officer's presence.

"In addition, in the event that shoplifting is captured on video and the person is not immediately apprehended in the store, current law also provides the district attorney the ability to charge and prosecute the person based on the evidence captured in the video. If a police officer or a district attorney feels that it is appropriate to take the person into custody, they can also seek an arrest warrant.

"In addition to being unneeded, this bill is unconstitutional. The standard to make an arrest under the California and Federal constitutions requires *probable* cause to believe that a person has engaged in the crime for which they are being arrested. This bill would only require *reasonable* cause (a lower evidentiary standard) to arrest a person for shoplifting. This lower standard does not meet constitutional requirements.

"This bill would allow an officer to take any person arrested for shoplifting into physical custody, regardless of whether any of the circumstances which currently provide a basis for physical arrest on a misdemeanor are present. As a general matter, persons arrested for a misdemeanor offense are issued a citation and allowed to remain out of custody to appear in court. This general rule recognizes two facts: (1) jail space is limited and should be used for individuals who pose an immediate safety risk, and (2) custodial arrest has a significant negative impact on the individual. It also reflects our deeply held value that people charged but not convicted of a crime should be presumed innocent and not subject to unnecessary detention.

"There are exceptions to this general rule which allows the officer to take an individual into

physical custody on a misdemeanor. Those exceptions include, among others, the fact that the person is likely to continue to commit the offense or there is reason to believe the person will not show up for court. Existing law provides sufficient protections for public safety by allowing police to take a person into custody on a shoplifting offense (or other misdemeanor offense) if certain circumstances, facts, or conditions are present.

"This bill would mandate that police take a shoplifting arrestee into custody in each and every case, even when there is no concern that the person will reoffend or fail to appear and even if the item stolen is as small as a pack of gum. Shoplifting is a minor charge which does not present a threat of physical danger to members of the community to justify custodial arrests in all cases."

9) **Related Legislation**:

a) AB 1772 (Ramos), would require the DOJ to submit a report to the Legislature regarding the number of retail theft convictions during the COVID-19 State of Emergency, as specified. AB 1772 is pending in this Committee.

b) AB 2943 (Zbur), among other things, would authorize a warrantless arrest for shoplifting not committed in the presence a police officer if the officer had probable cause that the person committed the offense based on either a sworn witness statement or video footage. AB 2943 is scheduled to be heard today in this committee.

c) AB 3209 (Berman), would authorize an officer to arrest a person for a violation of an order prohibiting a person from being present at a retail establishment instead of releasing the person pursuant to a written notice to appear. AB 3209 is scheduled to be heard today in this committee.

d) SB 923 (Archuleta), would revise the definition of shoplifting to require an intent to steal retail property or merchandise and would require a person convicted of petty theft or shoplifting, if the person has two or more prior convictions for specified theft-related offenses, to be punished by imprisonment in the county jail for up to one year, or for 16 months, or two or three years. SB 923 is pending in Senate Public Safety Committee.

e) SB 1416 (Newman), would create sentencing enhancements for selling, exchanging, or returning for value, or attempting to sell, exchange, or return for value, any property acquired through one or more acts of shoplifting, theft, or burglary from a retail business, if the property value exceeds specified amounts and would make these enhancements apply to any person acting in concert with another person to commit these offenses. SB 1416 is pending in Senate Public Safety Committee.

10) **Prior Legislation**:

a) AB 335 (Alanis), of the 2023-2024 Legislative Session, would have required the Little Hoover Commission to submit a report to the Legislature describing the reported retail thefts, as specified. AB 335 was held under submission in Assembly Appropriations Committee.

b) AB 23 (Muratsuchi), of the 2023-2024 Legislative Session, would have decreased the threshold amount for grand theft from $950 to $400. The hearing on AB 23 was canceled the request of the author.

c) AB 75 (Hoover), of the 2023-2024 Legislative Session, would have reinstated the offense of petty theft with a prior as it existed before it was eliminated by Prop. 47 and makes it applicable to the offense of shoplifting created by Prop.47, subject to approval by the voters. AB 75 failed passage in this committee.

d) AB 329 (Ta), would have imposed higher penalties for shoplifting and petty theft if the crime is committed by a non-citizen of the state of California. AB 329 failed passage in this committee.

e) AB 1599 (Kiley), of the 2021-2022 Legislative Session, would have repealed the changes made by Proposition 47, except those related to reducing the penalty for possession of concentrated cannabis, subject to approval of the voters. AB 1599 failed passage in this Committee.

f) AB 1603 (Salas), of the 2021-2022 Legislative Session, would have amended Proposition 47 by reducing the threshold amount for petty theft and shoplifting to be punished as a misdemeanor from $950 to $400. AB 1603 failed passage in this Committee.

g) AB 2390 (Muratsuchi), of the 2021-2022 Legislative Session, would have amended Proposition 47 by authorizing the aggregation of the value of property from one or more acts of theft or shoplifting, as specified. AB 2390 failed passage in this Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Association of Highway Patrolmen
California Business Properties Association
California Correctional Supervisors Organization, INC.
California District Attorneys Association
California Hispanic Chamber of Commerce
California Police Chiefs Association
California State Sheriffs' Association
Chief Probation Officers' of California (CPOC)
League of California Cities
Peace Officers Research Association of California (PORAC)
Whittier Blvd Merchant Association of East Los Angeles

1 Private Individual

Opposition

A New Way of Life Re-entry Project
Aouon Orange County

California Immigrant Policy Center
California Public Defenders Association
Californians for Safety and Justice
Californians United for A Responsible Budget
Center for Empowering Refugees and Immigrants
Ella Baker Center for Human Rights
Homies Unidos INC
Immigrant Legal Resource Center
Initiate Justice
Initiate Justice Action
LA Voice
Smart Justice California, a Project of Tides Advocacy
Vera Institute of Justice
Young Women's Freedom Center

Analysis Prepared by: Andrew Ironside / PUB. S. / (916) 319-3744

Date of Hearing: April 9, 2024
Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2042 (Jackson) – As Amended March 21, 2024

SUMMARY: Requires the Commission on Peace Officer Standards and Training (POST) to develop standards and standardized training guidelines for use of canines by law enforcement. Specifically, **this bill**:

1) Requires POST, on or before January 1, 2026, to develop standards for the use of canines by law enforcement.

2) Requires, at a minimum, the standards to establish guidelines based upon established best practices for all of the following:

   a) The use of unleashed police canines to arrest or apprehend persons being pursued for crimes of violence, as defined, and those being pursued for nonviolent crimes;

   b) The use of a police canine for crowd control at an assembly, protest, or demonstration; and,

   c) Procedures to minimize harm to innocent bystanders by an unleashed police canine.

3) Authorizes POST to amend the standards to include greater restrictions on the use of canines by law enforcement.

4) Requires a law enforcement agency, on or before January 1, 2027, to adopt a policy for the use of canines by the agency that, at a minimum, complies with POST standards, as specified.

5) Requires POST, on or before January 1, 2026, to develop standardized training guidelines for all law enforcement officers in the use of canines by law enforcement.

6) Requires POST training guidelines to include, at a minimum, all of the following:

   a) An explanation of POST standards for the use of canines by law enforcement, as specified;

   b) A description of the minimum standards for training canines prior to their use by law enforcement; and,

   c) A description of the minimum standards for training canine handlers before employing canines in the line of duty.

7) Requires a law enforcement agency, on or before January 1, 2027, to require regular and periodic training for all canines and canine handlers that, at a minimum, covers the POST canine use standards, as specified.

8) Defines "crime of violence" as a felony involving the infliction or threatened infliction of serious bodily injury or death.

EXISTING LAW:

1) Establishes POST. (Pen. Code, § 13500, et seq.)

2) Provides that POST has, among others, the power to develop and implement programs to increase the effectiveness of law enforcement and, when those programs involve training and education courses, to cooperate with and secure the cooperation of state-level peace officers, agencies, and bodies having jurisdiction over systems of public higher education in continuing the development of college-level training and education programs. (Pen. Code, § 13500.3, subd. (e).)

3) Requires POST to submit annually a report to the Legislature on the overall effectiveness of any additional funding for improving peace officer training, including the number of peace officers trained by law enforcement agency, by course, and by how the training was delivered, as well as the training provided and the descriptions of the training. (Pen. Code, § 13500.5, subd. (a) & (b).)

4) Authorizes a peace officer who has reasonable cause to believe that a person to be arrested has committed a public offense to use objectively reasonable force to effect the arrest, to prevent escape, or to overcome resistance. (Pen. Code, § 835a, subd. (b).)

5) Authorizes a peace officer to use deadly force when the officer believes, based on the totality of the circumstances, that such force is necessary for either of the following reasons:

   a) To defend against an imminent threat of death or serious bodily injury to the officer or to another person; or

   b) To apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended. Where feasible, a peace officer shall, prior to the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts. (Pen. Code, § 835a, subd. (c)(1)(A) & (B).)

6) Prohibits a peace officer from using deadly force against a person based on the danger that person poses to themselves, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person. (Pen. Code, § 835a, subd. (c)(2).)

7) Defines "deadly force" as any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm. (Pen. Code, §

835a, subd. (e)(1).)

8) Provides that an arrest is made by an actual restraint of the person, or by submission to the custody of an officer, and that the person arrested may be subjected to such restraint as is reasonable for their arrest and detention. (Pen. Code, § 835.)

9) Permits a peace officer who is authorized to make an arrest and who has stated their intention to do so, to use all necessary means to effect the arrest if the person to be arrested either flees or forcibly resists. (Pen. Code, § 843.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "There currently isn't a statewide policy that governs the use of police dogs. This bill seeks to fix that."

2) **Police Canine Use and Deployment Policies:** Law enforcement agencies view the use of police canines as indispensable to protecting the public and law enforcement personnel. According the Los Angeles County Sheriff's Department,

> The prompt and proper utilization of a trained canine team has proven to be a valuable use of a unique resource in law enforcement. When properly used, a canine team greatly increases the degree of safety to citizens within a contained search area, enhances individual officer safety, significantly increases the likelihood of suspect apprehension, and dramatically reduces the amount of time necessary to conduct a search.

(Field Operations Direction (FOD): 86-037 Canine Deployment, Search and Force Policy, at p. 2; see also VanSickle et al., *When Police Violence Is a Dog Bite*, The Marshall Project (Oct. 2, 2020) <https://www.themarshallproject.org/2020/10/02/when-police-violence-is-a-dog-bite> [last viewed Apr. 4, 2024] [a joint investigation with USA Today, AL.com, and the Invisible Institute] and Kaste, *Videos Reveal A Close, Gory View of Police Dog Bites*, NPR (Nov. 20, 2017) <https://www.npr.org/2017/11/20/563973584/videos-reveal-a-close-gory-view-of-police-dog-bites> [last visited Apr. 4, 2024].) Despite their importance to law enforcement, the state has offered very little direction to local law enforcement on the use and deployment of police canines.

POST has minimum training and performance standards for police canines. According to POST, "Patrol K-9 teams should meet minimum standards with regards to obedience, search, apprehension, and handler protection." (POST Law Enforcement K-9 Guidelines, p. xiii <https://post.ca.gov/Portals/0/post_docs/publications/K-9.pdf> [last viewed Apr. 4, 2024].) POST apprehension guidelines require, "[u]nder the direction of the handler and while off leash, the K-9 will pursue and apprehend a person acting as a 'suspect' (agitator/decoy)." It adds, "The K-9 team will demonstrate a pursuit and call off prior to apprehension. On command from the handler, the K-9 will pursue and apprehend the agitator/decoy. From a reasonable distance and on verbal command only, the K-9 will cease the apprehension." (*Id.* at p. 2.) POST detection guidelines advise "[t]he evaluator [to] be fully apprised of the pertinent agency policies and regulations prior to commencement of the exercise. The 'correct' response or reach of the handler, the dog, or the two acting together, may differ

from agency to agency, based on prevailing agency policy." (*Id.* at 5.) The detection exercise duplicates the apprehension procedure, "except in [the detection] scenario the agitator/decoy will not stop and the handler will send the dog to pursue, contact, and apprehend the agitator decoy." (*Ibid.*) The exercise requires the police canine to "contact and control the agitator/decoy until called off by the handler." (*Ibid.*) "During the apprehension and on verbal command only from the handler, the dog will disengage the contact." (*Ibid.*)

These limited training and guidelines leave local law enforcement agencies to come up with their own use and deployment practices and procedures. Some agencies have limited the use of police canines. The Oakland Police Department, for example, provides that a police canine may be used "[t]o search for and assist in the apprehension of criminal suspects when there is reasonable suspicion to believe they committed a *forcible violent crime*, burglary, or a weapon-related offense"; or "[t]o pursue and apprehend criminal suspects who are attempting to actively evade arrest" for a forcible violent crime, burglary, or a weapon-related offense." (Office of Chief of Police, Oakland Police Department, Revised DGO K-9, Department Canine Program (Aug. 1, 2006) p. 1 <http://www2.oaklandnet.com/oakca1/groups/police/documents/webcontent/oak059998.pdf> [last visited Apr. 4, 2024] [emphasis in original].)

Similarly, the Los Angeles County Sheriff's Department provides for police canine deployment for "[s]earches for felony suspects, or armed misdemeanor suspects, who are wanted for SERIOUS crimes and the circumstances of the situation presents a clear danger to deputy personnel who would otherwise conduct a search without a canine." (FOD: 86-037, *supra*, at p. 2 [emphasis in original].) The department's guidelines further provide, "Searches for suspects wanted for Grand Theft Auto shall be limited to those who are reasonably believed to be adults, and are reasonably believed to be the driver of a confirmed stolen vehicle." (*Ibid.*) Despite these limitations, the Special Counsel to the department recommended "winnowing the list of crimes for which canines should be used." (33rd Semiannual Report of Special Counsel, Los Angeles County Sheriff's Department (Sept. 2013) p. 14 <https://scvtv.com/pdf/lasd100713.pdf> [last visited Apr. 4, 2024].)

This bill would require POST to establish guidelines based upon established best practices for the use of unleashed police canines to arrest or apprehend persons being pursued for crimes of violence and those being pursued for nonviolent crimes; the use of a police canine for crowd control at an assembly, protest, or demonstration; and, procedures to minimize harm to innocent bystanders by an unleashed police canine. This bill would also require POST to establish training guidelines to include, at a minimum, an explanation of POST standards for the use of canines by law enforcement; a description of the minimum standards for training canines prior to their use by law enforcement; and a description of the minimum standards for training canine handlers before employing canines in the line of duty.

3) **Lack of Comprehensive Data:** Efforts to examine the effect and scope of police canine use by law enforcement agencies are stymied by a familiar problem: insufficient data. There currently is no statewide data on the use of police canines. No entity is charged with collecting information that would help contextualize existing practices.

For example, supporters and opponents of the use of police canines by law enforcement dispute the effectiveness of call-off procedures. Police dog-handlers "point out that a dog can be called back after it's been unleashed — unlike the deployment of a Taser or the firing of a

gun." (Kaste, *supra.*) Indeed, the Los Angeles County Sheriff's Department reasonably requires a handler to "call off the dog at the first moment the canine can be safely released." (FOD: 86-037, *supra*, at p. 2.)

But opponents point to instances where police canines do not obey call-off commands by their handlers. One report states, "Although training experts said dogs should release a person after a verbal command, we found dozens of cases where handlers had to yank dogs off, hit them on the head, choke them or use shock collars." (VanSickle et al., *supra.*) According to another, "Privately, handlers often talk about having trouble getting a dog to 'out,' or open its jaws. It's a concern that comes up on discussion boards, and in this K9 training video." (Kaste, *supra.*)

Law enforcement does not appear to collect data on the frequency with which police canines obey call-off commands. Some agencies require officers to document how long a bite lasted, but that does not appear to be a consistent practice throughout the state. (See FOD: 86-037, *supra*, at p. 2 [providing that "[w]ithout exception, a reference to the duration of the canine's contact with a suspect shall be included in the handler's supplemental report"].)

Would robust data collection and comparative analyses of existing agencies' protocols assist in the development of policies and procedure that would limit the use of police canines to a handful of cases when their use is most justifiable?

4) **Department of Justice Data on Use of Force Incidents Involving Police Canines:** According to data collected by the DOJ's Criminal Justice Statistics Center, law enforcement used a police canine in a use of force incident that resulted in serious bodily injury or death 76 times in 2020, accounting for 10.2% of the total such use of force incidents by law enforcement.[1] (DOJ, Use of Force Incident Reporting (2021) p. 30 <https://data-openjustice.doj.ca.gov/sites/default/files/2022-08/USE OF FORCE 2020.pdf> [last visited Apr. 1, 2024].) Of those 76 incidents, 49 were against persons of color—9 Black individuals, 33 Hispanic individuals, 3 Asian/Pacific Islander individuals, and 2 multi-race individuals. (*Id.* at 34 [2 individuals are identified as "other"].) In 29 of the 76 incidents, the officer did not perceive that the civilian was armed. (*Id.* at 37.) The civilian was later confirmed armed in 24 of the 76 of incidents. (*Id.* at 39.) In two incidents, the civilian did not resist. (*Id.* at 40.)

According to the raw data on use of force incidents in 2020, 14 use of force incidents involving canine contact also involved the discharge of a firearm by the officer, six of which resulted in fatalities and three of which resulted in critical or serious injuries. Of those 14 incidents involving the use of both a canine and a firearm, eight were against people of color. (2020 URSUS Use of Force Data.)

In 2021, law enforcement used a canine in a use of force incident that resulted in serious bodily injury or death 77 times, or 11.7% of the total use of force incidents by law enforcement against a civilian. (DOJ, Use of Force Incident Reporting (2021) p. 31 <https://data-openjustice.doj.ca.gov/sites/default/files/2022-08/USE OF FORCE 2021.pdf>

---

[1] The DOJ's Use of Force Incident Reporting contains only incidents where use of force resulted in serious bodily injury or death. DOJ, Use of Force Incident Reporting (2021) p. 1 <https://data-openjustice.doj.ca.gov/sites/default/files/2022-08/USE OF FORCE 2020.pdf> [last visited Apr. 4, 2024].)

[last visited Apr. 1, 2024].) Of those 77 incidents, 50 were against persons of color—13 Black individuals, 36 Hispanic individuals, and 1 American Indian individual. (*Id.* at 35.) In 37 of the 77 incidents, the officer did not perceive that the civilian was armed. (*Id.* at 38.) The civilian was later confirmed armed in 27 of the 77 incidents. (*Id.* at 39.) In five of those incidents the civilian did not resist. (*Id.* at 40.)

There were 63 use of force incidents reported to DOJ in 2022, which amounted to 10.3% of the total use of force incidents. (DOJ, Use of Force Incident Reporting (2022) p. 38 <https://data-openjustice.doj.ca.gov/sites/default/files/2023-06/USE OF FORCE 2022f.pdf> [last visited Apr. 1, 2024].) Arrests were made in 62 of the 63 incidents, and 49 of the 63 incidents were against people of color—11 Black individuals, 36 Hispanic individuals, and 2 Asian/Pacific Islander individuals. (*Id.* at p. 32.) The officer did not perceive the individual to be armed in 22 of the 63 incidents. (*Id.* at p. 35.) The civilian was later confirmed to be armed in 26 of the 63 incidents. (*Id.* at p. 36.)

5) **Past Use of Police Dogs:** In July 2022, the California Task Force to Study and Develop Reparations Proposals for African Americans issued an interim report documenting the history of, among other things, the enslavement, racial terror, political disenfranchisement, and mistreatment of African Americans in the justice system. The report briefly discussed the role of police dogs in that history:

> Slave patrols also used dogs to attack enslaved people by biting them but also to instill fear, and used bloodhounds to track down enslaved people. Freedom seekers learned to run without shoes and put black pepper in their socks to make the slave patrols' bloodhounds sneeze and throw them off their scent.
>
> Much like slave patrols, police have continued to use dogs against African Americans in the 20th century through the present. Police used dogs against demonstrators during the civil rights movement. The United States Department of Justice noted in its 2015 report that the Ferguson Police Department "exclusively set their dogs against black individuals, often in cases where doing so was not justified by the danger presented." In Baton Rouge, Louisiana, police dogs bit at least 146 people from 2017 to 2019 and almost all of whom were Black…
>
> In the 1980s, the Los Angeles Police Department, which is the largest police department in California and one of the largest in the country, referred to Black suspects as "dog biscuits." Victims of police dogs sued and alleged that the department disproportionately used dogs in minority neighborhoods, which resulted in police dogs inflicting 90 percent of their reported bites on African Americans or Latinos. In 2013, the Special Counsel to the Los Angeles County Sheriff's Department, which is the largest sheriff's department in California and the country, found that African Americans and Latinos comprised 89 percent of the total individuals who were bitten by the department's dogs from 2004 to 2012. During the same time, the Special Counsel found that the number of African Americans that police dogs bit increased 33 percent.

(California Task Force to Study and Develop Reparations Proposals for African Americans, Interim Report (June 2022) p. 376, 380 < https://oag.ca.gov/system/files/media/ab3121-reparations-interim-report-2022.pdf> [last visited Apr. 4, 2024].)

There remain "stark racial disparities in police interactions and use of force, particularly for Black people." (Premkumar et al., *Police Use of Force and Misconduct in California*, PPIC (Oct. 2021) <https://www.ppic.org/publication/police-use-of-force-and-misconduct-in-california/> [last visited Apr. 4, 2024].)

6) **Police Canine Bites:** Given the history and contemporary uses of police canines by law enforcement, the question is whether this particular law enforcement tool is unique.

Police canines are considered less than lethal. Law enforcement hopes that the presence of a canine will de-escalate a situation by intimidating the sought individual with the threat of a canine attack. The fear is supposed to make the person submit. If they do not surrender, and occasionally even when they do, law enforcement releases the canine who subdues the individual by biting them.

According to canine handlers, a police canine's bite should not cause serious injury. (VanSickle et al., *supra.*) However, as one report observed, "police videos shows some officers using biting dogs against people who show minimal threat to officers, and a degree of violence that would be unacceptable if inflicted directly by the officers." (Kaste, *supra.*).) A police canine's bite causes more damage than a domestic dog bite. According to one study, "Police dog bite victims were usually bitten multiple times…were bitten more often in the head, neck, chest, and flank. They were hospitalized more often, underwent more operations and had more invasive diagnostic tests." (https://www.sciencedirect.com/science/article/pii/S1572346106000596.)

Indeed, police canine bites are "strong enough to punch through sheet metal" and have been compared to shark attacks. (VanSickle et al., *supra.*) One article argued that "the police canine needs to be reconceptualized as the physical equivalent of a police baton with spikes three centimeters in length, the approximate length of German Shepherd teeth (i.e., a spiked impact weapon capable of sustained puncturing, compression-pressure, pulling and tearing)." (McCauley et al., *The Police Canine Bite: Force, Injury, and Liability*, The Center for Research in Criminology (Nov. 2008) <k9-crc-report-11-08-final-for-pds_1_.pdf (iup.edu)> [last visited Apr. 4, 2024].) By comparison, for the purpose of DOJ use of force investigations, a deadly weapon includes a billy or blackjack. (Gov. Code, § 12525.3, subd. (a)(1).)

Moreover, individuals suspected of a crime are not the only ones injured by police canines. Occasionally, a police canine bites an individual who is not a suspect of a crime. (VanSickle et al., *supra.*) Sometimes, a law enforcement officer is the victim. According to NPR, "In 2016, California's workers compensation system recorded 190 law enforcement officers reporting on-the-job injuries involving police dogs." (Kaste, *supra.*)

7) **Limitations on Use of Force by Law Enforcement:** The legislature has acted to limit the authority of law enforcement to use specific types of force. Following the death of George Floyd in Minneapolis, MN, California banned the use of carotid restraint control holds by law enforcement. (Gov. Code, § 7286.5; AB 96 (Gipson), Chapter 324, Statutes of 2020.) According to the DOJ's Use of Force Incident Reporting data, these holds resulted in serious bodily injury or death at similar rates as police canines, and the racial disparities among those who suffered the injuries mirrored those of police canines. For example, of the 60 carotid restraint hold incidents in the year before the ban, 37 were used on people of color (DOJ, Use

of Force Incident Reporting (2019) p. 34 <https://data-openjustice.doj.ca.gov/sites/default/files/2022-08/USE OF FORCE 2019.pdf> [last visited Apr. 1, 2024].)

8) **Argument in Support**: None submitted.

9) **Argument in Opposition**: According to *ACLU California Action*, "As you know, the practice of training and using dogs to attack people dates to slave patrols, and police agencies continue to disproportionately use attack dogs against our Black and Latino communities. Statewide, two-thirds of Californians severely injured by police dogs are people of color. Notably, many of the attacks by police dogs are perpetrated against people who are unarmed, do not pose a danger to officers or others, are suspected of minor crimes or no crime at all, and often against people who are experiencing a behavioral health crisis. Their use is outdated and dangerous – with the potential of severe, life-altering, and deadly consequences.

"We know that without clear restrictions written into state law, AB 2042 will do no more than endorse the status quo and usher in objectively weak rules for this dangerous practice, perpetuating standards far below the federal standards for the limited permissible use of police attack dogs, and that do not mirror best practices from other law enforcement agencies. We have observed police special interest groups such as Lexipol and the Peace Officers Research Association of California (PORAC), among others, manipulate the outcome of POST's use of force policy-making process in ways that completely undermined both public safety and the Legislature's intent. AB 2042's delegation of authority to set canine use of force standards to POST, without meaningful guidelines or limitations, directly facilitates police special interests' efforts to perpetuate the status quo. Also of concern is the increase to POST's budget in light of potential cuts to critical social safety net programs and other critical funding. As such, we respectfully oppose AB 2042 unless amended.

"AB 2042 should be amended to, at a minimum, include clear and strict restrictions on the use of police attack dogs.

"Instead of setting clear and strict restrictions on the use of police attack dogs, AB 2042 grants POST unfettered power to develop regulations for the use of police dogs even in situations where your constituents and other Californians fundamentally believe police attack dogs should never be used. Despite what law enforcement tells us, data and public records show that police most commonly use attack dogs to inflict severe injuries on people who pose no serious danger to officers or to others. The vast majority of Californians severely injured by police attack dogs are not armed with any weapon, according to data reported by police agencies to the state Department of Justice. A news investigation analyzing the same official data found that many Californians seriously injured by police attack dogs were not combative or even running from "police but reported to be only 'passively not complying.'" A canine attack - which may lead to serious and often permanent damage to nerves, muscles, and bones, and even loss of organs and limbs - is *not* proportional as a response to any movement a person may make, or any form of physical or threatened resistance. Such an attack would obviously be inappropriate in response to a person merely flinching or cowering, or verbally or passively resisting in a manner that poses no threat to the officer or another person, or unable to respond to police command and in need of medical care because the individual has a mental or physical disability or is experiencing a behavioral health crisis. Given the potential for harm by police attack dogs, AB 2042 must be amended to, at a

minimum, prevent police dogs from being used for 1) non-violent offenses, 2) crowd control at an assembly, protest, or demonstration, and 3) when a person does not present an imminent threat of death or serious bodily injury to others or the officer.

"AB 2042 must provide clear and strict limitations on when a police attack dog can be deployed to arrest or apprehend a person. These limitations must include, at a minimum, all the following:

1. The person is being pursued for a crime of violence (i.e., a felony involving the infliction or threatened infliction of serious bodily injury or death).

2. Canine handler must remain within visual and auditory range of the canine;

3. Canine handler shall have approval from a canine supervisor (sergeant or higher) prior to deployment;

4. Canine handler shall issue three loud and clear warnings capable of being heard throughout the area of deployment that a canine will be deployed;

5. Canine handler shall provide a reasonable amount of time after the warning described in number 3 to enable uninvolved members of the public and other officers to reach a safe distance from the area of deployment, and the person being pursued to yield to the officer's commands prior to deployment;

6. A police canine shall not be used for crowd control at any assembly, protest, or demonstration;

7. A police canine shall not be used to bite in any circumstance unless there is an imminent threat of death or serious bodily injury to the officer or another person by the person against whom the canine is used, and alternatives to force could not reasonably be expected to defend against this threat.

"AB 2042 should be amended to include that corresponding training regarding the use of police attack dogs shall be consistent with, at a minimum, all of the limitations set forth immediately above.

"The delegation to POST to establish regulations for police attack dogs will certainly lead to weak standards, which will not safeguard the rights or well-being of our community.

"Although the Legislature has regularly delegated to POST the responsibility to develop policies related to officer use of force and other agency practices, POST's actions over the past several years have been inconsistent with the spirit, intent, and sometimes plain language of the law.

"For example, AB 846 (Burke, 2020) required POST to update their regulations and screening material for prospective police officers to help identify implicit or explicit bias. Instead, POST rejected public comment recommendations from the Racial and Identity Profiling Advisory (RIPA) Board, and blatantly refused to implement the spirit and intent of

the legislature despite RIPA highlighting the Legislature's explicit intent. Only after the Office of Administrative Law rejected POST's regulations because POST did not meaningfully respond to the RIPA Board's comments, did POST amend its regulations to comply.

"The Legislature also directed POST to develop guidelines and training to address peace officer bias. POST's existing training curricula do not train officers based on the existing definitions of bias enacted by the Legislature and instead uses a lower standard than California law. Additionally, the Legislature in 2017 directed POST to "develop and disseminate guidelines . . . [for] effective, noncombative methods of carrying out law enforcement duties in a diverse racial, identity, and cultural environment," which agencies can use to develop their own policies implementing RIPA. POST has never created these guidelines, despite the recommendation by the RIPA Board that it complete this duty, and numerous findings of this failure in the RIPA reports. While POST has finally agreed to satisfy this obligation, it has not yet done so.

"Senate Bill 2 (Bradford, 2021) created the police decertification process and delegated to POST the duty to develop regulations defining "serious misconduct" that would render an individual ineligible to work as a peace officer in California. The Legislature set a floor for minimum conduct that would satisfy this definition and authorized POST to expand those grounds–yet POST's proposed regulations either restate this minimum or, in some cases, attempt to undercut the statutory language by permitting conduct that the Legislature determined categorically rendered an individual unfit to serve as an officer.

"POST should not be entrusted to draft regulations to safeguard the rights and safety of our community against the use of police attack dogs because it has allowed police special interest groups, such as Lexipol and the PORAC, to undermine use of force policies and trainings in ways that endanger public safety. For example, POST caved to the demands of police special interest groups (e.g., PORAC and California Police Chiefs Association) who objected to an AB 392 training video. Records indicate POST discussed the content of the training with these opponents of the new law behind closed doors and agreed to their demands remove portions of the training, then completely de-published the training, and only republished a revised, watered-down version after these special interest groups provided their stamp of approval. Police special interest groups have continuously employed aggressive efforts to limit and undermine POST regulations, making it plain that legislation granting POST the authority to regulate the use of police attack dogs would fare no differently. For these reasons, strong statewide limitations on the use of attack dogs by California's police agencies must be explicitly legislated in clear statutory standards.

"Funding POST to develop standards and training that would be more effectively and efficiently set by statute is not a fiscally sound approach.

"POST's budget is bloated, and the current allocation of funds to it is disproportionate when compared to other critical areas like education, healthcare, and social services. POST's proposed budget for training alone, for fiscal year 2024-2025, is more than half (57%) of its total budget. Given a potential fiscal crisis in California that will likely require significant cuts to critical social safety net programs, we are compelled to oppose policies that would direct more funding to law enforcement when people are struggling to access affordable housing, quality education, community-based mental health and substance use services, and

low or no-cost healthcare.

"Moreover, the Little Hoover Commission (LHC), the Legislature's own oversight agency, has called into serious doubt the efficacy of POST trainings. In its 2021 report, LHC found that California "spends ***millions of dollars*** on law enforcement training each year, yet there is ***very little evidence*** to demonstrate which types of training actually achieve intended goals and positively impact officer behavior in the field – and which do not." LHC's report also explained the importance of assessing and improving law enforcement training courses *prior* to spending more taxpayer dollars on training that may have limited effectiveness. The California State Auditor has also raised similar concerns about POST training, further raising concerns about the effectiveness of training being delivered to officers. Similarly, the RIPA Board raised concerns in its 2022 and 2023 Annual Reports. AB 2042 would require a convoluted, costly process for POST to create regulations for the use of police attack dogs, when instead clear and strict limitations on the use of police attack dogs could be set simply, clearly, and effectively by statute.

"We are deeply concerned with the approach employed in AB 2042, which cedes the authority of regulating the use of police attack dogs to POST. Conspicuously absent are clear and strict statutory limitations."

10) **Related Legislation**: AB 3241 (Pacheco), would establish minimum standards for the use of a canine by law enforcement to search for and/or apprehend a suspect; requires POST to develop minimum standards for the use of canines by law enforcement; and requires each law enforcement agency to publish on its website a report on the use of canines by the agency.

11) **Prior Legislation**:

a) AB 742 (Jackson), of the 2023-2024 Legislative Session, would have prohibited the use of canines by peace officers for arrest and apprehension, or in any circumstances to bite a person, but permits their use of canines for search and rescue, explosives detection, and narcotics detection. AB 742 was ordered to the inactive file in the Assembly.

b) AB 1196 (Gibson), Chapter 324, Statutes of 2020, prohibited a law enforcement agency for authorizing the use of a carotid restraint or a choke hold, as defined, and further prohibits techniques or transport methods that involve a substantial risk of positional asphyxia, as defined.

REGISTERED SUPPORT / OPPOSITION:

Support

None

Opposition

Arcadia Police Officers' Association
Association of Orange County Deputy Sheriffs
Burbank Police Officers' Association

California Association of Highway Patrolmen
California Coalition of School Safety Professionals
California Fish and Game Warden Supervisors and Managers Association
California Fraternal Order of Police
California Narcotic Officers' Association
California Police Chiefs Association
California Public Defenders Association
California Reserve Peace Officers Association
California State Sheriffs' Association
California Statewide Law Enforcement Association
California Wildlife Officers Foundation
Claremont Police Officers Association
Corona Police Officers Association
Culver City Police Officers' Association
Deputy Sheriffs' Association of Monterey County
Fullerton Police Officers' Association
Legal Services for Prisoners With Children
Long Beach Police Officers Association
Los Angeles County Professional Peace Officers Association
Los Angeles County Sheriff's Department
Los Angeles Police Protective League
Los Angeles School Police Management Association
Los Angeles School Police Officers Association
Murrieta Police Officers' Association
Newport Beach Police Association
Novato Police Officers Association
Palos Verdes Police Officers Association
Peace Officers Research Association of California (PORAC)
Placer County Deputy Sheriffs' Association
Pomona Police Officers' Association
Riverside Police Officers Association
Riverside Sheriffs' Association
Sacramento County Deputy Sheriffs' Association
San Bernardino County Sheriff's Employees' Benefit Association
Santa Ana Police Officers Association
Upland Police Officers Association
ACLU California Action
Asian Law Alliance
Californians United for A Responsible Budget
Care First Kern
Initiate Justice Action
Milpa (motivating Individual Leadership for Public Advancement)
National Police Accountability Project
Pacific Juvenile Defender Center
San Francisco Public Defender

Analysis Prepared by: Andrew Ironside / PUB. S. / (916) 319-3744

Date of Hearing: April 9, 2024
Counsel: Kimberly Horiuchi

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2045 (Hoover) – As Introduced February 1, 2024

As Proposed to be Amended in Committee

SUMMARY: Adds fentanyl to the list of controlled substance for which a defendant may be sentenced to an additional period of incarceration for using, inducing, or employing a minor to transport or possess specified controlled substances. Specifically, **this bill**:

1) Adds fentanyl to the one year enhancement for any person over the age of 18 convicted of using, inducing, or employing a person under the age of 18 to transport or possess a specified controlled substance on the grounds of any church, synagogue, day care, or playground.

2) Adds fentanyl to the two year enhancement for any person over the age of 18 convicted of using, inducing, or employing a person under the age of 18 to transport or possess a specified controlled substance within 1,000 feet of any public or private school during hours when the school is open or minors are present.

3) Specifies that if the offense of using a minor to transport or sell a controlled substance involves fentanyl or a fentanyl analog, the person must have knowledge that the specific controlled substances involved was fentanyl or a fentanyl analog.

EXISTING LAW:

1) Provides that any person 18 years of age or over who is convicted of a violation of inducing or using a minor to sell or transport controlled substances, in addition to the punishment imposed for that conviction, shall receive an additional punishment as follows:

   a) If the offense involved heroin, cocaine, cocaine base, or any analog of these substances and occurred ***upon the grounds of,*** or within, a church or synagogue, a playground, a public or private youth center, a child day care facility, or a public swimming pool, during hours in which the facility is open for business, classes, or school-related programs, or at any time when minors are using the facility, the defendant shall, as a full and separately served enhancement to any other enhancement, as specified, be punished by imprisonment in the state prison for one year.

   b) If the offense involved heroin, cocaine, cocaine base, or any analog of these substances and occurred upon, ***or within 1,000 feet of, the grounds of any public or private elementary, vocational, junior high, or high school***, during hours that the school is open for classes or school-related programs, or at any time when minors are using the facility where the offense occurs, the defendant shall, as a full and separately served enhancement to any other enhancement, as specified, be punished by imprisonment in the

state prison for two years.

c) If the offense involved a minor who is at least four years younger than the defendant, the defendant shall, as a full and separately served enhancement to any other enhancement provided in this subdivision, be punished by imprisonment in the state prison for one, two, or three years, at the discretion of the court. (Health & Saf. Code, § 11353.1, subd. (a)(1-3).)

2) Makes it unlawful for a person to possess for sale, or purchase for purpose of sale, several specified controlled substances, including heroin, cocaine, cocaine base, opium, and fentanyl. Provides that the punishment is imprisonment in the county jail for two, three, or four years. (Health & Saf. Code, §§ 11351, 11351.5.)

3) Makes it unlawful for a person to transport, import, sell, furnish, administer, or give away, or offer or attempt to transport, import, sell, furnish, administer, or give away several specified controlled substances, including cocaine, cocaine base, heroin, and fentanyl. Provides that the punishment is imprisonment in the county jail for three, four, or five years. Provides that the punishment for transporting those specified controlled substances within the state between noncontiguous counties is imprisonment in the county jail for three, six, or nine years. (Health & Saf. Code, § 11352.)

4) Makes it unlawful to possess for sale several specified controlled substances, including methamphetamine, amphetamine, and GHB. Provides that the punishment is imprisonment in the county jail for 16 months, two years, or three years. (Health & Saf. Code, § 11378.)

5) Makes it unlawful for a person to transport, import into this state, sell, furnish, administer, or give away, or offer to transport, import into this state, sell, furnish, administer, or give away, or attempt to import into this state or transport specified controlled substances, including methamphetamine, amphetamine, and GHB. Provides that the punishment is imprisonment in the county jail for two, three, or four years. Provides that the punishment for transporting those specified controlled substances within the state between noncontiguous counties is imprisonment in the county jail for three, six, or nine years. (Health & Saf. Code, § 11379.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement:** According to the author: "The opioid epidemic has worsened in recent years with fentanyl being the primary driver. In fact, according to the CDC, fentanyl is now the number one cause of death for Americans ages 18-45, surpassing suicide and car accident-related deaths. This is partly attributed to how fentanyl is being sold. It is not labeled by name and is instead often used to lace cocaine, marijuana and other street drugs. There have been many cases where teens and young adults thought they were purchasing one drug and then overdose because fentanyl was in it, making it that much more lethal and dangerous. Given that fentanyl is 50 times stronger than heroin and 100 times stronger than morphine, this bill is necessary to hold drug traffickers accountable for selling fentanyl, especially when they target are schoolchildren. This bill simply updates California law to reflect the growing opioid crisis by ensuring that fentanyl is classified in the same category as other illicit drugs by increasing penalties for fentanyl dealers who specifically target our

children at school.

2) **Fentanyl in California:** In California, the number of deaths involving fentanyl has increased significantly. Between 2012 and 2018, fentanyl overdose deaths increased by more than 800%—from 82 to 786. (OPI, *supra.*) In 2020, there were 3,946 deaths related to fentanyl overdoses. (CDPH, California Overdose Surveillance Dashboard.)[1]

   Criminal justice experts and commentators have noted that, with regard to sentencing, "A key question for policy development regards whether enhanced sanctions or an enhanced possibility of being apprehended provide any additional deterrent benefits. Research to date generally indicates that increases in the *certainty* of punishment, as opposed to the *severity* of punishment, are more likely to produce deterrent benefits."[2] Sentencing enhancements for drug offenses specifically may have very little general deterrent effect. According to the National Research Council:

   > For several categories of offenders, an incapacitation strategy of crime prevention can misfire because most or all of those sent to prison are rapidly replaced in the criminal networks in which they participate. Street-level drug trafficking is the paradigm case. Drug dealing is part of a complex illegal market with low barriers to entry. Net earnings are low, and probabilities of eventual arrest and imprisonment are high… Drug policy research has nonetheless shown consistently that arrested dealers are quickly replaced by new recruits….
   >
   > Despite the risks of drug dealing and the low average profits, many young disadvantaged people with little social capital and limited life chances sell drugs on street corners because it appears to present opportunities not otherwise available. However, [they] … overestimate the benefits of that activity and underestimate the risks. This perception is compounded by peer influences, social pressures, and deviant role models provided by successful dealers who live affluent lives and… avoid arrest. Similar analyses apply to members of deviant youth groups and gangs: as members … are arrested and removed from circulation, others take their place. Arrests and imprisonments of easily replaceable offenders create illicit "opportunities" for others. (Cmte. On Causes and Consequence of High Rates of Incarceration, National Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences (2014) p. 146.)

3) **Drug-Related Sentencing Enhancements:** One of the most common criticisms of drug-related sentencing enhancements is that it results in significant racial disparities and is most often used against users hailing largely from underserved communities. However, a great deal of statistical research has been conducted since the 2000s to determine the efficacy of drug-free school zone laws and there appears to be scant evidence that such laws reduce crime or increase child safety.

---

[1] Located at <https://skylab.cdph.ca.gov/ ODdash/> [last visited April 5, 2024].).
[2] (http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf.)

Alternatively, the Public Policy Institute in June 2020 found that the laws enacted over the past ten years that reformed California's drug sentencing practices actually decreased racial disparities in sentencing.

> "… After Prop 47 passed in November 2014, the number of bookings quickly dropped by 10.4 percent. As a result, California's use of pretrial detention has declined. Prop 47 also led to notable decreases in racial/ethnic disparities in arrests and bookings. The African American–white arrest rate gap narrowed by about 5.9 percent, while the African American–white booking rate gap shrank by about 8.2 percent. Prop 47 has not meaningfully changed the disparities in arrest and booking rates between Latinos and whites, which are still only a small fraction of the African American–white gap. The narrowing of African American–white disparities has been driven by property and drug offenses. The gap in arrests for these offenses dropped by about 24 percent and the bookings gap narrowed by almost 33 percent. Even more striking, African American–white gaps in arrest and booking rates for drug felonies decreased by about 36 percent and 55 percent, respectively. The likelihood of an arrest leading to a jail booking declined the most for whites, but this is attributable to the relatively larger share of white arrests for drug offenses covered by Prop 47.
>
> When we account for arrest offense differences, the decreases in the likelihood of an arrest being booked are similar across race and ethnicity. We also looked at the cumulative impact of reforms and prison population reduction measures in California since 2009 on racial disparities in incarceration. We found that the sizable reduction in the overall incarceration rate produced by these efforts has led to a narrowing of racial disparities in the proportion institutionalized on any given day. In particular, the African American–white incarceration gap dropped from about 4.5 percentage points to 2.8 percentage points, a decrease of about 36 percent.[3]

Furthermore, the Sentencing Project also noted "researchers documented that 80% of the defendants who received enhanced sentences under the drug-free zone law were black or Hispanic— even though 45% of those arrested for drug violations statewide were white."[4]

---

[3] Magnus Lofstrom, et al. (2020), *"Proposition 47's Impact on Racial Disparity in Criminal Justice Outcomes,"* Public Policy Institute, located at file:///C:/Users/horiucka/Downloads/proposition-47s-impact-on-racial-disparity-in-criminal-justice-outcomes-june-2020.pdf, last visited on March 4, 2024.)

[4] Porter, supra, The Sentencing Project, found at file:///C:/Users/horiucka/Downloads/Drug-Free-Zone-Laws%20(2).pdf (last visited March 4, 2024); *See generally*, Judith Green, et al., (March 2006) Justice Policy Institute, *"Disparity by Design: How Drug-Free Zone Laws Impact Racial Disparity – and Fail to Protect Youth."*

4) **Argument in Support:** According to the *California State Sheriffs Association:* "Fentanyl-involved deaths have risen in California year over year, especially among youth. While pursuing an evidence-based public health approach to drug use is one tool to combat fentanyl, reasonable penalty enhancements can be another measurable method to combat the crisis. Bolstering enforcement efforts and enhancing penalties associated with fentanyl-related crimes will ensure that perpetrators face the full weight of the law for their contribution to the devastation caused by fentanyl. This legislation will deter potential offenders and safeguard the lives of countless minors who would otherwise fall victim to this insidious drug."

5) **Argument in Opposition**: According to *the Drug Policy Alliance*: While adolescent drug use is at a record low, there has been an alarming spike on teen drug overdose deaths, in 2022, an average of 22 adolescents died of drug overdose each week. [Citation omitted for formatting.] An important driver of these overdose deaths has been fentanyl. This is a public health crisis that requires immediate attention and understand the author's intent in introducing AB 2045. However, this bill does not propose a new solution to reduce the potential risk of teen overdose, instead it turns back the clock on the progress the state is making in advancing evidence-based policies to address the overdose crisis."

6) **Related Legislation:**

   a) AB 1848 (Davies), would expand an existing one year sentencing enhancement for any person over the age of 18 who induces a minor to transport, carry, sell, give away, prepare for sale, or sell heroin, cocaine, or cocaine base on any church, synagogue, youth center, day care, or public swimming pool grounds to include the transport, carry, sell, give away, prepare for sale, or sell heroin, cocaine, cocaine base, and fentanyl either on the grounds of, or within 1000 feet from a church, synagogue, youth center, day care, or public swimming pool. The hearing on AB 1848 was canceled at the request of the author.

   b) AB 2209 (Sanchez), would allow law enforcement to assist the Immigration & Customs Enforcement in investigations of any person who is suspected or previously convicted of possession for sale or sale of fentanyl. AB 2209 will be heard today in this committee.

   c) AB 2341 (Fong), would prohibit the granting of credits to any inmate serving a sentence for a fentanyl-related offense, as specified. AB 2341 is pending hearing in this committee.

7) **Prior Legislation**:

   a) AB 675 (Soria), of the 2023-2024 Legislative Session, would have added a substance containing a heroin analog, a substance containing fentanyl, and a substance containing a fentanyl analog to the list of controlled substances for which possession of those substances while armed with a loaded and operable firearm is a felony punishable in state prison by two, three, or four years. AB 675 was held in suspense in the Assembly

Appropriations Committee.

b) SB 226 (Alvarado-Gil), of the 2023-2024 Legislative Session, would add fentanyl to the list of controlled substances for which possession of those substances while armed with a loaded and operable firearm is a felony. SB 226 is failed passage in this committee.

c) AB 1673 (Seyarto), of the 2021-2022 Legislative Session, would have created the Anti-Fentanyl Abuse Task Force to evaluate the nature and extent fentanyl abuse in California and to develop policy recommendations for addressing it. AB 1673 was held in suspense in the Assembly Appropriations Committee.

d) SB 1070 (Melendez), of the 2021-2022 Legislative Session, would have added oxycodone and fentanyl to the list of controlled substances for which possession of those substances while armed with a loaded and operable firearm is a felony. Hearing on SB 1070 in the Senate Public Safety Committee was canceled at the request of the author.

REGISTERED SUPPORT / OPPOSITION:

Support

(EM)power + Resilience Project
California Association of Highway Patrolmen
California District Attorneys Association
California Police Chiefs Association
California State Sheriffs' Association
Placer County District Attorney's Office

Oppose

Bienestar Human Services
California for Safety and Justice
California Public Defenders Association
Californians United for A Responsible Budget
Drug Policy Alliance
Ella Baker Center for Human Rights
Healthright 360
Initiate Justice
Initiate Justice Action
Pacific Juvenile Defender Center
San Francisco Public Defender
Smart Justice California, a Project of Tides Advocacy
The Gubbio Project
Uncommon Law
Vera Institute of Justice
Young Women's Freedom Center

Analysis Prepared by: Kimberly Horiuchi / PUB. S. / (916) 319-3744

AMENDMENTS TO ASSEMBLY BILL NO. 2045

Amendment 1

In the title, in line 1, strike out "Sections 11353, 11353.1, and 11353.6" and insert:

Section 11353.1

Amendment 2

On page 2, strike out lines 1 to 21, inclusive, on page 3, strike out lines 1 to 18, inclusive, in line 19, strike out "SEC. 2." and insert:

SECTION 1.

Amendment 3

On page 3, in line 25, after "(1)" insert:

(A)

Amendment 4

On page 3, in line 25, after the third comma insert:

fentanyl,

Amendment 5

On page 3, between lines 33 and 34, insert:

(B) If the offense involved fentanyl or a fentanyl analog, this paragraph only applies if the person had knowledge that the specific controlled substance involved was fentanyl or a fentanyl analog.

Amendment 6

On page 3, in line 34, after "(2)" insert:

(A)

Amendment 7
On page 4, between lines 2 and 3, insert:

(B) If the offense involved fentanyl or a fentanyl analog, this paragraph only applies if the person had knowledge that the specific controlled substance involved was fentanyl or a fentanyl analog.

Amendment 8
On page 5, strike out lines 12 to 40, inclusive, on page 6, strike out lines 1 to 19, inclusive, in line 20, strike out "SEC. 4." and insert:

SEC. 2.

PROPOSED AMENDMENTS TO ASSEMBLY BILL NO. 2045

CALIFORNIA LEGISLATURE—2023–24 REGULAR SESSION

ASSEMBLY BILL **No. 2045**

Introduced by Assembly Member Hoover

February 1, 2024

Amendment 1

An act to amend ~~Sections 11353, 11353.1, and 11353.6~~ *Section 11353.1* of the Health and Safety Code, relating to controlled substances.

LEGISLATIVE COUNSEL'S DIGEST

AB 2045, as introduced, Hoover. Controlled substances: fentanyl trafficking penalties.

Existing law makes it a crime to solicit or encourage a minor to commit specified crimes relating to controlled substances, to hire or employ a minor to transport or sell controlled substances, or to sell or give controlled substances to minors and imposes a punishment of imprisonment for a period of 3, 6, or 9 years. Existing law makes a person who is 18 years of age or older who violates these provisions with respect to heroin, cocaine, or cocaine base *on the grounds of, or within certain locations, such as a church, synagogue, or a public swimming pool, among others, or* on the grounds of, or within 1,000 feet of, public or private schools, as specified, subject to punishment with an additional enhancement in the state prison of *one or* 2 years.

This bill would ~~increase the penalty for that crime as it relates to fentanyl to 5, 8, or 11 years and would~~ make the above-described enhancement applicable to offenses involving ~~fentanyl.~~ *fentanyl if the person had knowledge that the specific controlled substance involved was fentanyl.*

~~Existing law, the Juvenile Drug Trafficking and Schoolyard Act of 1988, subjects a person 18 years of age or over who is convicted of~~

~~possession for sale, sale or transportation, or manufacturing offenses involving specified controlled substances, including cocaine base, heroin, or methamphetamine, to an additional term of imprisonment for 3, 4, or 5 years if the offense takes place upon the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school during hours that the school is open for classes or school-related programs, or at any time when minors are using the facility where the offense occurs.~~

~~This bill would make the above-described enhancement applicable to those offenses as they relate to fentanyl.~~

By increasing the penalties for a crime, this bill would create a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

Amendment 2

Page 2

~~SECTION 1. Section 11353 of the Health and Safety Code is amended to read:~~

~~11353. (a) Except as provided in subdivision (c), a person 18 years of age or over who does any of the following acts shall be punished by imprisonment in the state prison for a period of three, six, or nine years:~~

~~(1) Voluntarily solicits, induces, encourages, or intimidates any minor with the intent that the minor shall violate any provision of this chapter or Section 11550 with respect to a controlled substance listed in subdivision (b).~~

~~(2) Hires, employs, or uses a minor to unlawfully transport, carry, sell, give away, prepare for sale, or peddle a controlled substance listed in subdivision (b).~~

Page 3

~~(3) Sells, furnishes, administers, gives, or offers to sell, furnish, administer, or give, a controlled substance listed in subdivision (b) to a minor.~~

~~(b) The punishment stated in subdivision (a) shall apply with respect to the substances specified in the following provisions:~~

Page 3

~~(1) Subdivisions (b), (c), (e), paragraphs (14), (15), and (20) of subdivision (d), and paragraph (1) of subdivision (f), of Section 11054.~~

~~(2) Subdivisions (b) and (c) of Section 11055.~~

~~(3) Subdivision (h) of Section 11056.~~

~~(4) Any controlled substance classified in Schedule III, IV, or V that is a narcotic drug.~~

~~(e) A person 18 years of age or over who does any of the acts listed in subdivision (a) with respect to fentanyl, as specified in paragraph (8) of subdivision (c) of Section 11055, shall be punished by imprisonment in the state prison for a period of five, eight, or eleven years.~~

~~SEC. 2.~~

SECTION 1. Section 11353.1 of the Health and Safety Code is amended to read:

11353.1. (a) Notwithstanding any other provision of law, a person 18 years of age or over who is convicted of a violation of Section 11353, in addition to the punishment imposed for that conviction, shall receive an additional punishment as follows:

(1) *(A)* If the offense involved heroin, cocaine, cocaine base, *fentanyl,* or any analog of these substances and occurred upon the grounds of, or within, a church or synagogue, a playground, a public or private youth center, a child day care facility, or a public swimming pool, during hours in which the facility is open for business, classes, or school-related programs, or at any time when minors are using the facility, the defendant shall, as a full and separately served enhancement to any other enhancement provided in paragraph (3), be punished by imprisonment in the state prison for one year.

Amendments 3 & 4

Amendment 5

(B) If the offense involved fentanyl or a fentanyl analog, this paragraph only applies if the person had knowledge that the specific controlled substance involved was fentanyl or a fentanyl analog.

(2) *(A)* If the offense involved heroin, cocaine, cocaine base, fentanyl, or any analog of these substances and occurred upon, or within 1,000 feet of, the grounds of any public or private elementary, vocational, junior high, or high school, during hours that the school is open for classes or school-related programs, or at any time when minors are using the facility where the offense occurs, the defendant shall, as a full and separately served

Amendment 6

Amendment 7

Page 4

enhancement to any other enhancement provided in paragraph (3), be punished by imprisonment in the state prison for two years.

(B) If the offense involved fentanyl or a fentanyl analog, this paragraph only applies if the person had knowledge that the specific controlled substance involved was fentanyl or a fentanyl analog.

(3) If the offense involved a minor who is at least four years younger than the defendant, the defendant shall, as a full and separately served enhancement to any other enhancement provided in this subdivision, be punished by imprisonment in the state prison for one, two, or three years, at the discretion of the court.

(b) The additional punishment provided in this section shall not be imposed unless the allegation is charged in the accusatory pleading and admitted by the defendant or found to be true by the trier of fact.

(c) The additional punishment provided in this section shall be in addition to any other punishment provided by law and shall not be limited by any other provision of law.

(d) Notwithstanding any other provision of law, the court may strike the additional punishment provided for in this section if it determines that there are circumstances in mitigation of the additional punishment and states on the record its reasons for striking the additional punishment.

(e) As used in this section the following definitions shall apply:

(1) "Playground" means any park or recreational area specifically designed to be used by children which has play equipment installed, including public grounds designed for athletic activities such as baseball, football, soccer, or basketball, or any similar facility located on public or private school grounds, or on city, county, or state parks.

(2) "Youth center" means any public or private facility that is primarily used to host recreational or social activities for minors, including, but not limited to, private youth membership organizations or clubs, social service teenage club facilities, video arcades, or similar amusement park facilities.

(3) "Video arcade" means any premises where 10 or more video game machines or devices are operated, and where minors are legally permitted to conduct business.

(4) "Video game machine" means any mechanical amusement device, which is characterized by the use of a cathode ray tube

display and which, upon the insertion of a coin, slug, or token in any slot or receptacle attached to, or connected to, the machine, may be operated for use as a game, contest, or amusement.

(5) "Within 1,000 feet of the grounds of any public or private elementary, vocational, junior high, or high school" means any public area or business establishment where minors are legally permitted to conduct business which is located within 1,000 feet of any public or private elementary, vocational, junior high, or high school.

(6) "Child day care facility" has the meaning specified in Section 1596.750.

(f) This section does not require either that notice be posted regarding the proscribed conduct or that the applicable 1,000-foot boundary limit be marked.

~~SEC. 3. Section 11353.6 of the Health and Safety Code is amended to read:~~

~~11353.6. (a) This section shall be known, and may be cited, as the Juvenile Drug Trafficking and Schoolyard Act of 1988.~~

~~(b) A person 18 years of age or over who is convicted of any of the following violations, or of a conspiracy to commit one of those offenses, where the violation takes place upon the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school during hours that the school is open for classes or school-related programs, or at any time when minors are using the facility where the offense occurs, shall receive an additional punishment of three, four, or five years at the court's discretion:~~

~~(1) Section 11351.5, 11352, or 11379.6, as those sections apply to paragraph (1) of subdivision (f) of Section 11054.~~

~~(2) Section 11351, 11352, or 11379.6, as those sections apply to paragraphs (8) and (11) of subdivision (c) of Section 11054.~~

~~(3) Section 11378, 11379, or 11379.6, as those sections apply to paragraph (2) of subdivision (d) of Section 11055.~~

~~(c) A person 18 years of age or older who is convicted of a violation pursuant to subdivision (b) that involves a minor who is at least four years younger than that person, as a full and separately served enhancement to that provided in subdivision (b), shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for three, four, or five years at the court's discretion.~~

Amendment 8

Page 6

~~(d) The additional terms provided in this section shall not be imposed unless the allegation is charged in the accusatory pleading and admitted or found to be true by the trier of fact.~~

~~(e) The additional terms provided in this section shall be in addition to any other punishment provided by law and shall not be limited by any other provision of law.~~

~~(f) Notwithstanding any other provision of law, the court may strike the additional punishment for the enhancements provided in this section if it determines that there are circumstances in mitigation of the additional punishment and states on the record its reasons for striking the additional punishment.~~

~~(g) "Within 1,000 feet of a public or private elementary, vocational, junior high, or high school" means any public area or business establishment where minors are legally permitted to conduct business which is located within 1,000 feet of any public or private elementary, vocational, junior high, or high school.~~

~~SEC. 4.~~

+ *SEC. 2.* No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

O

Date of Hearing: April 9, 2024
Consultant: Elizabeth Potter

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2064 (Jones-Sawyer) – As Amended March 21, 2024

SUMMARY: Establishes the Community Violence Interdiction Grant Program (CVIGP). Specifically, **this bill**:

1) Establishes CVIGP and requires it to be administered by the California Health and Human Services Agency (HHSA) to provide funding to local community programs for community-driven solutions to decrease violence in neighborhoods and schools.

2) Requires eligible programs to include, but are not limited to, all of the following:

   a) Evidence-based, focused-deterrence collaborative programs that conduct outreach to targeted gangs and offer supportive services in order to preemptively reduce and eliminate violence and gang involvement;

   b) Programs that create and enhance recreation- and health-based interventions for youth during peak times of violence;

   c) Programs that implement evidence-based interventions for pupils impacted by trauma for the improvement in the health and well-being of the youth and school and community stability;

   d) Youth diversion programs that promote positive youth development by relying on responses that prevent a youth's involvement or further involvement in the justice system; and,

   e) The creation and operation of school-based health centers.

3) Requires the HHSA to develop an application process and criteria for funding.

4) Provides that grants shall be made on a competitive basis with preference to cities and local jurisdictions that are disproportionately impacted by violence and gang involvement, and with preference to community-based organizations that serve the residents of those cities and local jurisdictions.

5) Requires HHSA, when implementing the grant program, to work with relevant stakeholders to promote and implement the grant program in a manner that effectively reaches a wide geography throughout the state and ensures that regions most impacted by violence and gang involvement are adequately considered with an emphasis on addressing the violence prevention and gang deterrence needs within these regions.

6) Requires applicants seeking grant funding to implement evidenced-based interventions for pupils impacted by trauma to demonstrate how they will prioritize interventions for pupils most impacted by trauma and typically unable to access traditional services, including, but not limited to:

   a) Pupils who are low income or homeless;

   b) Pupils who display symptoms of post-traumatic stress disorder or severe trauma-related symptoms;

   c) Pupils who are members of immigrant and refugee groups;

   d) Pupils with exceptional needs; and,

   e) Pupils who interact with child protective systems or who have had contact with the juvenile justice system.

7) Establishes the CVIG Fund within the State Treasury and states that moneys in the fund are to be continuously appropriated without regard to fiscal year for carrying out the objectives of the grants, as specified.

8) Requires the Director of Finance and the Legislative Analyst's Office, on or before July 31, 2025, and every year thereafter, to calculate savings that accrued from the closure of state prisons during prior fiscal year.

9) Requires the Director of Finance and the Legislative Analyst's Office, when calculating cost savings, to use actual data or best available estimates where actual data is not available.

10) Requires the Director of Finance to calculate the average between actual data and best available estimates from prison closures and once finalized, cannot be adjusted.

11) Provides that the Director of Finance shall certify the results of the calculation to the Controller no later than August 1 of each fiscal year.

12) Provides that before August 15, 2025, and before August 15 of each fiscal year thereafter, the Controller shall transfer money from the General Fund to the CVIGP based on the final calculations from the Director of Finance.

EXISTING LAW:

1) Establishes the Youth Reinvestment Grant Program (YRGP) within the Board of State and Community Corrections (BSCC) for the purpose of granting funds, as specified. (Welf. & Inst. Code, § 1450.)

2) Requires that three percent of funds allocated to YRGP be used for the purpose of implementing diversion programs for Native American children that use trauma-informed, community-based, and health-based interventions. (Welf. & Inst. Code, § 1453, subd. (a).)

3) States that priority must be given to diversion programs addressing the needs of Native American children who experience high rates of juvenile arrest, suicide, and alcohol abuse, among other things. (Welf. & Inst. Code, § 1453, subd. (b).)

4) Requires that a specified percentage of funds be allocated for the purpose of implementing diversion programs for children throughout local jurisdictions that are trauma-informed, evidence-based, and culturally relevant, among other things. (Welf. & Inst. Code, § 1454 subds. (a) & (b).)

5) States that jurisdictions with the highest need must be provide a certain minimum of funds and defines "highest needs" as areas with high juvenile arrest rates and high levels of racial or ethnic disparity in juveniles arrest rates. (Welf. & Inst. Code, §1454, subd. (b).)

6) Provides that BSCC is responsible for oversight and accountability of the program and that it must track funding, provide guidance to programs, and contract with a research firm to conduct a statewide evaluation of the grant, as specified. (Welf. & Inst. Code, § 1455.)

7) States that the YRGP funds must be allocated by the BSCC through a competitive grant process, as specified. (Welf. & Inst. Code, § 1458.)

8) Establishes the Office of Youth and Community Restoration (OYCR) in the California Health and Human Services Agency, whose mission is to promote trauma responsive, culturally informed services for youth involved in the juvenile justice system that support their successful transition to adulthood and help them become responsible, thriving, and engaged members of the community. (Welf. & Inst. Code, § 2200, subds. (a) & (b).)

9) Provides that all juvenile justice grant administration functions in the Board of State and Community Corrections shall be moved to the OYCR no later than January 1, 2025. (Welf. & Inst. Code, § 2200, subd. (h).)

10) Establishes the California Violence Intervention Program (CalVIP), to be administered by the BSCC. (Pen. Code, § 14131, subd. (a).)

11) States that the purpose of CalVIP is to improve public health and safety by supporting effective community gun violence reduction initiatives in communities that are disproportionately impacted by community gun violence. (Pen. Code, § 14131, subd. (b).)

12) Defines "community gun violence" to mean intentional acts of interpersonal violence involving a firearm, generally committed in public areas by individuals who are not intimately related to the victim, and which result in physical injury, emotional harm, or death. (Pen. Code, § 14131, subd. (b).)

13) States that CalVIP grants shall be used to develop, support, expand, and replicate evidence-based community gun violence reduction initiatives, including, without limitation, hospital-based violence intervention programs, evidence-based street outreach programs, and focused-deterrence strategies, that seek to interrupt cycles of community gun violence and retaliation in order to reduce the incidence of homicides, shootings, and aggravated assaults. (Pen. Code, § 14131, subd. (c).)

14) States that CalVIP grants shall be made on a competitive basis to cities that are disproportionately impacted by community gun violence, to community-based organizations that serve the residents of those cities, including tribal governments, and to counties that have on or more cities disproportionately impacted by community gun violence within their jurisdictions. (Pen. Code, § 14131, subd. (d).)

15) States that for purposes of CalVIP, a city is disproportionately impacted by community gun violence if any of the following are true:

   a) The city experienced 20 or more homicides per calendar year during two or more of the three calendar years immediately preceding the grant application;

   b) The city experienced 10 or more homicides per calendar year and had a homicide rate that was at least 50%higher than the statewide homicide rate during two or more of the three calendar years immediately preceding the grant application; or,

   c) An applicant otherwise demonstrates a unique and compelling need for additional resources to address the impact of community gun violence in the applicant's community. (Pen. Code, § 14131, subd. (e)(1)-(3).)

16) States that an applicant for a CalVIP grant shall submit a proposal, in a form prescribed by the board, as specified. (Pen. Code, § 14131, subd. (f).)

17) States that in awarding CalVIP grants, the board shall give preference to applicants whose grant proposals demonstrate the greatest likelihood of reducing the incidence of community gun violence in the applicant's community, without contributing to mass incarceration. (Pen. Code, § 14131, subd. (g).)

18) Requires the amount of funds awarded to an applicant to be commensurate with the scope of the applicant's proposal and the applicant's demonstrated need for additional resources to address community gun violence in the applicant's community. (Pen. Code, § 14131, subd. (h).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "By advancing sensible legislation and budget items to improve public safety and advance justice and equity, the State Legislature has decreased the number of incarcerated people in California. It is imperative that the resulting savings be reinvested into effective strategies proven to further reduce crime and violence. AB 2064 will capture the savings from the closure of prisons and reinvest those funds in programs with proven success. By keeping the funding within our crime prevention budget rather than sending it back to the General Fund, we send a message that our efforts to reduce crime are continuous and we provide much needed resources for some outstanding programs."

2) **Programs for Harm Reduction in California:** The CalVIP grant program was established in 2017 and replaced the California Gang Reduction Intervention and Prevention grant

program. According to the BSCC website "In October 2019 Governor Newsom signed the Break the Cycle of Violence Act (AB 1603). AB 1603 codified the establishment of CalVIP and defined its purpose: to improve public health and safety by supporting effective violence reduction initiatives in communities that are disproportionately impacted by violence, particularly group-member involved homicides, shootings, and aggravated assaults. The Break the Cycle of Violence act specifies that CalVIP grants shall be used to support, expand and replicate evidence-based violence reduction initiatives, including but not limited to:

- Hospital-based violence intervention programs,
- Evidence-based street outreach programs, and
- Focused deterrence strategies.

"These initiatives should seek to interrupt cycles of violence and retaliation in order to reduce the incidence of homicides, shootings, and aggravated assaults and shall be primarily focused on providing violence intervention services to the small segment of the population that is identified as having the highest risk of perpetrating or being victimized by violence in the near future." (https://www.bscc.ca.gov/s_cpgpcalvipgrant/ [as of April 3, 2024])

In 2023 the purpose of CalVIP changed. Rather than focusing on various forms of violence, including shootings, assaults, and homicides in general, CalVIP's focus is community gun violence.

The YRGP also has similar goals. In 2018, the YRGP was established for the purpose of implementing trauma-informed diversion programs for minors. This program covers local youth, including youth in tribal communities.

This bill would establish the CVIGP within the HHSA to help and support communities by decreasing violence in schools and neighborhoods.

3) **Argument in Support**: According to *The Greater Sacramento Urban League,* "AB 2064 is a critical piece of legislation that aims to address community violence by establishing the Community Violence Interdiction Grant Program within the California Health and Human Services Agency. This program will provide funding for community-driven solutions designed to decrease violence in neighborhoods and schools.

"The reduction in California's prison population over recent years, due to successful criminal justice reform efforts, has generated significant savings. AB 2064 recognizes the importance of reinvesting these savings into programs that prevent incarceration on the front end, promoting safer communities and reducing the need for future prison beds.

"The bill creates the Community Violence Interdiction Grant Fund, ensuring that funds generated from the closure of state prisons are allocated towards proactive measures to address violence. Eligible programs outlined in the bill include supportive programs, recreational opportunities, health programs addressing youth trauma, and youth diversion programs, all of which are crucial for preemptively reducing and eliminating violence and gang involvement.

"The Greater Sacramento Urban League has been dedicated to empowering communities and fostering positive change throughout the Sacramento region since 1968. Our mission is to empower Black and other historically marginalized people throughout the region in securing economic self-reliance, educational fulfillment, social justice, and civil rights while living well, being well, and thriving. Over the years, we have diligently worked to address systemic issues impacting our communities and advocate for policies that promote safety, equity, and opportunity for all."

4) **Related Legislation**: AB 2267 (Jones-Sawyer), would re-establish the Youth Reinvestment Grant Program (YRGP) and designates the Office of Youth and Community Restoration (OYCR) to administer it. AB 2267 is pending hearing in the Assembly Appropriations Committee.

5) **Prior Legislation**:

   a) AB 762 (Wicks), Chapter 421, Statutes of 2023, changed the purpose of the California Violence Intervention and Prevention Grant Program (CalVIP), as well as the eligibility requirements for the grant, and makes the program permanent.

   b) AB 912 (Jones-Sawyer), of the 2023-2024 Legislative Session, would have provided for the establishment, expansion, and funding for early-violence-intervention programs, school-based physical and mental health services, and youth-recreational activities, contingent upon appropriation. AB 912 was vetoed by the Governor and stricken from the file.

   c) AB 1454 (Jones-Sawyer), Chapter 584, Statutes of 2019, revised and recast the Youth Reinvestment Grant Program by increasing the maximum grant award from $1,000,000 to $2,000,000 and allowing nonprofit organizations to apply for grants through the program.

   d) AB 1603 (Jones-Sawyer) Chapter 735, Statutes of 2019, codified the establishment of the California Violence Intervention and Prevention Grant Program and the authority and duties of BSCC in administering the program, including the selection criteria for grants and reporting requirements to the Legislature

   e) SB 493 (Bradford), of the 2021-2022 Legislative Session, would have revised components of the Juvenile Justice Crime Prevention Act, including by requiring funded programs to be modeled on trauma-informed and youth development approaches in collaboration with community-based organizations (CBOs), requiring no less than 95 percent of specified funds appropriated to counties be allocated to CBOs and non-law enforcement government entities, and changing the composition of county juvenile justice coordinating councils. SB 493 was held on the Senate Appropriations Suspense

calendar.

REGISTERED SUPPORT / OPPOSITION:

Support

Greater Sacramento Urban League
2 Private Individuals

Opposition

None on File.

Analysis Prepared by: Elizabeth Potter / PUB. S. / (916) 319-3744

Date of Hearing: April 9, 2024
Chief Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2209 (Sanchez) – As Introduced February 7, 2024

SUMMARY: States that the California Values Act does not prohibit a law enforcement agency (LEA) from performing any responsibilities under the scope of its jurisdiction, including, but not limited to, conducting enforcement or investigative duties regarding any person who is alleged to have violated, or who has been previously convicted of, possession of fentanyl for sale or selling, furnishing, administering, giving away or transporting fentanyl.

EXISTING LAW:

1) Prohibits LEAs from using resources to investigate, interrogate, detain, detect, or arrest people for immigration enforcement purposes. These provisions are commonly known as the Values Act. Restrictions include:

   a) Inquiring into an individual's immigration status;

   b) Detaining a person based on a hold request from ICE;

   c) Providing information regarding a person's release date or responding to requests for notification by providing release dates or other information unless that information is available to the public;

   d) Providing personal information, as specified, including, but not limited to, name, social security number, home or work addresses, unless that information is "available to the public;"

   e) Arresting a person based on a civil immigration warrant;

   f) Participating in border patrol activities, including warrantless searches;

   g) Performing the functions of an immigration agent whether through agreements known as 287(g) agreements, or any program that deputizes police as immigration agents;

   h) Using ICE agents as interpreters;

   i) Transfering an individual to immigration authorities unless authorized by a judicial warrant or judicial probable cause determination, or except as otherwise specified;

   j) Providing office space exclusively for immigration authorities in a city or county law enforcement facility; and,

k) Entering into a contract, after June 15, 2017, with the federal government to house or detain adult or minor non-citizens in a locked detention facility for purposes of immigration custody. (Gov. Code, § 7284.6, subd. (a).)

2) Contains limited exceptions allowing LEAs to cooperate with immigration authorities, including: responding to a request from immigration authorities for information about a specific person's criminal history; giving immigration authorities access to interview an individual in their custody; and conducting enforcement or investigative duties associated with a joint law enforcement task force, as specified. (Gov. Code, § 7284.6, subd. (b).)

3) Provides that LEAs are able to participate in joint taskforces with the federal government only if the primary purpose of the joint task force is not immigration enforcement. Participating agencies must annually report to the California Department of Justice (DOJ) if there were immigration arrests as a result of task force operations. (Gov. Code, § 7284.6, subds. (b) & (c).)

4) Describes the circumstances under which a LEA has discretion to respond to transfer and notification requests from immigration authorities. These provisions are known as the TRUST Act. LEAs cannot honor transfer and notification requests unless one of the following apply:

   a) The individual has been convicted of a serious or violent felony, as specified;

   b) The individual has been convicted of any felony which is punishable by imprisonment in state prison;

   c) The individual has been convicted within the last five years of a misdemeanor for a crime that is punishable either as a felony or misdemeanor (a wobbler);

   d) The individual has been convicted within the past 15 years for any one of a list of specified felonies, including an offense involving the felony possession, sale, distribution, manufacture, or trafficking of controlled substances;

   e) The individual is a current registrant on the California Sex and Arson Registry;

   f) The individual has been convicted of a federal crime that meets the definition of an aggravated felony as specified in the federal Immigration and Nationality Act;

   g) The individual is identified by ICE as the subject of an outstanding federal felony arrest warrant for any federal crime; or,

   h) The individual is arrested on a charge involving a serious or violent felony, as specified, or a felony that is punishable by imprisonment in state prison, and a magistrate makes a finding of probable cause as to that charge. (Gov. Code, § 7282.5.)

5) Provides individuals who are in the custody of local LEAs with information about their procedural and legal rights in the event that immigration authorities want to contact them. These provisions are commonly referred to as the TRUTH Act. (Gov. Code, §§ 7283, 7283.1, & 7283.2.)

EXISTING FEDERAL LAW:

1) Prohibits the federal government from "conscripting" the states to enforce federal regulatory programs. (U.S. Const. Tenth Amend.)

2) Authorizes the Secretary of DHS to enter into agreements that delegate immigration powers to local police. The negotiated agreements between ICE and the local police are documented in memorandum of agreements (MOAs). (8 U.S.C. § 1357(g).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Californians have been hit hard by the fentanyl crisis. In 2022, the California Department of Public Health recorded over 6,000 deaths related to fentanyl. International cartels are exploiting our border crisis and dumping fentanyl into our communities with the aid of undocumented drug dealers. That's why I've introduced AB 2209 to end sanctuary state protections for felony fentanyl dealers that are poisoning our loved ones. We can't continue prioritizing the livelihoods of drug dealers over the lives of Californians."

2) **Cooperation with Immigration Authorities**: The Values Act, which became effective on January 1, 2018, limits the involvement of state and local law enforcement agencies in federal immigration enforcement. It prohibits law enforcement agencies (including school police and security departments) from using resources to investigate, interrogate, detain, detect, or arrest people for immigration enforcement purposes. It also places limitations on the ways in which law enforcement agencies can collaborate with federal task forces that involve elements of immigration enforcement.

   The Values Act was an expansion of prior state law, the TRUST Act which prohibited law enforcement from honoring federal immigration holds unless the detainee had a criminal history involving a serious or violent felony.

   The Values Act contains some exceptions that allows law enforcement agencies to cooperate with immigration authorities. Under the Values Act, law enforcement is allowed to engage with immigration authorities in the following circumstances:

   a) Provide a person's release date or personal information, as specified, if such information is available to the public;

   b) Respond to notification and transfer requests when the individual had been convicted of specified crimes which reflected a higher public safety danger and are on the serious end of the criminal spectrum. Specifically, those crimes include serious and violent felonies, as well as offenses requiring an individual to register as a sex offender;

   c) Make inquiries into information necessary to certify an individual for a visa for a victim of domestic violence and human trafficking;

d) Respond to a request from immigration authorities for information about a person's criminal history;

e) Participate with a joint law enforcement task force, as long as the primary purpose of the task force is not immigration enforcement; or,

f) Give immigration authorities access to interview an individual in agency custody as long as the interview access complied with the requirements of the TRUTH Act.

This bill would create an additional exemption allowing LEA cooperation with immigration authorities. It would allow an LEA to "perform[] *any* responsibilities under the scope of its jurisdiction, including, *but not limited to*, conducting enforcement or investigative duties regarding any person who is alleged to have violated, or who has previously been convicted of violating" specified controlled substances offenses relating to fentanyl. (emphasis added.)

Arguably, this is an exception that swallows the rule. While containing specific language about violations of law related to fentanyl, the preceding phrases say that an LEA can perform any responsibilities under the scope of its jurisdiction. Fentanyl sales is just one example. Moreover, LEAs can already conduct enforcement and investigative duties involving fentanyl crimes with immigration authorities as part of a joint task force. (See Gov. Code, § 7284.6, subd. (b)(3).)

Additionally, while this bill appears to be premised on the notion that the majority of fentanyl dealers are undocumented immigrants, that is not what the data reflects. Most of the illicit fentanyl consumed in the United States originates in China, "a major pipeline of the building blocks of fentanyl, known as fentanyl precursors, according to U.S. officials." (John et al., *The US sanctioned Chinese companies to fight illicit fentanyl. But the drug's ingredients keep coming*, CNN.com (Mar. 30, 2023) < https://www.cnn.com/2023/03/30/americas/fentanyl-us-china-mexico-precursor-intl/index.html > [last visited Mar. 25, 2024].). Chemical manufactures in China ship fentanyl precursors to Mexico where drug cartels make fentanyl and arrange for it to be transported across the U.S./Mexico border. (Rappeport, *U.S. Moves to Crack Down on Money Behind Fentanyl Trade*, New York Times (Dec. 4, 2023) < U.S. Moves to Crack Down on Money Behind Fentanyl Trade - The New York Times (nytimes.com)> [last visited Mar. 25, 2024].) The vast majority of the fentanyl seizures in the U.S. occur at legal ports of entry or interior vehicle checkpoints, and U.S. citizens are primarily the ones trafficking fentanyl. (Bier, *Fentanyl Is Smuggled for U.S. Citizens By U.S. Citizens, Not Asylum Seekers*, Cato.org (Sept. 14, 2022) < Fentanyl Is Smuggled for U.S. Citizens By U.S. Citizens, Not Asylum Seekers | Cato at Liberty Blog > [last visited Mar. 25, 2024].) According to the Cato Institute, in 2021, 86.3% of convicted fentanyl traffickers were U.S. citizens. (*Ibid.*)

3) **Responding to Transfer or Notification Requests**: LEAs are never required to respond to immigration requests for transfer of custody or for notification of a person's release information (transfer or notification requests). However, under the Values Act, LEAs have discretion to honor these requests if certain conditions are satisfied. These conditions include convictions for specified criminal offenses, or arrests for other specified criminal offenses in which a magistrate has made a finding of probable cause as to the charge. (Gov. Code, § 7282.5.)

As it pertains to this bill, under existing law LEAs have discretion to cooperate with immigration authorities if an individual has been convicted within the past 15 years of "[a]n offense involving the felony possession, sale, distribution, manufacture, or trafficking of controlled substances." (Gov. Code, § 7282.5, subd. (a)(3)(M).) In other words, LEAs already have the discretion to cooperate with immigration authorities of a person has been convicted of the above offenses with regards to fentanyl.

4) **ICE Involvement Can Impede Cooperation Between Law Enforcement and the Community:** A study by the University of Illinois – Chicago sought to assess how police involvement in immigration enforcement impacted public safety and police-community relations. Latinos in Cook (Chicago), Harris (Houston), Los Angeles, and Maricopa (Phoenix) counties were surveyed on their perception of local law enforcement when there is police involvement in immigration enforcement. The results showed that "a substantial number of Latinos are less likely to voluntarily contact the police if they are a victim of a crime, or to provide information about a crime, because they are afraid the police will ask them or persons they know about their immigration status." (*Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement*, Nik Theodore et al., (May 2013), p. 1 http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF)

   Specifically, the study found that 44 percent of Latinos surveyed reported they are less likely to contact police officers if they have been the victim of a crime because they fear that police officers will use this interaction as an opportunity to inquire into their immigration status or that of people they know. (*Id.* at p. 6.) Likewise, 45 percent of Latinos surveyed stated that they are less likely to voluntarily offer information about crimes, and 45 percent are less likely to report a crime because they are afraid the police will ask them or people they know about their immigration status. And while undocumented immigrants are particularly fearful to contact law enforcement authorities if they were victims of a crime or to offer information relating to a crime; fear of police contact is not confined to immigrants; but rather, it is shared by US-born Latinos. (*Ibid.*)

5) **Argument in Support**: According to the *Orange County Sheriff's Department*, "The California Values Act (SB 54) … restricted the ability of local law enforcement to fully communicate with immigration authorities. I, along with my law enforcement colleagues, opposed this measure because it violated the important best practice of open communication amongst law enforcement at all levels. This principle is fundamental to ensuring we are aware of and addressing shared threats like the fentanyl epidemic. …

   "Beyond the limits on a communication in a custody setting, the limitations chill our ability to collaborate fully with our partners in an operational and investigative setting. This is particularly concerning with regard to our effort to combat fentanyl. To stop the flow of fentanyl into our community it is imperative that local law enforcement work hand in hand with our federal partners. Such collaboration maximizes resources and intelligence sharing. While there are great partnerships in our region among local and federal agencies, the unnecessary limitations imposed by SB 54 prevent full sharing of information on fentanyl traffickers, handing the cartels and additional advantage. Your bill would remove this barrier by making clear in the law our ability to communicate with federal partners regarding any person who is alleged to have violated, or has been previously convicted of violating, laws

related [sic] the selling and distribution of fentanyl.

"My support for AB 2209 and desire to work with federal authorities to keep drug traffickers out of the community should not be construed to mean my department and I have any interest in enforcing immigration law. To be clear local law enforcement does not engage in immigration enforcement. Enforcement of immigration law is the responsibility of the federal government. As deputies patrol our communities, they are focues on criminal violations of state and local law. We enforce these laws equally, without bias, and without regard for one's immigration status. In carrying out our duties, we do not ask the immigration status of suspects, witnesses, or those who call to report crimes. The Sheriff's Department provides for the safety of all residents and responds to all calls for service without concern for immigration status.

"Notifying federal authorities of the pending release of a fentanyl trafficker is not the enforcement of immigration law. These offenders perpetuate the fentanyl crisis in our communities and removing them is consistent with my department's mission to enhance public safety for all Orange County residents."

6) **Argument in Opposition**: According to the *Immigrant Legal Resource Center*, "AB 2209 …cynically and unfairly scapegoats immigrants for the tragic fentanyl overdose crisis. AB 2209 encourages unequal treatment, racial profiling, pretextual stops and arrests, and wrongful referrals of brown and Black Californians to immigration enforcement even before establishing probable cause for a lawful arrest….

"Under current state and federal law, immigrants already face harsh consequences, including indefinite detention and permanent separation from their families and homes, for drug convictions. Notably, under the California Values Act, local law enforcement already has the discretion to notify ICE and transfer individuals who have a conviction for violation of Section 11351 or 11352 of the Health and Safety Code (as it relates to fentanyl and other controlled substances in the statute). Moreover, federal immigration laws already impose severe immigration penalties for even a minor controlled substance offense. A California state conviction of simple possession, possession of paraphernalia, or being under the influence can subject an immigrant to ICE detention without the possibility of bond, ineligibility for lawful status, and permanent deportation to the home country - regardless of hardship to the person or to the U.S. family they leave behind.

"The Values Act ensures that the civil rights of all individuals, regardless of immigration status, are protected during the investigation, arrest, and court processes, and immigrants and refugees are not subject to pretextual stops, arrests, or wrongfully turned over to ICE based on racist policing. AB 2209 would undercut these protections for immigrant and refugee Californians. It targets Black and brown communities, copying racist tactics currently employed by Texas Governor Greg Abbott, and stokes distrust among immigrant and refugee community members of local and state agencies.

"To seriously address the fentanyl overdose crisis, we need to prioritize a health approach and increase access and funding to evidence-based approaches. California must also uphold and expand existing policies like the Values Act that allow immigrant Californians to participate in our communities and access care and support - such as going to the hospital and appearing for court hearings - without fear of discrimination based on the color of their skin

or being subjected to traumatic ICE detention or deportation.

"Moreover, AB 2209 will contribute to increased overdose rates and preventable deaths. The fear of arrest may prevent witnesses of drug overdoses from seeking medical help. A study conducted with over 100 Latino substance users in San Francisco found that a significant percentage of participants did not access drug treatment services due to fears of being arrested by police or immigration authorities. Evidence also demonstrates that deportations can have a harmful impact on drug use rates. For example, Latinos with family members who have been deported or detained are nearly four times more likely to misuse prescription drugs. AB 2209 will exacerbate health inequities among immigrant communities who already face barriers getting the medical support they need. Studies have shown that policing and fear of deportation deter undocumented Latino communities from seeking health services.

"In addition, targeting immigrants for fentanyl or other drugs ignores the realities of the drug trade or overdose mortality rates across the country. Nearly 9 in 10 of those convicted of trafficking fentanyl are U.S. citizens driving cars and commercial vehicles through legal ports of entry, not undocumented immigrants or asylum seekers. In addition, the presence of immigrant residents in our communities has nothing to do with overdose mortality rates. In 2021, West Virginia had the lowest percentage of immigrant residents in the country, yet suffered the worst overdose mortality rate in the country.

"The fentanyl overdose crisis needs immediate action and all Californians deserve a robust public health response to fentanyl, not more criminalization. Instead of scapegoating vulnerable communities, the state must continue to build a health approach that includes expanding voluntary substance use services and social support systems. This includes evidence-based treatment and greater access to naloxone to reverse overdoses as well as drug-testing tools to reduce the harms of the tainted illicit drug supply.

"Scapegoating legislation like AB 2209 and the war on drugs have only bolstered mass incarceration and racism in our justice system while failing to meaningfully address overdose mortality rates or drug sales. To curb the fentanyl overdose crisis, California must urgently invest in comprehensive, health and evidence-based approaches grounded in science not xenophobia."

7) **Prior Legislation**:

a) AB 2948 (Allen), of the 2017-2018 Legislative Session, would have repealed the California Values Act. AB 2948 failed passage in this committee.

b) AB 2931 (Patterson), of the 2017-2018 Legislative Session, would have expanded the list of qualifying criminal convictions which permit law enforcement to cooperate with federal immigration authorities. AB 2931 failed passage in this committee.

c) AB 298 (Gallagher), of the 2017-2018 Legislative Session, would have repealed the TRUST Act and required law enforcement to cooperate with federal immigration by detaining an individual convicted of a felony for up to 48 hours on an immigration hold, as specified, after the person became eligible for release from custody. AB 298 failed passage in this committee.

d) AB 1252 (Allen), of the 2017-2018 Legislative Session, would have repealed the TRUST Act and prohibited state grants to county and local "sanctuary jurisdictions." AB 1252 failed passage in this committee.

e) SB 54 (De Leon), Chapter 495, Statutes of 2017, limited the involvement of state and local law enforcement agencies in federal immigration enforcement.

f) AB 2792 (Bonta), Chapter 768, Statutes of 2016, requires local law enforcement agencies to provide copies of specified documentation received from ICE to the individual in custody and to notify the individual regarding the intent of the agency to comply with ICE requests.

g) AB 4 (Ammiano), Chapter 570, Statutes of 2013, prohibits a law enforcement official from detaining an individual on the basis of an ICE hold after that individual becomes eligible for release from custody, unless, at the time that the individual becomes eligible for release from custody, certain conditions are met, including, among other things, that the individual has been convicted of specified crimes.

REGISTERED SUPPORT / OPPOSITION:

Support

Arcadia Police Officers' Association
Burbank Police Officers' Association
California Coalition of School Safety Professionals
California Narcotic Officers' Association
California Reserve Peace Officers Association
California State Sheriffs' Association
Claremont Police Officers Association
Corona Police Officers Association
Culver City Police Officers' Association
Deputy Sheriffs' Association of Monterey County
Fullerton Police Officers' Association
Los Angeles School Police Management Association
Los Angeles School Police Officers Association
Murrieta Police Officers' Association
Newport Beach Police Association
Novato Police Officers Association
Orange County Sheriff's Department
Palos Verdes Police Officers Association
Placer County Deputy Sheriffs' Association
Pomona Police Officers' Association
Riverside Police Officers Association
Riverside Sheriffs' Association
Santa Ana Police Officers Association
Upland Police Officers Association

Oppose

ACLU California Action
Alianza
Alliance San Diego
Any Positive Change INC.
Asian Americans Advancing Justice - Asian Law Caucus
Asian Americans Advancing Justice-southern California
Asian Pacific Islander Re-entry and Inclusion Through Support and Empowerment
Bienestar Human Services
Buen Vecino
California Alliance for Youth and Community Justice
California Attorneys for Criminal Justice
California Coalition for Women Prisoners
California for Safety and Justice
California Immigrant Policy Center
California Public Defenders Association
Californians United for A Responsible Budget
Center for Empowering Refugees and Immigrants
Communities United for Restorative Youth Justice (CURYJ)
Drug Policy Alliance
Ella Baker Center for Human Rights
Glide
Harbor Institute for Immigrant and Economic Justice
Healthright 360
Human Impact Partners
Immigrant Legal Resource Center
Initiate Justice
Inland Coalition for Immigrant Justice
Interfaith Movement for Human Integrity
LA Defensa
Law Enforcement Action Partnership
Lawyers' Committee for Civil Rights of The San Francisco Bay Area
Legal Services for Children
Legal Services for Prisoners With Children
National Day Laborer Organizing Network (NDLON)
National Harm Reduction Coalition
Norcal Resist
Oakland Privacy
Orale: Organizing Rooted in Abolition Liberation and Empowerment
Orange County Equality Coalition
Orange County Rapid Response Network
Pacific Juvenile Defender Center
Pacifica Social Justice
Public Health Institute
Sacramento Area Congregations Together
San Diego Immigrant Rights Consortium
San Francisco Gray Panthers
San Francisco Pretrial Diversion Project

San Francisco Public Defender
San Mateo County Participatory Defense Hub
Santa Cruz Barrios Unidos
Senior and Disability Action
Services, Immigrant Rights, & Education Network
Smart Justice California, a Project of Tides Advocacy
South Bay People Power
Southeast Asia Resource Action Center
Surj San Mateo
The Black Alliance for Just Immigration
The Gubbio Project
Transitions Clinic Network
Uncommon Law
Universidad Popular
Ventura County Clergy and Laity United for Economic Justice
Vera Institute of Justice
Vietrise

Analysis Prepared by: Sandy Uribe / PUB. S. / (916) 319-3744